



## ***CLOSED CASE SUMMARY***

ISSUED DATE: APRIL 26, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0218

### **Allegations of Misconduct & Director's Findings**

#### **Named Employee #1**

Allegation(s):		Director's Findings
# 1	15.170 POL – 2 Preparing and Administering Photomontages and Show-ups (Effective 02-01-16)	Sustained

#### **Imposed Discipline**

Retired Prior to Proposed DAR
-------------------------------

#### **Named Employee #2**

Allegation(s):		Director's Findings
# 1	5.002 – Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations (Effective 02-01-16)	Not Sustained (Unfounded)

***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 treated him unprofessionally, retaliated against him, and failed to provide his identifying information when requested.

### **SUMMARY OF INVESTIGATION:**

The Named Employees were assigned to an auto theft investigation. They were informed that a witness to the theft – the Subject – was needed to participate in a photo montage to identify the possible suspect. Named Employee #1 (NE#1) performed the photo montage, while Named Employee #2 (NE#2) was in the room. NE#1 documented his performance of the photo montage as follows: "I showed [the Subject] six photographs and reminded her that the suspect may or may not be in the group." In the criminal court file, notes indicated that the Subject initially narrowed the potential suspects to two, ultimately picking out a male – who is the Complainant in this case. Ultimately, the King County Prosecuting Attorney's Office (KCPAO) dismissed the case citing the failure to timely disclosure the issues surrounding the montage procedure in discovery. The KCPAO noted that the Subject raised concerns with the montage. She stated that she initially picked out someone who was not the Complainant but was then told to repick and selected the Complainant.

The Complainant later filed this complaint with OPA, and this investigation ensued. As part of its investigation, OPA interviewed the Subject, NE#2, and two KCPAO prosecutors. OPA attempted to interview NE#1, but he had retired from the Department and did not respond to OPA's requests to speak with him.



The Subject said that she was presented with a grouping of photographs by NE#1. She confirmed that she initially picked someone who was not the Complainant and that NE#1 responded by telling her to take her time. She construed this as meaning that she had selected the wrong person. She then picked the Complainant. She felt that the montage was improper. She did not believe that NE#2 was involved in the montage and recalled him walking around the room at the time.

NE#2 said that he drove NE#1 to the Subject's location but that he was not involved in the montage. He said that he was walking around the room and did not see or hear anything to indicate that the montage was improper; however, he could not definitively say that there were no problems. NE#2 also told OPA that he did not speak to NE#1 after the fact about the montage.

The first prosecutor confirmed that she dismissed the case because of concerns regarding the montage that were contained in the case file but not relayed to the defense. She did not have independent knowledge concerning how the montage was conducted.

The second prosecutor recalled that, while working on the case, he spoke to NE#1 about the montage. NE#1 told him that, after the Subject identified the Complainant, he told her that she had picked the police's suspect. The prosecutor told him that this was problematic, but NE#1 said that this was his standard practice, and the prosecutor did not push the issue. The prosecutor told OPA that, based on the irregularities flagged by the Subject, he did not intend to utilize the montage evidence in the criminal case and recognized that, regardless, he should have disclosed it to the defense.

#### **ANALYSIS AND CONCLUSIONS:**

##### **Named Employee #1 – Allegation #1**

##### ***15.170 POL – 2 Preparing and Administering Photomontages and Show-ups***

As discussed above, the Subject stated that, during the photo montage, she picked someone who was not the Complainant and that NE#1 suggested to her that she should repick. If this is true, it would violate SPD Policy 15.170-POL-2 as this montage would have been unduly suggestive.

Here, the sole evidence available on how the montage was conducted is the Subject's account. She was a witness to criminal activity and was not involved in the theft in any respect as far as OPA could discern. Given this, there is no indication that she has any bias or any reason to fabricate what occurred during the montage. On the other hand, NE#1 declined to participate in this investigation and offered no accounting of what he did and why he did it. In the absence of this evidence and when applying a preponderance of the evidence standard, OPA credits the Subject's account and finds that the montage here was conducted in violation of policy. Buttressing this finding is the decision of the first prosecutor to dismiss the criminal case, as well as the statement provided by the second prosecutor that there were other problems with how NE#1 conducted montages. This provides a further basis for concluding that this montage was flawed and contrary to policy.

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

Recommended Finding: **Sustained**



**Named Employee #2 – Allegation #1**

***5.002 – Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations (Effective 02-01-16)***

SPD Policy 5.002-POL-6 (which has since been renumbered) requires officers to report potential misconduct to a supervisor and/or to OPA.

NE#2 denied that he was aware of any misconduct engaged in by NE#1. He said that he was only tangentially involved in the incident and did not observe how the montage was performed. This was largely corroborated by the Subject who confirmed that NE#2 was walking around the room and did not conduct the montage with NE#1.

Given this, OPA concludes that the evidence indicates that NE#2 did not fail to report misconduct that he was aware of. Indeed, OPA finds no basis to conclude that NE#2 had any knowledge that the montage was improper. Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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