



## CLOSED CASE SUMMARY

ISSUED DATE: MAY 22, 2019

CASE NUMBER: 2018OPA-1163

### 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 (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 may have acted contrary to Department policy when he authorized the arrest of a signature gatherer.

### ADMINISTRATIVE NOTE:

This case was provided to the Office of Inspector General for Public Safety (OIG) for review and certification on April 15, 2019. As of the date of this DCM, more than one month later, OPA has not received a certification or, for that matter, a request for additional investigation.

SMC 3.29.260(G) states the following: “If the OIG has not advised OPA of concerns with the investigation within ten days after being notified that an investigation has been preliminarily completed the OPA Director may certify the case and issue findings. In these instances, OIG is precluded from requiring further investigation.” As discussed above, OPA routed this case to the OIG and indicated that its investigation was complete on April 15. However, as of the date of this DCM and more than ten (10) days after the date of provision of the case to the OIG, the OIG has not responded to certify the case or to direct that additional investigation be completed. Accordingly, consistent with the SMC, I certify this investigation as thorough, objective, and timely and proceed to issue the recommended findings set forth herein.

### ANALYSIS AND CONCLUSIONS:

#### **Named Employee #1 - Allegations #1**

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

OPA received a complaint concerning law enforcement action that was taken towards a signature gather, who is referred to here as the Subject. At the time that he was contacted by the police, the Subject was gathering signatures on private property in front of a grocery store. The grocery store owner called 911 to report the Subject’s activity and to ask that the Subject be trespassed from the location. Officers responded and contacted the Subject. They asked him to leave the vicinity and he refused to do so. One of the officers informed the owner that this was a



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civil issue and that they could not remove the Subject from the property. They suggested that the owner seek an injunction to prohibit signature gatherers from being on the property.

The officers left the scene and screened this matter with their Sergeant, Named Employee #1 (NE#1). NE#1 gave the officers the authority to arrest the Subject if he did not agree to voluntarily leave the premises. NE#1 did not believe that the area in which the Subject was gathering signatures was the equivalent of a public forum and, as such, NE#1 concluded that he was not permitted by law to remain at that location. In support of this belief, NE#1 cited to the Washington State Supreme Court's decision *Alderwood Associations v. Washington Environmental Council*. NE#1 sent the legal authority to the officers.

The officers again contacted the Subject and told him that, based on information they had received, the Subject was, in fact, required to leave the premises. The officers cited to the holding in *Alderwood Associations* and told the Subject that, if he did not leave, he would be arrested. The Subject left. The Subject later conveyed to the Complainant that he left under "duress." The Complainant then initiated this complaint with OPA.

This incident, as well as another case in which law enforcement action was taken against a signature gatherer, caused this issue to be flagged for the North Precinct chain of command. The chain of command sought a legal opinion from the City Attorney's Office concerning how to deal with these matters.

In that opinion, the City Attorney's Office recommended that no law enforcement action be taken against signature gatherers operating on private property unless there was an active injunction prohibiting that activity. In reaching this opinion, the City Attorney's Office noted that "it is a complex analysis to determine whether signature gatherers are permitted on certain property..." Based on this legal opinion, NE#1's chain of command directed that he no longer take law enforcement action against signature gatherers unless there was an injunction in place.

At his OPA interview, NE#1 stated the following in explaining why he initially advised the officers to arrest the Subject: "since there is no Department policy restricting...signature gathering...and there's no absolute RCW law on it, that I have to be dependent upon court cases." NE#1 contended that, based on his research at the time, he believed that the caselaw supported the authority for the officers to remove the Subject from the location. NE#1 stated that he did not interpret the entrance of a grocery store to be a public forum.

However, during its investigation, OPA found April 4, 2008 Legal Bulletin that addressed this exact issue. Notably, that Legal Bulletin stated the following: "[T]he general policy is to not take enforcement action at the scene [of signature gathering] but rather to gather and report information to help determine if future enforcement action might be appropriate." The Legal Bulletin further instructed that: "The initiative signature gatherers may be approached but not detained and do not have to identify themselves to the officer."

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. This policy compels compliance with SPD directives and special orders but does not explicitly reference Legal Bulletins. However, OPA interprets this policy as also requiring that officers act in accordance with such legal directives.

Here, NE#1 acted contrary to the direction provided in the April 4 Legal Bulletin. However, for several reasons, I do not believe that this represented as violation of policy. First, at the time of the incident, this Legal Bulletin was more than ten years old. From a reading of NE#1's OPA interview, it does not appear that he was aware that it existed.



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This is not necessarily surprising. OPA is unaware of any database in which Legal Bulletins, and particularly those that are a decade old, are sortable by topic and readily accessible. Second, based on my review of the caselaw, the Legal Bulletin, and the advice proffered by the City Attorney's Office, I find it very possible that the entrance of a grocery store would, in fact, not be a public forum providing legal protection to a signature gatherer. As such, by authorizing the arrest of the Subject, NE#1 may not have actually acted in violation of law, even if his decision was contrary to legal guidance provided by the Department. Third, NE#1 made the best decision that he could based on his review of a complex area of law and without the luxury of time. His decision was backed by his interpretation of caselaw and was made in good faith. This is exactly what the Department expects of its supervisors and, with this expectation, comes the understanding that, at times, supervisors will make mistakes. This should be embraced not punished. Accordingly, for the above reasons, I recommend that NE#1 receive the below Training Referral rather than a Sustained finding.

- **Training Referral:** Based on my review of NE#1's OPA interview, it appears that he understands the legal framework surrounding the issues raised in this case, as well as the direction of his chain of command moving forward. As such, and from OPA's perspective, no further retraining or counseling is needed unless NE#1's chain of command deems it necessary. OPA requests, however, that NE#1's chain of command commend him for his leadership during this incident and his willingness to continue to learn and improve as a supervisor. The steps taken by the chain of command should be documented and this documentation should be maintained in an appropriate database.

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