



CLOSED CASE SUMMARY

ISSUED DATE: NOVEMBER 22, 2019

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0406

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.140 - Bias-Free Policing 6. Supervisors Conduct Preliminary Inquiry into Bias-Based Policing	Sustained
# 2	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Training Referral)

Imposed Discipline

Written Reprimand

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)
# 2	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	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:

It was alleged that Named Employee #1, a supervisor, did not properly handle a bias allegation made by the Complainant. It was further alleged that Named Employee #1 abused her discretion when she approved the arrest of the Complainant. Lastly, it was alleged that Named Employee #2 was unprofessional and potentially acted contrary to law when he engaged in a physical altercation with the Complainant in a mall.

ADMINISTRATIVE NOTE:

Based on information provided by Named Employee #2 at his Loudermill hearing and given further discussion between OPA and the chain of command and review of the evidence of OPA, Allegation #1 for Named Employee #2 has been changed from a Sustained finding to a Training Referral.

SUMMARY INVESTIGATION:

Named Employee #2 (NE#2) was walking through a mall in North Seattle when he stopped to look at his phone. Mall security video showed a man – referred to here as the Complainant – walking 10 to 15 steps behind NE#2 at the time. When NE#2 began looking at his phone, he stopped right where he had been walking and stood the path of the Complainant. NE#2 then turned to the side. The Complainant walked several steps up to NE#2 and brushed by him,



with the Complainant's left arm making contact with NE#2's left arm. NE#2 turned to face the Complainant and the Complainant, who had been walking away, looked back towards NE#2. NE#2 took two steps towards the Complainant and the Complainant slowed and turned around. They faced each other and began talking for several seconds. The Complainant put down the black bag he had been carrying. The Complainant lifted up his pants and made another movement towards his shirt. NE#2 and the Complainant continued to talk while facing each other. At one point, the Complainant moved his left hand towards his pocket and NE#2 then grabbed the Complainant, placed him in a headlock, and tried to pull the Complainant down to the ground. The Complainant grabbed onto NE#2, pulled backwards, and was able to throw NE#2 down to the ground. The Complainant went down on top of NE#2. The Complainant held NE#2 down and straddled him. NE#2 held his arms around the Complainant's back, while the Complainant's hands appeared to be in the vicinity of NE#2's upper chest/neck/head area. Community members in the mall came up to where the Complainant and NE#2 were fighting and began to try to separate them. The community members were able to do so. NE#2 and the Complainant both got off the ground and continued to face each other while being separated.

NE#2 and the Complainant remained at the scene until police responded. Officers and a supervisor, Named Employee #1 (NE#1), interviewed NE#2, the Complainant, and other witnesses. NE#2 and the Complainant provided differing accounts of what had occurred. The Complainant stated that NE#2 stopped directly in his way and that he pushed by NE#2, making contact with him. The Complainant said that NE#2 deliberately stopped right in his path of travel. He said that, after he brushed by NE#2, NE#2 approached him and appeared "enraged." The Complainant stated that he asked NE#2 if he should call the police and that NE#2 said: "You don't need to do that; I'll take you down." He said that he put his glasses in his pocket and was "ready." At that point, NE#2 "rushed" the Complainant and the Complainant wrestled NE#2 to the ground in order to protect himself. NE#2 told the responding officers that he was texting someone when he was "pushed from behind." NE#2 said that he asked the Complainant what he was doing and that the Complainant "walked back" to him and got "right" in his face. NE#2 told the officers that he did not recall what the Complainant said to him but that the Complainant was "very confrontational." NE#2 said that the Complainant reached into his pockets and NE#2 told him not to do so. NE#2 stated that he then made the decision to try to take the Complainant down to the ground. NE#2 told the officers that, at the time he made physical contact with the Complainant, he believed that the Complainant could be reaching for a weapon.

The Complainant was placed under arrest by the investigating officers and was transported to the North Precinct. NE#1 screened the arrest at the precinct, which included obtaining an additional recorded interview from the Complainant. The Complainant reiterated his previous assertion that he was assaulted by NE#2. He stated that, after the bump, NE#2 approached him aggressively. The Complainant again said that, when he asked if he had to call the police, NE#2 told him not to call the police. The Complainant told NE#1 that, because he thought NE#2 was intending to fight him, he put his glasses in his pants pocket. He said that NE#2 then rushed him and tried to throw him down, including trying to "choke" him. The Complainant explained that he was able to put NE#2 on the ground. The Complainant indicated that his hands were at NE#2's throat area but denied that he was trying to choke NE#2. The Complainant confirmed that NE#2 never announced himself as a police officer and he did not know this until he saw NE#2's badge at the end of the altercation. The Complainant stated that he would not have engaged in any conflict with NE#2 had he known that NE#2 was a police officer.

NE#1 ultimately approved the Complainant's arrest. In doing so, she signed off on the reports generated by the investigating officers and NE#1. She did not identify any inconsistencies in those reports. Prior to approving the arrest, NE#1 did not watch the mall security video. She relied on the investigating officers' representations of the video.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.001 - Standards and Duties 6. Employees May Use Discretion

As discussed above, NE#1 responded to the mall and approved the arrest of the Complainant. She explained that, in determining that probable cause existed for the Complainant's arrest, she relied on witness statements, the statements made at the scene by NE#2 and the Complainant, and the responding officers' interpretation of the mall security video. NE#1 did not personally review the video prior to approving the arrest.

NE#1 told OPA that she did not identify any inconsistencies in the reports written by the officers. NE#1 also approved the report that was written by NE#2. NE#1 said that she did not personally allow NE#2 to watch video prior to writing his report and did not know whether he did so. OPA later determined that NE#2 did, in fact, watch the mall security video before he completed his report. At her OPA interview, NE#1 was asked about several inconsistencies between NE#2's report and the evidence. NE#1 said that she was not aware of the inconsistencies in NE#2's report because she did not watch the video. NE#1 stated the following: "I didn't personally interview any of the witnesses. The report had probable cause established in it, and I didn't know there were inconsistencies. I've never seen the mall surveillance video."

NE#1 asserted that the fact that she was responding to a "help the officer" call did not impact her decision to approve the Complainant's arrest. She said that, if anything, this caused her to scrutinize the incident more closely. She stated that the decision to approve the arrest was based, in large part, on the independent witnesses. NE#1 indicated that she would have made the same arrest even had NE#2 not been an officer.

As indicated in SPD Policy 5.001-POL-6, "[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-6.)

Ultimately, NE#1 is correct that she did not make the decision to arrest the Complainant. That probable cause existed to take the Complainant into custody had already been determined by the investigating officers. However, as a supervisor, NE#1 was still required to screen and approve the arrest, as well as to review and sign off on the documentation that was generated. NE#1 did not conduct much, if any review, of the underlying facts. While she believed that the arrest was warranted based, in substantial part, on witness statements, no witnesses actually observed what led up to the conflict. NE#1 also cited to the fact that the Complainant technically assaulted NE#2 when he brushed by him; however, this would not have, by itself, justified NE#2's escalation of the incident, which is what the Complainant described. This is particularly the case given that the Complainant was walking away at the time and was no longer posing an imminent threat to NE#2. Further, it is difficult to envision a scenario where brushing by and bumping into someone would ever constitute grounds for an arrest, even if intentional and where, as here, it caused no injury. Moreover, while NE#1 approved the reports, she did not identify the inconsistencies between the documentation and the video and, indeed, never reviewed the video. Given her statement to OPA that she scrutinized an officer-involved incident more than one involving solely community members, it is surprising that she did not do so.



From OPA's investigation, it does not appear that any other result other than the arrest of the Complainant was a likely conclusion of this incident. This is supported by NE#1's interviews of the Complainant at the scene and at the precinct, as reflected by video, as well as by her factual characterizations in the OPA complaint that she forwarded. In that complaint, NE#1 consistently articulated the facts in the light most favorable to NE#2. For example, in providing her overview of the incident, NE#1 wrote:

[NE#2] was on vacation and was at the mall texting on his phone when a suspect who has history of mental illness suddenly approached and bumped into him hard from behind. [NE#2] did not know the suspect and had no prior interactions with the suspect. The suspect then got in his face and took his glasses off and put them in his pocket as if to challenge [NE#2] to a fight. [NE#2] did not have time to identify himself. The suspect then started reaching in his pockets and [NE#2] feared he was likely to produce a weapon...[NE#2] was attacked from behind.

There are a number of issues with this description of the events. First, in several portions of the complaint, NE#1 referenced that the Complainant suffered from mental illness and, in others, she discussed the Complainant's history of "assaultive behavior." The inclusion of this information seems purposed to diminish the Complainant's credibility and account. Second, the video does not support a determination that the Complainant bumped into NE#2 "hard." To the contrary, the video indicates that the Complainant brushed by NE#2. Third, the description is inaccurate by omission when it moves from the bumping from behind to saying that the Complainant "got in [NE#2's] face." Notably, it leaves out the fact that NE#2 took affirmative steps towards the Complainant and re-initiated the conflict when the Complainant was walking away. Fourth, the narrative states that the Complainant was putting his glasses in his pocket "as if to challenge [NE#2] to a fight," but totally disregards the video evidence indicating that NE#2 had squared up to the Complainant and the Complainant's account that he felt NE#2 was acting aggressively towards him and that NE#2 was preparing to take physical action against him.

OPA views the above as problematic. This is especially the case given that this incident involved an off-duty SPD officer and, according to NE#1 herself, should have received an even higher level of scrutiny. However, OPA recognizes that it was not NE#1's obligation to investigate this matter, even if OPA believes that she could have done more in her evaluation of the arrest. OPA further recognizes that NE#1 was entitled to rely on the investigation performed by the investigating officers, even if she should have been more critical in her assessment of the evidence and the results of that investigation. As such, OPA cannot say that her decision-making during her supervision of this incident was so deficient as to constitute an abuse of her discretion. Instead, OPA finds that NE#1 would benefit from additional training and counseling and, thus, recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#1's chain of command should debrief this incident with her. The chain of command should focus on her decision to approve the Complainant's custodial arrest and her overall screening and review of this incident. The chain of command should discuss NE#1's review of the reports and her failure to identify inconsistencies within those reports. NE#1 should also be counseled concerning her writing of the OPA complaint in a manner that did not, in many respects, set forth the facts in a neutral light. This retraining 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 #2

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

During his conversations with officers at the scene and again with NE#1, the Complainant stated that NE#2's conduct towards him was potentially based on race.

SPD Policy 5.140-POL-6 requires Department supervisors to perform a preliminary inquiry into allegations of biased policing. The policy requires that the supervisor informing the person making the allegation of the option of an OPA referral. If the person requests a referral, the supervisor is required to proceed in that fashion. If not, the supervisor is expected to investigate the allegation. If the supervisor's allegation indicates that there is no apparent bias, the supervisor should complete a Bias Review. If the supervisor believes that there was bias, an OPA referral should be made at that point.

As a threshold matter, OPA has evaluated the question of whether a generic claim of an officer being racist, without any nexus to police action, constitutes an allegation of bias and requires a chain of command investigation or potential OPA referral. As an example, a bias allegation will likely not lie where an officer effectuates an arrest and the arrestee says that the officer is racist without directly linking the alleged racism to law enforcement action. Similarly, where, during a demonstration, someone yells that all officers are racist, OPA does not interpret this as constituting an actionable bias allegation.

Here, NE#1 asked the Complainant: "What precipitated this interaction?" The Complainant responded: "I think [NE#2] was maybe racist or in anger, or something, bad day, I did him wrong, something like that." In summary, the Complainant told NE#1 that NE#2's conduct towards him was potentially based on NE#2's purported prejudice. As such, OPA concludes that the Complainant's statement did rise to the level of a bias allegation.

Given this, NE#1 was required to either refer the bias allegation to OPA or, in the alternative, to complete a Bias Review. She did neither. Moreover, even had NE#1 believed that the Complainant's comment, while referencing racism, did not rise to the level of a bias allegation, she still should have documented that conclusion and her rationale in the arrest screening report. NE#1 did not do that either. Lastly, this specific issue was not screened with OPA, which was another option available to NE#1.

Ultimately, NE#1 failed to comply with Department policy when she did not properly handle the Complainant's allegation of bias. Accordingly, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #2 - Allegations #1

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 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-10.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person." (*Id.*)



Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

The video evidence established that the Complainant made first contact with NE#2. Even if NE#2 did deliberately stand in the Complainant’s way, which the Complainant alleged, this did not provide a basis for him to purposefully bump into NE#2. However, after that contact occurred, NE#2, who was not injured from the contact, had a choice. He could have let the contact go or he could have engaged with the Complainant to continue the interaction. He made the latter choice and, as the video showed, this began a chain of events that led to the fight.

At the time NE#2 chose to re-engage with the Complainant, the Complainant had already moved on and was walking away. NE#2 chose to take two steps towards the Complainant and, as a result, the Complainant turned around to face him and they both squared up to each other. At that point, NE#2 had another choice. He could continue to square up to the Complainant or he could walk away. He again chose to continue the interaction.

The Complainant then put his bag down, lifted up his pants, and touched his shirt. For the third time, NE#2 chose to continue the interaction. Even though he asserted his belief that he thought the Complainant could be assaultive and potentially armed.

Lastly, after the Complainant made a movement – which the Complainant explained was him placing his glasses in his pocket – NE#2 made a fourth choice when he grabbed the Complainant, put him in a headlock, and tried to take him down to the ground. This resulted in NE#2, a Department employee, being involved in a physical altercation that had to be broken up by community members.

Nearly all of these choices and the resultant physical fight were avoidable. While NE#2 asserted that he felt that he needed to defend himself from the Complainant, this was due to an escalating conflict that he re-initiated and that he was an equal participant in. Moreover, if NE#2 believed that the Complainant presented an ongoing threat to himself or others, he should have immediately identified himself as an off-duty police officer. This almost certainly would have diffused any further conflict.

Moreover, NE#2’s choices caused officers from the precinct he works in to come to the scene and investigate an incident in which he was, from the Complainant’s recounting, potentially a suspect. This investigation that was conducted later resulted in these officers and NE#1 being subject to review by OPA.

In its initial DCM for this case, OPA recommended that this allegation be Sustained. NE#2 then participated in a Loudermill hearing. At that hearing, NE#2 again denied that he engaged in unprofessional conduct and stated that he was simply defending himself from an aggressive individual. Importantly for OPA, NE#2 described, for the first time, that he did not recall taking an affirmative step towards the Complainant until he watched the video. He described his actions as instinctual and not an intentional aggressive move. Given this, NE#2 denied that he necessarily tried to precipitate a physical conflict. Based on this, both the Chief of Police and the chain of command expressed their belief that an alteration of the findings might be warranted.

After further consideration, OPA agrees. OPA cannot conclusively prove that NE#2 deliberately moved towards the Complainant to create a conflict, as opposed to simply reacting, albeit aggressively, to an external stimulus. Accordingly, OPA reverses its Sustained finding. OPA now recommends that NE#2 be issued a Training Referral. In reaching this finding, OPA still has significant concerns with NE#2’s decision-making and the impact it had on him



and others. OPA also wants to make clear that the expert opinion presented by NE#2 at his Loudermill hearing did not have any impact on this decision and, indeed, was roundly discounted as unhelpful and unpersuasive by OPA and the chain of command.

- **Training Referral:** NE#2's chain of command should discuss this incident with him and, specifically, go over the negative impact such conduct can have on the community's perception of both him and the Department. NE#2 should be informed that future similar decision-making will result in OPA investigations and the potential imposition of discipline. This counseling and re-training should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegation #2

5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy

SPD Policy 5.001-POL-2 states, in relevant part, that Department employees must adhere to the law. This allegation was classified for investigation given the Subject's claim that NE#2 assaulted him.

Ultimately, the evidence is insufficient to establish that NE#2 engaged in a criminal assault. First, the Subject made initial contact with NE#2, which prompted NE#2's response. Second, while NE#2 re-engaged the Complainant, who was walking away at the time, and made caused the physical altercation when he grabbed the Subject, put him in a headlock, and tried to take him down to the ground, OPA cannot prove that NE#2 acted with the intent to assault the Subject, rather than to defend himself as he indicated.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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