



CLOSED CASE SUMMARY

ISSUED DATE: APRIL 6, 2018

CASE NUMBER: 2017OPA-1055

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Inconclusive)
# 2	15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a General Offense Report	Not Sustained (Inconclusive)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 5. Employees May Use Discretion	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times	Not Sustained (Unfounded)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The subject was arrested for DUI by Named Employee #1, even though he claimed to not be impaired. At the precinct, a breath test revealed that the subject was not intoxicated and the subject was released. The Complainant, who is the wife of the subject, later complained to a Department supervisor concerning the subject’s stop and arrest. Named Employee #2 was named in this investigation as his call to Named Employee #1 concerning his belief that the subject was impaired set this incident in motion.

STATEMENT OF FACTS:

Named Employee #2 was driving in his personal vehicle while off-duty and on his way to work when he observed the subject’s vehicle driving in front of him. NE#2 explained that he perceived the subject’s vehicle to be driving erratically and indicated that he observed the vehicle commit a number of moving offenses. NE#2, who is viewed and views himself as a DUI and Drug Recognition Expert (DRE), called another officer who he knew to be on duty – Named Employee #1 (NE#1), and informed him of the subject vehicle’s location and his belief that the driver was under the influence of drugs and/or alcohol. NE#2 explained to OPA that he called NE#1 directly with this information, rather than contacting dispatch, because he was concerned that the risk of delaying a response to this potentially impaired driver was too great.

Shortly after speaking with NE#2, NE#1 effectuated a traffic stop of the subject vehicle. NE#2 did not come to the scene of the stop, but instead proceeded to the East Precinct to commence his shift. NE#1 approached the subject and informed him that he was being stopped based on observations of erratic driving by another officer. The subject



asked where he was observed doing so and, when NE#1 gave him the location, the subject stated that he had been eating a hotdog. The subject denied that he had any alcohol to drink.

NE#1 informed the subject that the officer who had reported his driving was a drug recognition expert. NE#1 then asked the subject whether he would agree to perform some "tests" and the subject said that he "would rather not." NE#1 said "ok" and asked whether he could examine the subject's eyes and the subject agreed. NE#1 conducted a Horizontal Gaze Nystagmus (HGN) test and reported that the subject had a "lack of smooth pursuit." After the test, NE#1 then told the subject that "at that point" he "pretty much believed" that the subject was under the influence. He engaged in a conversation with the subject during which the subject again denied that he was. NE#1 returned to his vehicle.

NE#1 came back and again asked the subject to do field sobriety tests. He refused several times. At that time, NE#1 explained to the subject that based on NE#2's reported observations and NE#1's own observations from the HGN sobriety test, he was concerned that the subject was impaired. NE#1 then informed the subject that he was going to be arrested. They engaged in further conversation and the subject ultimately agreed to perform the field sobriety tests.

NE#1 conducted the field sobriety tests, which occurred out of the view of the camera. In his General Offense Report relating to this incident, NE#1 described the tests he conducted and his belief that the subject's performance, coupled with the results of the HGN test, indicated that the subject was impaired. NE#1 then told the subject that based on what he learned from NE#2 and the tests that NE#1 conducted, he was going to place the subject under arrest. The subject was, to his visible disbelief, handcuffed and transported to the East Precinct. NE#1's car was towed from the scene and brought to a lot pursuant to applicable law.

While at the precinct, NE#1 took the subject to the Blood Alcohol Content (BAC) room and read him the Implied Consent Warnings. The subject did not request an attorney and agreed to provide two breath samples. The subject blew a 0.000 on both occasions. NE#1 asked NE#2, who was at that time, to observe the subject and NE#2 did so and told NE#1 that he did not believe the subject to be impaired. NE#2 further told NE#1 that they should not seek a warrant to take the subject's blood and that the subject should be released. NE#1 reported that he screened the arrest with his sergeant and the formal decision was made to release the subject. NE#1 drove the subject to the lot where he recovered his vehicle. The Department ultimately covered the cost of the tow. NE#1 further provided the subject with his name, serial number, and email address. The subject also requested the BAC report and was given that information.

Later that evening, the Complainant, who is the subject's wife, called the precinct and complained about the subject's treatment. The sergeant attempted to explain what had occurred and the officers' conduct, but the Complainant was not assuaged. She indicated that she wished to file an OPA complaint and the sergeant did so on her behalf. OPA spoke with the Complainant, but she indicated that she did not want the conversation to be recorded. She indicated to OPA that she would speak with the subject to determine whether they would provide any further statements and said, if so, she would contact OPA. Neither the Complainant nor the subject did so and OPA did not have any further conversations with either of them.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

SPD Policy 6.010-POL-1 states that an arrest must be supported by probable cause. As discussed above, it was conclusively established at the precinct that the subject was not impaired, as he tried to convince NE#1. However, that the subject was not actually impaired does not, in and of itself, yield the conclusion that no probable cause existed for his arrest. Indeed, whether there was probable cause depends on the facts and information known to NE#1 at the time of the arrest, not after, and exists if NE#1 had a reasonable basis to believe that a crime had been committed by the subject.

Here, NE#1 stated that the report from NE#2 that the subject was driving erratically, coupled with the results of the HGN and field sobriety tests, provided him with a reasonable basis to believe that NE#1 was driving while impaired. Based on my review of the record, NE#1 appeared to have placed great weight on NE#2's opinion that the subject appeared to be impaired. As discussed herein, NE#2 has the reputation of a DUI and DRE expert and told OPA that he has engaged in approximately 1,400 DUI investigations and arrests. It seems to me that once NE#1 was informed of NE#2's belief, the results of the test were a foregone conclusion and the subject was going to be arrested. That is not to say that NE#1 deliberately misapplied or misinterpreted the tests or necessarily acted in bad faith. Instead, I believe that he had outcome bias based on his perception of NE#2's expertise.

I very much empathize with the subject who suffered through a Kafkaesque experience. He was not intoxicated and instead drove "erratically" for a short period of time because he was eating a hotdog. However, he was then stopped, told that he was suspected of being impaired based on the observations of NE#2, and then – even though he was completely sober – he "failed" each sobriety test conducted by NE#1. As a result, he was arrested, handcuffed, and transported in the rear of a patrol vehicle to a police precinct when he had committed no crime – only eating while driving.

That being said, while I believe that the subject and the Complainant are rightly angered at the Department and that the subject suffered through an inconvenient, frightening, and unfortunate situation, I cannot conclusively find that there was insufficient probable cause supporting his arrest. Most notably, neither the HGN test nor the field sobriety tests were performed on camera. All I have is NE#1's account of what tests he applied, the results of those tests, and his interpretation of those results. The subject did not agree to an OPA interview, so I do not have his version of what occurred and any information that could contradict NE#1's written account. As such, while I have concerns with the subject's arrest and while I expressly do not find that the action taken by NE#1 in this case was acceptable or appropriate, I recommend that this allegation be Not Sustained – Inconclusive.

Recommended Finding: **Not Sustained (Inconclusive)**



Named Employee #1 - Allegation #2

15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a General Offense Report

SPD Policy 15.180-POL-5 governs officers' documenting of primary investigations on General Offense Reports. The policy requires that such reports be thorough, complete and accurate.

Here, NE#1 did not generate a DUI packet concerning the arrest and ultimate release of the subject. Instead, he completed a General Offense Report. With regard to that report, I find that it was thorough, complete, and accurate as SPD Policy 15.180-POL-5 requires.

The more pertinent question is whether NE#1 violated policy by generating a General Offense Report rather than completing a DUI packet. Both NE#1 and NE#2 told OPA that because they were not proceeding forward with the subject's arrest for DUI, they were not required to complete the packet. They further stated that the DUI packet was largely purposed for later proceedings before the Washington State Department of Licensing and in criminal court. As the officers did not believe that any such proceedings were going to occur, they thought this to be another basis supporting their decision not to complete and submit the DUI packet.

Given the above, I believe that the more appropriate allegation for this case would have been, as the Auditor indicated in his review, SPD Policy 15.280-POL-14. That policy governs DUI packets and states that: "Officers will complete and submit to Data portions of the WSP DUI Packet that apply to the investigation."

NE#1's and NE#2's argument appears to be that the DUI packet did not "apply to the investigation" in this case as the arrest had been voided and there was no further investigation and no anticipated future proceedings or prosecution. As such, they contended that they were not required to complete and submit the packet.

It is unclear whether or not a DUI packet must be completed in every case, even where an arrest is voided, no further investigation will be conducted, and no charges will be brought. I disagree with the OPA Auditor that the policy compels such a result. Indeed, it seems reasonable to not send the packet and associated documents to the Department of Licensing and the courts in such a scenario. Ultimately, I do not feel like the policy provides clear guidance of its expectations for NE#1's conduct in this incident and, as such, I recommend that this allegation be Not Sustained – Inconclusive.

Recommended Finding: **Not Sustained (Inconclusive)**

Named Employee #2 - Allegations #1

5.001 - Standards and Duties 5. Employees May Use Discretion

As indicated in SPD Policy 5.001-POL-5, "[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment." This policy further states that "[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed." (SPD Policy 5.001-POL-5.)

This allegation was classified given that NE#2's call to NE#1 concerning his belief that the subject was impaired set this entire incident in motion. The question is whether this was an abuse of NE#2's discretion. Ultimately, I do not



believe that it was. I do think that NE#2 should have known what impact his opinion of impairment – as DUI and DRE expert – would have had on a less experienced officer; however, NE#2 did not tell NE#1 what conclusions to reach and apparently assumed that NE#1 would conduct a comprehensive investigation into this incident and, if the subject was not impaired, that the subject would be released. While this was not what occurred here, that responsibility is borne by NE#1 not NE#2.

I further do not find NE#2's decision to call NE#1 concerning his observations rather than contacting dispatch to have been unreasonable. Even though he was ultimately incorrect, NE#2 believed that the subject was possibly impaired. If that was the case, it was important to investigate this situation as soon as possible in order to prevent a possible accident.

For the above reasons, I recommend that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

Named Employee #2 - Allegation #2

5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times

SPD Policy 5.001-POL-9 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-9.)

While the subject was subjected to a situation that certainly undermined his and the Complainant's trust in the Department, I believe that the conduct of NE#1, not NE#2, was the ultimate cause of this. As discussed above, even though NE#2 set this incident in motion, the investigation and decision to arrest were NE#1's responsibility. Accordingly, I recommend that this allegation be Not Sustained – Unfounded as against NE#2.

Recommended Finding: **Not Sustained (Unfounded)**