



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 16, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0124

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Sustained
# 3	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity i. Determining the Conclusion of an Event	Sustained
# 4	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Inconclusive)

Imposed Discipline

Suspension Without Pay: 30-days/hrs

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Sustained
# 3	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity i. Determining the Conclusion of an Event	Sustained

Imposed Discipline

Suspension Without Pay: 1 day/hrs

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 Complainant alleged that the Named Employees improperly arrested him and subjected him to biased policing. OPA further alleged that the Named Employees may have been unprofessional and may have failed to record Body Worn Video when required.

SUMMARY OF INVESTIGATION:

The Named Employees were dispatched to a trespass call. When they arrived, the officers contacted building security, who pointed the individual out and said that they wanted the individual to be trespassed. The Named Employees then



approached and contacted the individual – who was later identified as the Complainant. This contact and the law enforcement action they took was captured on Body Worn Video (BWV).

The Complainant told Named Employee #2 (NE#2) to stop pointing his flashlight in the Complainant's face. He repeated that request, even though it appeared that the flashlight moved down to the Complainant's chest area. NE#2 said that the flashlight was not pointed at the Complainant's face. Named Employee #1 (NE#1) and the Complainant began to discuss the Complainant trespassing. The Complainant denied that he was doing so and asked to see a sign or to hear from a security guard. NE#1 identified two SPD Conditions of Entry signs. The Complainant said that he could not see the signs because he had bad eyes and asked NE#1 to show him. NE#1 replied: "I'm gonna show you some handcuffs if you don't leave...for trespass." The Complainant walked over to one of the posted signs and said that it prohibited video recording, not trespassing or loitering. NE#2 asked the Complainant whether he was going to leave or be arrested. The Complainant said that he wanted to know where the no trespassing/loitering sign was, and NE#1 said that they would "show him." The Complainant began walking away and NE#1 asked him where he was going because he wanted to "show" the Complainant the sign. The Complainant continued to ask to be shown the sign and NE#1 said that he would do so.

The Complainant asked for NE#1's badge number and he provided this information. The Complainant then walked onto the sidewalk. NE#2 reiterated that the Complainant's prior location was private property, and NE#1 said that the Complainant was "good" on the sidewalk. The Complainant continued to complain, and NE#1 told the Complainant to come over so that he could show him something. NE#1 and NE#2 both repeated that, if the Complainant went back on the property, he would be arrested. When the Complainant kept talking, NE#1 remarked to NE#2 that they should let the Complainant yell. The Complainant made additional demands to see the signs and NE#1 responded: "so what are you going to do then." When the Complainant said that he was going to go back over to where he was, NE#1 stated: "If you go back over there, we're going to show you where it says it." The Complainant went to speak to another community member and NE#1 remarked: "Dude...nobody wants to talk to you." NE#2 began laughing. The officers began walking away laughing. The Complainant yelled insults after them, to which NE#1 responded: "good night"; "thank you"; and "bye." NE#2 told the Complainant as they departed: "You're not a very nice guy." NE#1 and NE#2 returned to their patrol vehicle. NE#1 remarked to NE#2 that the Complainant was "all tough...until we walked up on him." NE#2 replied that they had discovered an "Antifa member with his mask off." They both laughed. They then de-activated their BWV.

Shortly thereafter, the Named Employees recontacted the Complainant. NE#2's BWV, which had no sound because it was still in pre-buffer mode, showed the Complainant by the window of the patrol vehicle. He appeared to be videotaping the officers with his phone. As the officers emerged from the vehicle, he backed away. NE#1 ultimately ran after him and took hold of him. The Complainant stated that he had just been expressing his opinion. NE#1 walked the Complainant over to NE#2 and said that the Complainant had threatened to "beat [his] ass." The Complainant denied saying this and indicated that NE#1 was lying. The officers placed the Complainant into a prone position where they handcuffed him. The Complainant told the officers to get off of him and NE#2 said that he should "shut up." The Complainant stated that he could not breathe, and NE#2 responded: "Why don't you shut up?" The Complainant said that he did nothing wrong and that the officers were hurting him. The Complainant exclaimed: "This is America!" NE#2 replied: "Yeah, you were arrested in America. Congratulations." The Complainant alleged that he did not make threats and that the officers had fabricated this. NE#2 stated: "Congratulations, you're going to jail."

NE#1 told the Complainant that all he had to do was to walk away. The Complainant said that he was just walking and expressing his opinion when he was chased down by NE#1 for no reason. He contended that NE#1 simply lost his



temper. NE#2 began to read the Complainant his Miranda warnings. The Complainant asked the officers why they were violating his rights. NE#2 queried whether the Complainant understood the warnings. When the Complainant said that he did not, NE#2 replied: "Then I can't hear you. Can't hear you. Can't hear you. Didn't understand your rights? I'm not talking to you." When the Complainant continued to question his arrest, NE#2 began singing: "You are under arrest. You are under arrest." The Complainant asked NE#2 whether he was being judged for his record. NE#2 responded: "You should probably lay off the drugs my friend." The Complainant repeatedly denied that he threatened the officers and the Named Employees continued engaging in a back and forth with him. NE#1 told the Complainant that, if he could repeat the threat to NE#1's Sergeant, the Sergeant would let him go. When the Complainant asserted that he could not remember what he said, but that he remembered NE#1 chasing him, NE#1 stated: "You remember that, but you don't remember what you said? Oh... great memory." The Complainant was then transported from the scene.

The officers later documented that the Complainant was arrested because he made a threat to harm the officers and a threat to kill NE#1's family. The Named Employees' Sergeant screened this matter with OPA. OPA reviewed the BWV and, based on that review, initiated this investigation.

As part of its investigation, OPA reviewed the BWV and the documentation concerning the incident. OPA also interviewed both of the Named Employees. OPA attempted to interview the Complainant but was unsuccessful.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

As discussed above, the Complainant alleged that the Named Employees subjected him to biased policing when they arrested him. He specifically asserted that he was arrested, at least in part, because of his mental illness.

SPD policy prohibits biased policing, which it defines as "the different treatment of any person by officers motivated by any characteristic of protected classes under state, federal, and local laws as well other discernible personal characteristics of an individual." (SPD Policy 5.140.) This includes different treatment based on an individual's mental health status. (*See id.*)

Ultimately, when reviewing the BWV, there is no evidence that the officers knew that the Complainant suffered from mental illness at the time they placed him under arrest, let alone that they arrested him because of this. While, as discussed herein, OPA has concerns with how both Named Employees handled this matter, OPA does not find any evidence of bias.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against both NE#1 and NE#2.

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

Named Employee #1 - Allegation #2

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.*)

Based on OPA’s review of the BWV, OPA concludes that the totality of NE#1’s statements to and demeanor towards the Complainant violated the Department’s professionalism policy. From virtually the inception of their interaction, NE#1 made statements that served to antagonize the Complainant. For example, in response to the Complainant’s questioning of whether he was trespassing, NE#1 responded: “I’m gonna show you some handcuffs if you don’t leave.” He also made several statements that could have been perceived by the Complainant as threatening, including: “we’ll show you [your rights]”; “you know what, step back over here and I’ll show you”; and “step back on this property.” In addition, the manner in which he said these statements was dismissive and, at times, taunting. Moreover, when the Complainant began talking to someone else, NE#1 rudely stated: “nobody wants to talk to you, dude.” It is unclear to OPA what possible law enforcement purpose this statement had. Throughout his interaction with the Complainant, NE#1 laughed at him and with NE#2. In OPA’s perspective, virtually the entirety of NE#1’s interaction with the Complainant was neither necessary nor consistent with the Department’s expectations of his conduct.

In reaching this finding, OPA notes that NE#1 has had multiple cases in which he has been found to have engaged unprofessionally with community members. NE#1 has received five Sustained professionalism findings, which have included significant suspensions without pay. He has further received three training referrals. However, none of this remedial action appears to have had any effect on how NE#1 conducts himself. This is unfortunate as, in many respects, NE#1 is a capable officer with good instincts. But his continued unprofessional interactions with those he comes into contact with simply cannot be tolerated.

For these reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity i. Determining the Conclusion of an Event

After their initial interaction with the Complainant ended, the Named Employees returned to their patrol vehicle and turned off their BWV. However, they remained in that location and continued to observe the Complainant to ensure that he did not again trespass. They then re-contacted him after he purportedly threatened NE#1’s family and the officers and took him into custody. While both Named Employees later reported the threat, the statement was not recorded on BWV based on the officers’ failure to continue recording. When he was taken into custody, the Complainant continually denied making any threats and asserted that the officers were arresting him for no legitimate reason.



SPD Policy 16.090-POL-5 governs when officers are required to record law enforcement activity. Pursuant to this policy, officers must record the entirety of their response to dispatched calls and their interaction with criminal suspects. (See SPD Policy 16.090-POL-5.) SPD Policy 16.090-POL-5(i) details when an event ends for the purpose of officers determining whether BWV can be turned off. Relevant to this case, an event ends where both of the following apply: (1) “The employee has completed his or her part of the active investigation”; and (2) “There is little possibility that the employee will have further contact with any person involved in the event.” (SPD Policy 16.090-POL-5(i).)

Based on both officers’ accounts, they remained at the scene to observe the Complainant and to see whether he re-engaged in criminal activity. As such, even if they had completed their active investigation into the dispatched call – which is debatable, there was the very real possibility that, depending on the Complainant’s conduct, they could have had further contact with him. Indeed, given their back and forth with the Complainant, it appears that the officers felt it likely that he would return to the prohibited area.

As the Named Employees did not satisfy this second prong, they were prohibited from de-activating their BWV. When they did so, they acted contrary to policy. While such violations may, at times, result in retraining rather than discipline, OPA finds this incident to be more egregious. The failure to record BWV as required prevented crucial evidence – the alleged threats – from being recorded. This would undermine any later prosecution and the offense almost certainly could not be proved beyond a reasonable doubt given the absence of such video evidence and the disputes of fact between the parties.

Accordingly, OPA believes that this warrants a Sustained finding against both Named Employees.

Recommended Finding: **Sustained**

Named Employee #1 - Allegations #4

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

NE#1 arrested the Complainant based on threats that the Complainant was alleged to have made against NE#1’s family. Specifically, both NE#1 and NE#2 reported that the Complainant threatened to kill NE#1’s family. Both officers also indicated that the Complainant said that he was going to “beat [the officers’] ass.” Because, as discussed above, the Named Employees failed to continue recording BWV even when it was possible that they would re-contact the Complainant, these statements were not recorded. The Complainant later denied making the statements and said that he was being improperly arrested.

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer’s knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed.

If the Complainant was established to have made the threats attributed to him, there would have been probable cause supporting his arrest. However, as discussed in the context of Allegation #3, above, this evidence was not established because of the Named Employees’ failure to record BWV as they were required to do. Given this, coupled with the Complainant’s steadfast denials that he made the threats, OPA does not believe that there is



sufficient evidence permitting OPA to reach a determinative finding on the propriety of the arrest. Accordingly, OPA recommends that this allegation be Not Sustained – Inconclusive.

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

Named Employee #2 - Allegations #1

5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

For the same reasons as stated above (see Named Employee #1 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #2

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

OPA found NE#2's conduct during this incident even more concerning than NE#1's. NE#2, like NE#1, was dismissive, argumentative, and rude towards the Complainant. He made a number of unprofessional statements to the Complainant, including: telling the Complainant to shut up twice; saying that he could not hear the Complainant; saying that the Complainant should "lay off the drugs"; and remarking to the Complainant "congratulations, you just made it to jail. He further laughed at the Complainant with NE#1.

These statements, coupled with NE#2's overall approach and demeanor, were unacceptable and inconsistent with the Department's professionalism policy. As such, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #2 - Allegation #3

16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity i. Determining the Conclusion of an Event

For the same reasons as stated above (see Named Employee #1 – Allegation #3), OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**