



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 1, 2019

CASE NUMBER: 2018OPA-1023

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication	Not Sustained (Inconclusive)
# 2	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Not Sustained (Training Referral)
# 3	5.140 - Bias-Free Policing 6. Supervisors Conduct Preliminary Inquiry into Bias-Based Policing	Not Sustained (Training Referral)
# 4	5.140 - Bias-Free Policing 5.140–PRO-1 Handling a Bias-Based Policing Allegation	Not Sustained (Training Referral)
# 5	8.400 - Use of Force Reporting and Investigation 8.400-TSK-6 Use of Force –RESPONSIBILITIES OF THE SERGEANT DURING A TYPE II INVESTIGATION	Not Sustained (Training Referral)

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:

It was alleged that the Named Employee violated multiple Department policies resulting from his investigation of a Type II use of force.

SUMMARY OF THE INVESTIGATION:

Officers on-viewed a disturbance at DESC. Force was ultimately used on the perpetrator, who is referred to herein as the Subject. After the force was used, the Subject claimed that the officers broke his arm. Named Employee #1 (NE#1), who was the officers’ supervisor, responded to the scene shortly after the force was used. The officers informed him of the Subject’s claim of a broken arm, but stated that they only used de minimis force. NE#1 screened the alleged injury with the Department’s Force Investigation Team (FIT), given that it was a claim of a broken bone and, thus, potential Type III force. FIT declined to respond and advised NE#1, instead, to perform a Type II force investigation.

In his force review, NE#1 wrote the following in his review: “Several staff members were present during the arrest of the suspect. When asked to provide taped statements the [sp] declined.” He further wrote that he “spoke with SFD personnel” during his investigation.



NE#1's screening of the incident and investigation were captured on Body Worn Video (BWV). The BWV revealed no evidence that NE#1 ever spoke with or tried to speak with DESC staff or SFD personnel. The BWV also indicated that the Complainant, at one point, made a bias allegation to NE#1. He specifically stated that an officer broke his arm because the officer was a "racist." NE#1 did not investigate this allegation or timely complete either a Bias Review or an OPA referral.

NE#1's Lieutenants determined that he failed to properly handle the bias allegation and counseled NE#1 regarding this. However, they did not refer NE#1 to OPA at that time. NE#1's Captain later reviewed this matter, disagreed with how the Lieutenants handled NE#1's failure to comply with policy, and referred this matter to OPA. This investigation ensued. The Lieutenants were originally included as Named Employees in this case, but were later removed as the investigation proceeded.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.001 - Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication

SPD Policy 5.001-POL-11 requires Department employees to be truthful and complete in all communications. This allegation was classified based on the fact that NE#1 stated that he spoke to various individuals, but the video revealed that he did not do so.

With regard to his written statement that he interviewed SFD personnel, NE#1 initially told OPA that he did not do so. However, when he was shown his report, he stated that he must have spoken to them but he did not recall doing so. When he was further informed that SFD appeared to be leaving the scene when he was arriving, NE#1 told OPA that he did not recall when he spoke with SFD. With regard to his statement concerning interviewing DESC staff, NE#1 stated that he asked an officer to speak with the DESC staff members to determine whether they would give a statement. He confirmed that he did not, himself, speak with DESC staff. OPA interviewed that officer and he stated that he may have asked the staff whether they saw anything, but he did not recall whether he received any specific direction from NE#1 to do so or whether he, in fact, had those conversations. Notably, there was no indication from a review of the BWV that NE#1 asked the officer to conduct those interviews. Moreover, he did not write in his report that he gave this direction to the officer.

When compared to his report, the BWV raises significant questions as to the accuracy of NE#1's account. Most notably, there is no evidence on the video indicating that NE#1 made any efforts to either interview DESC and SFD witnesses or to ensure that someone else did so. Moreover, NE#1's later account at his OPA interview was clearly different from the contents of his initial report.

Had SPD Policy 15.180-POL-5, which requires that reports be complete, thorough, and accurate, been alleged, I would have recommended that allegation be Sustained. However, under the facts and circumstances of this case, it is significantly more difficult to meet the burden necessary to prove dishonesty. This is the case even though it appears clear from the video that NE#1 was inaccurate. The question is whether this inaccuracy was borne out of an intentional attempt to mislead, rather than an error in reporting or sloppiness. Here, OPA gives NE#1 the benefit of the doubt and finds that it is due to the latter.



Accordingly, OPA recommends that this finding be Not Sustained – Inconclusive. In reaching this decision, however, OPA wants to make clear this was a close call and that it had significant concern regarding the veracity of NE#1's account.

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

Named Employee #1 - Allegations #2

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation

SPD Policy 5.002-POL-5 requires supervisors who become aware of a potential policy violation to investigate or refer the allegations depending on their severity. Minor allegations of misconduct may be investigated by a supervisor, while allegations of serious misconduct – such as the use of excessive force – must be referred to OPA. (SPD Policy 5.002-POL-5.) This allegation was classified for investigation based on NE#1's failure to address the Complainant's bias allegation and the claim that his arm was broken.

With regard to the claim that the officers broke the Complainant's arm because, according to the Complainant, the officers were racist, NE#1 should have, at the very least, screened that allegation with OPA. Indeed, NE#1's Lieutenant later did so and OPA agreed to allow the allegation to be handled in a chain of command review. Without such a screening taking place, NE#1 should have treated the Complainant's claim as an allegation of misconduct and, without direction to the contrary, should have made an OPA referral.

The above being said, I recommend that NE#1 receive a Training Referral rather than a Sustained finding for two main reasons. First, the Complainant's allegation was clearly unsubstantiated based on the evidence and OPA later agreed that a referral was unnecessary. Second, NE#1 screened the complaint with his Lieutenant and did not receive any direction at that time to make a referral. While NE#1 was still responsible for taking appropriate action, it seems unfair to subject him to discipline under the circumstances of this case.

- **Training Referral:** NE#1 should be retrained concerning the requirements of SPD Policy 5.002-POL-5. He should be counseled to take appropriate action on allegations of possible misconduct, which may include screening the allegation with OPA. NE#1 should be informed that future failure to appropriately handle an allegation of misconduct will likely result in a recommended Sustained finding. This training and associated counseling should be documented and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #1 - Allegation #3

5.140 - Bias-Free Policing 6. Supervisors Conduct Preliminary Inquiry into Bias-Based Policing

SPD Policy 5.140-POL-6 requires that supervisors conduct a preliminary investigation into allegations of biased policing. In certain circumstances, supervisors are permitted to complete a bias review and, otherwise, the supervisor must make an OPA referral. A complaint of bias is made when individuals allege that they have been



treated differently by law enforcement officers because of the individuals' membership in one or more protected classes.

NE#1 told OPA that he simply did not hear the Complainant's bias allegation. He stated that, in the months prior to the incident, he had been diagnosed with hearing loss and began using hearing aids. However, he was not wearing his hearing aids on the date in question and, according to his account, this resulted in him failing to hear the allegation of bias. He stated that, had he heard the allegation, he would have taken appropriate action. He further stated that he did not know about the allegation until it was later pointed out to him by his Lieutenant. He told OPA that, at that time, he completed a Bias Review. Notably, NE#1's Lieutenant told OPA that he believed that NE#1 legitimately did not hear the allegation.

Had NE#1 heard this allegation, he would have been required to investigate it and to take appropriate action in the form of either a Bias Review or an OPA referral. When he did not do so, he acted contrary to policy. However, NE#1 contended that he failed to comply with policy because he did not hear the statement due to hearing loss. OPA cannot disprove this claim and, if this were the case, it would excuse NE#1's conduct. As such, OPA issues a Training Referral rather than a Sustained finding.

- **Training Referral:** NE#1 should be counseled concerning his failure to identify and investigate the Complainant's bias allegation. When he failed to do so and to then take appropriate action, he violated policy. While OPA recognizes that NE#1 is suffering from hearing loss, it is his responsibility to wear his hearing aids during his shift to ensure that he can fully carry out the duties of his position. If he fails to do so again and this results in a violation of policy, OPA will recommend a Sustained finding. This counseling and any associated retraining should be documented and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #1 - Allegation #4

5.140 - Bias-Free Policing 5.140-PRO-1 Handling a Bias-Based Policing Allegation

5.140-PRO-1 details how a supervisor is to handle an allegation of bias. It provides guidance for when to use a Bias Review versus when to make an OPA referral, as well as practically how to do so.

For the same reasons as discussed in the context of Allegation #3, I recommend that this allegation be Not Sustained and I refer to the above Training Referral. (See Named Employee #1, Allegation #3.)

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #1 - Allegations #5

8.400 - Use of Force Reporting and Investigation 8.400-TSK-6 Use of Force -RESPONSIBILITIES OF THE SERGEANT DURING A TYPE II INVESTIGATION



SPD Policy 8.400-TSK-6 sets forth the duties of a Sergeant during a Type II force investigation. These duties include, but are not limited to, the following: taking photographs of the subject and the scene; interviewing the subject; interviewing the officers separately where at all possible; and arranging for civilian witnesses to be interviewed.

Here, NE#1 performed most of the tasks required by this policy. However, NE#1 did not interview the officers separately. Moreover, even crediting his account that he arranged for some of the civilian witnesses to be interviewed, he did not ensure that this occurred. These failures violated policy.

That being said, I recommend that NE#1 receive a Training Referral rather than a Sustained finding for three reasons. First, these failures constitute minor misconduct that, in OPA's opinion, is better addressed by training and counseling rather than discipline. Second, NE#1 has already received counseling from his supervisor concerning this matter. Third and last, aside from these shortcomings, NE#1 otherwise conducted a force investigation that was consistent with policy.

- **Training Referral:** NE#1 should be retraining concerning the elements of SPD Policy 8.400-TSK-6 and should be reminded of the Department's expectations of the quality of Type II force investigations. NE#1 should be instructed that, to the extent he conducts such investigations in the future, he should be careful to more closely comply with this policy. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**