



## **CLOSED CASE SUMMARY**

ISSUED DATE: JUNE 5, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0575

### **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 (Inconclusive)
# 2	5.001 – Standards and Duties 10. Employees Shall Strive to Be Professional	Not Sustained (Unfounded)
# 3	15.180 – Primary Investigations 5. Officers Shall Document All Primary Investigations on a Report	Not Sustained (Lawful and Proper)

***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 Employee used a racial slur towards him. The Complainant further alleged that the Named Employee’s report was inaccurate and that the Named Employee improperly touched his groin area during a search.

### **SUMMARY OF INVESTIGATION:**

The Complainant contacted an SPD supervisor concerning an incident involving Named Employee #1 (NE#1). The Complainant alleged that, during his arrest, NE#1 referred to him as a “tall ass n---r.” The supervisor reviewed NE#1’s BWV and determined that NE#1 said: “tall ass”; however, the supervisor deemed the next word to be indistinguishable. The supervisor referred the allegation to OPA, and this investigation ensued.

As part of its investigation, OPA interviewed the Complainant. He recounted his arrest for DUI by NE#1. He stated that there were inaccuracies in NE#1’s report. Specifically, he pointed to NE#1’s documentation of how he touched his nose during the field sobriety tests. He could not recall any other details that he felt were inaccurate. The Complainant also stated that NE#1 improperly touched his groin during the arrest. This was during a search.

With regard to the allegations regarding the use of a slur by NE#1, the Complainant said that both NE#1 and his partner – referred to here as Witness Officer #1 (WO#1) – smirked and laughed at him during the arrest. He said that they also made comments to him about his height. This included when the Complainant was being transported to the hospital. When they arrived at the hospital, NE#1 removed the Complainant from the car. NE#1 said that the Complainant was the first person he ever had to look up to. NE#1 then called him a “tall ass n---r.” The Complainant asked NE#1 what he said. WO#1 then stated that he wished he could say the same. The Complainant did not push



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the issue further because he saw NE#1 touching his waist and the Complainant did not want to escalate the situation.

As part of its investigation, OPA reviewed the Body Worn Video (BWV) and In-Car Video (ICV) recorded by both NE#1 and WO#1. The video showed the arrest of the Complainant and the provision of field sobriety tests. The video indicated that, when performing the finger to nose touch, the Complainant had to readjust each hand on the first touch. The remainders of the touches were performed fluidly. Ultimately, the officers made the decision to arrest the Complainant for DUI. He was transported to a hospital for a blood draw. The video also captured the search of the Complainant incident to arrest. The video indicated that NE#1 patted the Complainant down and searched through his pockets, including those on the Complainant's pants. At one point, NE#1 pat frisked the Complainant's groin area. This portion of the search lasted for around one second. There was no indication that NE#1 grabbed or groped the Complainant's genitals.

The Complainant was transported to a hospital for a blood draw. At that time, both officers noted the Complainant's height and asked whether he played sports. They asked the Complainant how tall he was, and the Complainant said that he was 6'8". NE#1 responded: "Geez Louise." NE#1 then said: "You're the first one I've had to look up to." Immediately thereafter, NE#1 commented: "Tall ass" followed by a third word. OPA, like the supervisor, could not conclusively determine what that third word was; however, it sounded as if it was a two-syllable word. At the time of the statement, WO#1 was seating the Complainant inside of the patrol vehicle. Neither WO#1 nor the Complainant reacted in a surprised manner or in a manner that suggested that they had just heard a racial slur. WO#1, who is significantly shorter than both NE#1 and the Complainant, remarked: "I wish I could say that." The Complainant interjecting asking: "What did you say." WO#1 repeated: "I wish I could say the same." Later during the ride, the Complainant asked NE#1 how tall he was, and NE#1 said that he was 6'4". OPA saw no evidence on the video indicating that, as the Complainant contended, NE#1 and WO#1 were smirking or laughing at him. OPA also could not confirm that NE#1 reached for his duty belt as the Complainant recalled.

OPA interviewed both NE#1 and WO#1. WO#1 did not remember why they were talking about the Complainant's height; however, he said that he and other officers often try to engage arrestees in conversation to keep tensions low. He felt that the Complainant's height was "cool." WO#1 did not know what the word used by NE#1 was. That being said, he did not hear NE#1 say the N-word. He told OPA that, had he heard this, he would have notified a supervisor immediately. He stated that he had been working with NE#1 for around two and a half years and he had never experienced NE#1 using the N-word or any other racial slurs. With regard to what he said after NE#1's comment, WO#1 explained that he was saying that, as a shorter person, he was always looking up at arrestees. He was remarking that he wished he could say that this was not the case.

NE#1 said that, during the incident, he tried to build a rapport with the Complainant. This included talking with the Complainant about his height and the fact that the Complainant played basketball. NE#1 told OPA that he said: "Tall ass man." He denied using the N-word. When asked about the word appearing to have two syllables, NE#1 said that he sometimes slurred his words and did not always speak clearly. He asserted that, when he slowed down his BWV and listened this, he heard the word "man." He told OPA that he never used the N-word or made any reference to the Complainant's race. He noted that the Complainant did not allege that he did so during the incident and that they had normal conversations for the rest of the time that they were together.



OPA reviewed NE#1's past history and determined that he had not previously been investigated for biased policing during his career at SPD, and had also not been alleged in the past to have used inappropriate language, including racial slurs.

OPA conducted an internal analysis of the video, including slowing it down and trying to isolate the audio, in order to determine the word used by NE#1 and to identify whether it was a slur. OPA could not sufficiently clean up the audio and could not conclusively determine what was said. However, OPA could not foreclose the possibility that a slur was used. OPA further had multiple staff members, civilian and sworn, listen to the video and give their opinions of what was said. These staff members had a host of interpretations, including some who heard the racial slur. Given this, OPA retained an expert to perform further analysis of the video and audio recordings.

The expert conducted two different assessments of the statement. First, the expert tried to better isolate the audio to hear what was said. The expert determined with confidence that the word used had two syllables, but the expert could not definitively confirm or deny that it was the N-word, or, for that matter, identify what other word it could have been.

Second, the expert conducted a blind study using thirteen individuals who were not familiar with the case. The survey had the following characteristics:

Participants were told that two short audio files would be played for them five times each, and that afterwards they would be asked what words they heard. They were instructed not to guess on what they heard, but to indicate what words they could hear and if any of the words were indiscernible. The two audio files used in this study were the ~2.7 second section of audio taken from the original video file...and the filtered and normalized version of the same section of audio...After playing the audio files five times each, participants were given the opportunity to repeat the audio playback if they wanted to hear the audio files again.

After receiving the initial responses, the expert disclosed the alleged statement made by NE#1 to the participants and once again played both audio files five times each. The participants were then all asked if they heard the alleged statement.

None of the participants identified the use of the N-word or any other racial slur after the first part of the study. Of the 13, ten identified some or all of the words they thought NE#1 said. Three of the 13 could not identify any of the words clearly. After the second part of the study and after the 13 participants were informed of what the Complainant alleged was said: seven still did not identify the racial slur being used; five did hear the racial slur being used; and one said that they maybe heard the racial slur.

### **ANALYSIS AND CONCLUSIONS:**

#### **Named Employee #1 - Allegation #1**

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

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 the race of the subject. (*See id.*) The policy further states that: Employees shall not express—verbally, in writing, or by other gesture—any prejudice or derogatory comments concerning discernible personal characteristics. (*Id.*) If NE#1 used a racial slur when describing the Complainant, it would constitute a clear violation of this policy.

After repeatedly listening to the audio recording of NE#1’s statement, across multiple videos and even when slowed down and isolated, OPA still cannot discern what was said. Moreover, whether NE#1 said the N-word is inconclusive even after retaining an expert to further analyze the audio and to conduct a blind study. As indicated both from OPA’s experience seeking internal opinions on the video and in the results of the study, virtually everyone that has listened to the audio has come away with a different interpretation. Unfortunately, one of those interpretations is that NE#1 used the N-word. If this did occur, the result of this case would have been termination of employment. There is no place in SPD or, for that matter, in society for such use of the N-word.

The remainder of the evidence is also inclusive. From a lay review of the video – including portions before and after the statement in question – OPA did identify that NE#1 has a unique speech pattern, which, at times, makes words he says unclear. OPA also noted that, after NE#1’s statement, neither WO#1 nor the Complainant had a visceral reaction suggesting that they had just heard a slur. While the Complainant asked what was said, it appeared in context that he was speaking to WO#1, who was standing right next to him, not NE#1. Moreover, while certainly not dispositive, the Complainant made no contemporaneous allegation that a slur had been used and, instead, engaged in further conversation with the officers, including asking NE#1 about his height. On the other hand, the explanation given by NE#1 – that he said “tall ass man” – seems unlikely given the expert’s conclusion that the third word had two syllables.

Ultimately, based on the above, OPA has no outcome to this case other than inconclusive. Even if I personally hear the use of a slur, the evidence is insufficient to establish that the N-word was used when applying the requisite burden of proof and when considering the varied opinions, expert and otherwise, of what was said. This is an extremely unsatisfactory result to a case in which a determinative finding that the N-word was used or not used would provide closure and the lack of such a finding leaves ongoing uncertainty. However, this the finding consistent with the evidence in this case. Accordingly, OPA recommends that this allegation be Not Sustained – Inconclusive.

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

#### **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.)

Based on a review of the BWV and ICV, there is no support for the Complainant’s allegation that NE#1 improperly touched his genitals. To the contrary, the video showed that NE#1 performed a search incident to arrest, which including briefly pat frisking the Complainant’s groin area. This was purposed to locate potential contraband or weapons. This search was consistent with NE#1’s training and with policy. It did not constitute a sexual assault.

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



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

**Named Employee #1 - Allegation #3**

***15.180 – Primary Investigations 5. Officers Shall Document All Primary Investigations on a Report***

SPD Policy 15.180-POL-5 governs reports written by officers. The policy directs that such reports must be thorough, complete, and accurate. (SPD Policy 15.180-POL-5.)

The Complainant asserted that portions of the incident report completed by NE#1 were inaccurate. He specifically identified NE#1's recitation of how he missed his nose on the finger touches to be incorrect.

NE#1's incident report included a description of the field sobriety tests. With regard to the finger to nose touches, it indicated that the Complainant missed on the first attempt with each hand. The field sobriety tests were fully captured on video. The video showed that, during the first finger to nose touches with each hand, the Complainant had to readjust his finger. The other finger to nose touches were performed in a fluid motion. Based on this, OPA does not believe that what NE#1 wrote in the report was inaccurate. In addition, when comparing the remainder of the report to the video, OPA deems it substantially accurate.

Accordingly, OPA finds no evidence establishing that NE1's report contained incorrect or misleading information. As such, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**