



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 4, 2020

FROM: DIRECTOR ANDREW MYERBERG
 OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0824

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	Sustained
# 2	5.001 Standards and Duties 10. Employees Shall Strive to be Professional	Sustained
Imposed Discipline		
Suspension Without Pay: 7 days		

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 Named Employee was alleged to have violated Department policies when he was arrested for DUI.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 – Allegation #1

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

Named Employee #1 (NE#1) was pulled over by a trooper employed by the Washington State Patrol (WSP) in the early morning hours of October 29, 2019. The WSP trooper documented his suspicions that NE#1 was intoxicated at the time of the stop. This included the smell of alcohol emanating from the vehicle, NE#1 having watery and bloodshot eyes, and NE#1 appearing nervous and his hands shaking. The WSP trooper further noted that NE#1’s face was flushed, that he dropped cards while sorting through his wallet, and that NE#1 had to be reminded to provide his registration. NE#1 told the WSP trooper that he was on his way to work and that he had come from his home. The WSP trooper asked how much alcohol he consumed the previous evening and NE#1 said that he had one beer before dinner and two more beers prior to going to sleep. The WSP trooper asked NE#1 to come to the front of his patrol vehicle.

At that time, the WSP trooper could detect a strong smell of alcohol on NE#1’s breath. NE#1 voluntarily consented to perform standardized field sobriety tests (SFSTs). Prior to doing so, NE#1 noted that he had a medical condition that, as the WSP trooper later described, was a vestibular dysfunction and could impact NE#1’s balance. The WSP trooper performed the HGN test. NE#1 scored a 6 out of 6, indicating to the WSP trooper that NE#1 was intoxicated. The WSP trooper did not perform the rest of the SFSTs because of NE#1’s claimed medical condition. NE#1



consented to take a preliminary breath test (PBT). The test came back at 0.097, above the legal limit. NE#1 was subsequently placed under arrest for DUI. NE#1 was taken into custody at approximately 5:28 a.m. and was transported to a WSP facility. Approximately 30 minutes later, NE#1 provided two breath samples in the BAC machine. They came back as 0.080/0.079 and 0.078/0.077. The legal limit in Washington State is 0.08. NE#1 was criminally cited for DUI and was then released from custody. NE#1's car was impounded, and his two handguns that were with him at the time of the stop were entered into evidence.

The King County Prosecuting Attorney's Office (KCPAO) ultimately declined to prosecute NE#1. In making this decision, the KCPAO noted that NE#1's blood-alcohol level was under the legal limit, even if barely, at the time he gave breath samples in the BAC machine and that, given this, the case would be difficult to prosecute beyond a reasonable doubt. As the KCPAO explained: "This does not mean the defendant was safe to drive. But unfortunately, it does mean we are unlikely to prevail at trial given the totality of the circumstances."

After the prosecution was declined, the case was referred to OPA and this administrative investigation commenced. OPA reviewed the reports generated by the WSP trooper and reviewed In-Car Video that captured the stop. OPA further interviewed NE#1. He confirmed that he consumed alcohol the night prior. NE#1 recalled that he left his house in the early morning and began his commute to work. When NE#1 was pulled over, the WSP trooper indicated that the smell of alcohol had been detected and asked NE#1 whether he had consumed alcohol, NE#1 told the WSP trooper that he drank the night before. NE#1 agreed to perform SFSTs. He also agreed to take the PBT. NE#1 acknowledged that the result was that he blew a 0.097 and he was placed under arrest. NE#1 told OPA that, the night prior, he had a rum and coke at dinner around 5:00 p.m. He then had two more rum and cokes that evening prior to going to bed at approximately 9:00 p.m. He said that he slept until around 4:40 a.m. – over seven hours. NE#1 told OPA that he was not a heavy drinker. He said that he had no explanation why his alcohol level was as high as it was that morning. There were no witnesses to his drinking or to the amount of time he slept that evening. NE#1 denied that he was impaired when he was pulled over.

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. This includes compliance with the laws prohibiting driving while impaired. 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.)

As a threshold matter, OPA notes that it is not bound by the KCPAO's decision to decline to prosecute this matter. OPA's investigations and findings are not governed by the beyond a reasonable doubt standard applied in the criminal context. The evidentiary standard OPA applies is substantially less stringent.

Based on the undisputed evidence in this case, OPA finds that NE#1 was impaired at the time he was pulled over. Indeed, as reflected in the WSP's trooper's report, NE#1 had many of the indications of being intoxicated – including, watery and red eyes, physical shakiness, inability to recall commands, and the strong order of intoxicants. Moreover, he was documented as failing the only SFST he took and as possessing a 0.097 blood-alcohol level at the time of the stop. While a PBT test may not be admissible in a criminal trial, it is appropriate and relevant evidence for OPA to consider and, in OPA's estimation, it confirms that NE#1 was in violation of law. In addition, when he used the BAC machine half an hour later NE#1's blood-alcohol level only just dropped below the legal limit, with his first test being 0.080/0.079. This provides a further basis supporting OPA's finding that NE#1 was impaired 30 minutes prior when he was stopped and while he was driving. Lastly, OPA finds it significant that NE#1 had no



explanation for why his blood-alcohol content would be as high as it was. It is illogical that NE#1 had three drinks between eight to 12 hours before getting in his car, slept for more than seven hours, and was still legally impaired.

Again, OPA is not required to prove that NE#1 engaged in this behavior beyond a reasonable doubt – the evidence available here is more than sufficient to show that he violated policy. Specifically, OPA finds that he violated both 5.001-POL-2 – by driving while impaired – and SPD Policy 5.001-POL-10 – by engaging in actions that diminished the public’s trust and confidence both in him and in the Department as a whole. As such, OPA recommends that both Allegation #1 and Allegation #2 be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 – Allegation #2

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

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

Recommended Finding: **Sustained**