



CLOSED CASE SUMMARY

ISSUED DATE: JULY 6, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0840

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Unfounded)
# 2	12.040 - Department-Owned Computers, Devices & Software POL-3-Using Department Devices 3. Personal Use of Department-Provided Devices Must Follow Department Guidelines	Sustained
Imposed Discipline		
Three Day Suspension		

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:

SPD received a tip from the National Center for Missing and Exploited Children (NCMEC) alleging that the Named Employee had accessed child pornography on his home computer.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

SPD received a "Cyber Tip" from the National Center for Missing and Exploited Children (NCMEC) alleging that Named Employee #1 (NE#1) had been accessing child pornography on his home computer. The tip was based on information provided to NCMEC by a Civilian Witness (CW#1) who identified herself as being acquainted with NE#1's wife – referred to here as Witness Employee #1 (WE#1). WE#1 is employed by SPD in a non-sworn position. CW#1 alleged that WE#1 had told her that NE#1 was accessing a child pornography website on their home office computer on July 12, 2019.

SPD began a criminal investigation into NE#1's conduct. The investigation included an interview with CW#1 and WE#1. WE#1 and her divorce attorney met with SPD detectives (and later OPA) and provided a detailed statement about the website she alleged NE#1 had been viewing. SPD Detectives were able to identify and review the website NE#1 allegedly accessed.



Detectives consulted with a supervisor and prosecutor about whether any of the images on the site or reported by WE#1 would qualify as images of a minor engaged in “sexually explicit conduct” as defined under RCW 9.68A.011(4). The detectives, supervisor, and prosecutor all agreed that they were not. OPA has conducted its own review of the statute in question and concurs in that determination.

Finally, NE#1 was interviewed by OPA. NE#1 stated it was “possible” that he viewed the website in question but denied having any specific recollection of the site or what websites he accessed on the day in question. He further denied having downloaded any images that could be reasonably construed as being child pornography. NE#1 was asked why WE#1 would have made this allegation him, to which he replied that he did not know.

SPD Policy 5.001-POL-2 requires that employees adhere to all laws, City policy, and Department policy. Had NE#1 downloaded and/or possessed images that depicted minors engaged in sexually explicit conduct, this would have constituted a criminal violation of RCW 9.68A.070 and therefore violated this policy.

Ultimately, OPA agrees that even if NE#1 had accessed the site he is alleged to have viewed, this conduct would not have violated state laws against possession of child pornography. Although the website in question contains disturbing images, and NE#1’s alleged conduct, if substantiated, would be cause for concern, it would not constitute a violation of law and therefore could not violate this policy.

As such, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #2

12.040 - Department-Owned Computers, Devices & Software POL-3-Using Department Devices 3. Personal Use of Department-Provided Devices Must Follow Department Guidelines

WE#1 also reported that NE#1 had previously viewed sexually explicit material on his SPD-issued cell phone. WE#1 reported that, in October 2017, she viewed an electronic image of an adult woman showing her breast and wearing lingerie on. She also reported that, in January 2018, she saw photos of the same woman topless, smacking her breasts, and walking around an apartment. WE#1 saw these photos on her home PC, but stated she could tell they came from NE#1’s work phone because they were located in between photos of a military exercise that NE#1 had taken using his work phone. WE#1 stated that NE#1 had an app on his work phone which allowed him to “mirror” its content with his personal phone. WE#1 also stated that NE#1 routinely accessed his work phone for personal use and allowed her and their children to use it.

WE#1 also reported that in late 2017 or early 2018 she had seen the “Kama Sutra” in the web browsing history of NE#1’s work phone. WE#1 stated this showed drawings of a man and a woman in various sexual positions. The “Kama Sutra” is an ancient Sanskrit text on sexuality and eroticism.

Three days before NE#1 was first notified of this investigation by OPA, he reported to SPD that his work phone had been lost in an accident while training with the military. As a result, neither SPD IT nor OPA was able to retrieve or review any data from NE#1’s department issued cell phone.



NE#1 told OPA that he understood that the loss of his work phone “looks bad” given the allegations in this case but denied that he had destroyed or disposed of the phone to conceal evidence from OPA. NE#1 showed OPA telephone records from his personal phone showing he had called establishments near the location of the training on the day he reported his work phone was lost. NE#1 stated he made these calls in an effort to locate his lost work phone. NE#1 denied that he had known of the investigation prior to being notified by OPA. WE#1 also denied that she had ever confronted NE#1 about these allegations; however her attorney told OPA that he may have “alluded” to the allegations in a phone call with NE#1’s attorney roughly seven months prior to OPA’s official notification to NE#1.

NE#1 was also questioned about whether he had used his work phone to access pornographic websites. NE#1 reported that there was a “possibility” this had occurred and that he could not say definitively that he had never done this. However, he denied any recollection of having done so, and denied any recollection of the specific instances of pornographic material that WE#1 reported. He also denied “mirroring” his work phone to other devices.

SPD Policy 12.040-POL-3(3) governs the use of department-owned devices for personal reasons. It provides that SPD allows “limited, reasonable, personal use of Department devices.” (*Id.*) It also prohibits the use of department devices when such a use would be “cause an embarrassment to the Department.” (*Id.*) Downloading, storing, or viewing sexually explicit content on a Department-owned phone violates this policy, as a such a use would be both unreasonable and clearly embarrassing to the Department.

Here, OPA finds that a preponderance of the evidence supports the conclusion that NE#1 violated this policy by accessing pornographic content on his Department-owned phone. OPA finds the testimony of WE#1 persuasive in this respect. WE#1 described, in detail, specific instances where she recalled that NE#1 had stored or viewed sexually explicit content on his work phone. For his part, NE#1 could not tell OPA with certainty that he had never accessed pornographic websites using his Department-issued phone. Indeed, NE#1 admitted there was a “possibility” that this had occurred. Finally, an examination of NE#1’s work phone by OPA or SPD’s IT Department was made impossible by NE#1’s very untimely loss of his phone, which he acknowledged was suspicious.

As such, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**