



CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 8, 2020

CASE NUMBER: 2019OPA-0382

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.170 - Alcohol and Substance Use 1. Employees Shall not Report for Duty Under the Influence of any Intoxicant	Not Sustained (Inconclusive)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Inconclusive)
# 3	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Inconclusive)

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 reported to duty and engaged in law enforcement activity while intoxicated.

SUMMARY OF INVESTIGATION:

On Friday, May 24, 2019, West Precinct Bicycle Officers, including Named Employee #1 (NE#1), were assigned to work two demonstrations that occurred within the confines of the East Precinct. NE#1 was working with his partner at that time, Witness Officer #1 (WO#1).

WO#1 provided the following account to OPA. At approximately 9:00 a.m. on May 24, NE#1, WO#1, and other Officers went to get coffee at the beginning of their shift. At that time, WO#1 smelled the odor of intoxicants. He observed that NE#1's eyes were bloodshot, that he had not shaved, and that he was speaking with an irregular affect. WO#1 also noted that NE#1 had been late to work that morning and NE#1 was rarely late. When they were out in the field, WO#1 spoke with NE#1 and detected the odor of intoxicants on his breath. WO#1 recalled that NE#1 was speaking loudly and jovially, which WO#1 described as being out of character for NE#1. WO#1 also recalled that NE#1 showed him and commented on various videos. WO#1 said that NE#1's eyes remained bloodshot.

The Officers' responsibilities at the demonstration concluded and they prepared to work the next event. WO#1 recounted that, at that time, he spoke with NE#1 concerning the smell of alcohol on NE#1's breath. WO#1 told him that he should use a sick day and go home. WO#1 offered to drive him home. WO#1 stated that NE#1 laughed and then left his presence. He saw NE#1 a little later. WO#1 described that NE#1 was chewing a large quantity of gum. WO#1 again asked whether NE#1 was going to go home. For a second time, WO#1 offered to drive NE#1 home. NE#1 again refused and walked away.



NE#1 and WO#1 began working the second demonstration. WO#1 said that he and NE#1 were in the lead of the other Bicycle Officers. WO#1 indicated that he remained in the vicinity of NE#1. WO#1 recalled that the protest was uneventful, and they did not have to take any law enforcement action.

WO#1 explained that he had received substantial training concerning the detection of intoxication, as well as concerning the physiological effects of alcohol on the body. WO#1 stated that he had earned advanced certifications in this area and estimated that he had processed several hundred DUIs. WO#1 told OPA that, based on his observations of NE#1 and his training and experience in this area, he believed that NE#1 reported for duty on May 24 with alcohol on his breath and that NE#1 may have been under the influence of intoxicants at that time.

WO#1 did not immediately report his concerns regarding NE#1. He recounted that, on May 24, his Sergeant was not working and that they were being supervised by an Acting Sergeant. NE#1 and WO#1 were scheduled for days off on the following two days. Upon their return to work on May 27, 2019, WO#1 again spoke with NE#1 regarding his conduct on May 24. WO#1 relayed that NE#1 was not receptive to this discussion and that he denied that there were any issues. Based on the result of their conversation, WO#1 made the decision to report NE#1's conduct to a supervisor and briefed two Bicycle Unit Sergeants. The following day, one of the Sergeants told the Bicycle Unit Lieutenant. The Lieutenant spoke with WO#1 (a Guild Representative was also present) and WO#1 informed him of his observations and concerns surrounding NE#1. The Lieutenant later referred NE#1's conduct, as well as WO#1's initial failure to report, to OPA as potential misconduct. Whether NE#1 violated policy is discussed herein. WO#1's decision to not initially report NE#1's alleged intoxication on duty is being investigated under a separate case – 2019OPA-0393.

As part of its investigation, OPA interviewed NE#1. OPA also interviewed WO#1, and the substance of his OPA interview is set forth above. Lastly, OPA interviewed two Bicycle Officers – Witness Officer #2 (WO#2) and Witness Officer #3 (WO#3) – and an Acting Sergeant for the unit.

NE#1 recalled the date in question and stated that he worked two demonstrations. NE#1 confirmed that he was late to work that morning. NE#1 did not recall whether he was clean shaven. He said that it was typical for him to shave every morning but that he might miss a day or two. NE#1 did not recall whether his eyes were bloodshot, and he acknowledged that "anything was possible." NE#1 did not believe that there was a change in his personality that morning. He said that it was not out of character for him to laugh and be jovial. NE#1 did not recall having any difficulty riding his bicycle on that day or performing maneuvers.

NE#1 remembered getting coffee with WO#1. He believed that WO#2 and WO#3 may also have been there. NE#1 did not recall engaging in anything tactically out of the ordinary and did not remember riding out in front of the other Officers. NE#1 said that it was possible that he rode by himself to the second demonstration. He did not feel that this was abnormal.

NE#1 stated that, during his shift, WO#1 approached him and told him that he smelled of alcohol. NE#1 described WO#1 as being sarcastic and said that it seemed that WO#1 was exaggerating. NE#1 said that it also appeared that WO#1 was upset by something else. He recalled that WO#1 recommended that he go home and take a sick day. When asked why he did not do so, NE#1 responded: "Because I didn't believe it was possible that I was intoxicated or impaired." NE#1 said that no other Officer told him that he smelled of alcohol on that date. He stated that this was the case even though he spent portions of his shift with WO#2, WO#3, and the Acting Sergeant.



NE#1 denied that he consumed any alcohol beverages on SPD property or on/in a Department vehicle. When asked whether he reported to work impaired, NE#1 said: "I do not believe that I did." When asked to explain his answer, NE#1 stated that, the night prior, he had around four to five beers. He said that he drank alcohol from approximately 8:00 p.m. to 1:00 a.m. NE#1 stated that he was hungover on the morning of May 24. He described a hangover as being tired, having a little less energy than usual, and maybe having a headache. However, NE#1 told OPA that he did not think it was likely that he would have alcohol on his breath, and he was not aware that this was the case.

NE#1 asserted that the allegations against him were based on assumptions not facts. He did not know why WO#1 would make the allegation against him and he believed that WO#1 "made...a pretty broad assumption that day."

WO#2 confirmed that he spent time with NE#1 on May 24. WO#2 did not recall whether or not NE#1 was clean shaven and he did not recall whether NE#1's eyes were bloodshot. WO#2 said that he did not notice anything different about NE#1's demeanor and that he did not see NE#1 have difficulty with any tactics or maneuvers. WO#2 did recall that NE#1 and WO#1 were riding out in front of the group, which he found frustrating as it was not what usually occurred. He remembered raising this with the Acting Sergeant. He later learned that WO#1 was trying to keep NE#1 away from other Officers. WO#2 said that he saw nothing to suggest that NE#1 was intoxicated that day and that he had no worries or concerns regarding NE#1's conduct or demeanor. WO#2 said that he did not believe that NE#1 consumed alcohol or was impaired at work.

WO#3, like WO#2, recalled that he worked on May 24. However, he had no specific recollection of that day and could not address whether or not NE#1 was impaired. When asked why WO#1 may have reported that NE#1 was impaired, WO#3 replied: "we're all police officers, so usually we can recognize when somebody is impaired or somebody is intoxicated. So, he had believed it then he might have seen something—might have seen something that indicated to him that they were intoxicated."

The Acting Sergeant remembered working on May 24 and interacting with NE#1. The Acting Sergeant did not recall whether NE#1 was clean shaven, whether his eyes were bloodshot, whether his demeanor was different, or whether he had difficulty performing tactics and maneuvers. The Acting Sergeant told OPA that he had no indication that NE#1 was impaired on the date in question. He confirmed that he would have been in the same vicinity as NE#1 and that he did not smell any alcohol on him. When asked about why WO#1 may have reported that NE#1 was impaired, the Acting Sergeant said, referring to WO#1: "[He's] very well-trained officer in recognizing signs of impairment. He's kind of one of our...go to officers for any kind of DUI type stuff, so...his experience is generally better than your average officer I would say, so."

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.170 - Alcohol and Substance Use 1. Employees Shall not Report for Duty Under the Influence of any Intoxicant

SPD Policy 5.170-POL-1 prohibits Department employees from reporting for duty under the influence of any intoxicant

As discussed above, WO#1 asserted that, based on his observations, training, and experience, he believed that NE#1 was impaired by alcohol on May 24. In support of that belief, WO#1 pointed to the fact that NE#1 was late to work, was unshaven, had bloodshot eyes, had the smell of alcohol on his breath, had difficulty performing tactics and



maneuvers, and was acting in a manner that was out of the ordinary for him. While NE#1 denied that his demeanor was abnormal, NE#1 acknowledged that he was late to work, that he may not have shaved, and that his eyes may have been bloodshot. Notably, he did not recall whether he had difficulty with tactics and maneuvers and told OPA that he was not “aware” of having alcohol on his breath.

In reviewing the record, OPA cannot determine any discernable motive for WO#1 to have fabricated this matter. While NE#1 simply asserted that WO#1 made assumptions, OPA finds it unlikely that WO#1 would have taken the risk to report NE#1’s conduct after the fact, well knowing that he could be disciplined for the delay in reporting, based purely on assumptions.

Moreover, when compared to the definitive account provided by WO#1, NE#1’s defenses are not overly persuasive. Throughout his OPA interview, NE#1 responded that he did not recall the answers to various questions. Moreover, when directly asked whether he was impaired, intoxicated, or any way affected by alcohol, his response was not that he absolutely was not. Instead, he replied to each question: “I do not believe that I was.” OPA finds these answers unconvincing. These are not complex queries – you either are or you are not impaired. In OPA’s perspective, NE#1’s responses were purposely and carefully couched to leave open the possibility that he was, in fact, impaired. This greatly decreases OPA’s confidence in his responses.

Lastly, NE#1 has previously been investigated and disciplined for alcohol related misconduct. While this does not, by itself, establish that he was impaired here, it is certainly evidence that suggests that it was a significant possibility.

While OPA believes that there is a substantial basis supporting a finding that NE#1 was impaired on May 24, two crucial pieces of evidence – the accounts provided by WO#2 and the Acting Sergeant – prevent OPA from being able to definitively determine that this was the case. Both WO#2 and the Acting Sergeant asserted that, even though they spent portions of the day around NE#1, they saw no indication that he was impaired and did not detect the odor of alcohol. This creates an irreconcilable dispute of fact with WO#1’s report of misconduct and prevents OPA from reaching a conclusive determination here. As such, and even though OPA has significant concerns regarding this incident, OPA has insufficient evidence to meet its burden of proof. 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

If the Complainant had reported for work intoxicated and remained at work in that condition, it would have been unprofessional conduct in violation of policy. However, as discussed above, the evidence is inconclusive as to this question. As such, and consistent with the result reached for Allegation #1, OPA recommends that this allegation be Not Sustained – Inconclusive.

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



Named Employee #1 - Allegation #3

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

Had NE#1 reported to work while intoxicated, had he remained at work in that condition, and had he rode on his bicycle throughout the day, this conduct would have violated a number of City policies and criminal laws. However, for the reasons articulated in the context of Allegation #1, OPA cannot conclusively establish whether this conduct occurred. Accordingly, OPA recommends that this allegation be Not Sustained – Inconclusive.

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