



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 19, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0233

Allegations of Misconduct & Director's Findings

Named Employee #1

| Allegation(s): | | Director's Findings |
|-----------------------|--|-----------------------------------|
| # 1 | 8.300 - Use of Force Tools 5. An Officer May Draw their Firearm in the Line of Duty When the Officer Reasonably Believes It May Be Necessary for His or Her Own Safety or for the Safety of Others | Not Sustained (Training Referral) |
| # 2 | 5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing | Not Sustained (Unfounded) |
| # 3 | 16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity b. When Employees Record Activity | Not Sustained (Training Referral) |
| # 4 | 5.001 - Standards and Duties 10. Employees Shall Strive to be Professional | Allegation Removed |

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 acted improperly and unprofessionally when he drew his firearm during an interaction with the Complainant and asserted that the Named Employee's actions may have been biased. OPA further alleged that the Named Employee may not have recorded Department video as required by policy.

ADMINISTRATIVE NOTE:

After reviewing this incident, the OIG certified it as timely and objective, but not as thorough. In reaching this determination, the OIG asserted that the interviews of Named Employee #1 (NE#1) and Witness Employee #1 (WO#1) were not thorough because, in the OIG's opinion, they were not questioned sufficiently on the Complainant's assertion that NE#1 "pulled a gun" on him. The OIG also took issue with OPA's questioning on the bias allegation, as well as with what the OIG perceived to be a lack of analysis at both the interviews and in the investigation case summary of a ten second security video.

In assessing the OIG's concerns, I concur that both NE#1 and WO#1 could have been questioned more fully concerning the "pulled a gun" statement; however, the Complainant, himself, does not assert that the gun was ever pointed at him and OPA finds the officers' present statements sufficient upon which to issue findings. Thus, it is questionable what relevance these additional questions would have had and certainly it suggests that the lack of



such questions should not impact thoroughness. Moreover, the video, while blurry and taken from a distance, is pretty clear that NE#1 never outstretched a handgun towards the Complainant and the Complainant never physically reacted in a manner that would suggest a handgun being pointed at him. With regard to the questioning on the bias allegation, it is unclear what other questions would have been relevant except that asked by OPA, which went to the specific elements of the claim. Indeed, the OIG provided no such guidance and simply offered its criticism. Lastly, the investigation case summary did discuss the video, while perhaps not with the detail wished for by the OIG. Again, it is unclear how much more detail and analysis could have been provided for a video that simply does not show much. For these reasons, OPA disagrees with the OIG's conclusion that this investigation was not thorough.

Lastly, the OIG noted that, in its estimation, the issues surrounding thoroughness could not be addressed with more investigation because "not only can the above identified deficiencies not be sufficiently remedied, but given the delays in OPA's investigative process, there is not enough time left in the investigation to address them." OPA struggles to understand why this is the case and the OIG failed to provide any meaningful explanation. OPA had more than sufficient time to ask clarification questions of the officers and to further amplify the investigation case summary. This case was provided to the OIG on January 28, 2021 and had a March 19, 2021 180-day deadline. When the case was returned to OPA with a partial certification on February 5, 2021, there were more than 45-days left prior to the 180-day expiration, more than enough time to take these additional investigative steps. However, in a departure from the approach of the prior OPA Auditors and even other auditors at the OIG but unfortunately more common over the past several months, the OIG simply did not certify and provided OPA no opportunity to remedy and certainly no opportunity to discuss whether thoroughness could be remedied prior to not certifying. This is too bad and it neither advances the relationship that was contemplated between the entities in the Accountability Ordinance nor helps OPA and its investigators to get better and improve the final investigation, which should be the purpose of the OIG's reviews.

SUMMARY OF INVESTIGATION:

The Complainant reported to OPA that he was in the vicinity of the Rainier Beach Safeway when he observed an SPD patrol vehicle that was parked in the rear parking lot. He pulled his car in front of the patrol vehicle and got out. His intent was to offer the SPD officers, as well as Seattle Fire Department (SFD) personnel, two cases of Ensure. He approached the patrol vehicle, and an officer cracked the window open. He said to the officer: "Can I give you two cases of Ensure? One for the police department and one for the fire department?" The officer got out of his patrol vehicle and the Complainant noticed that the officer had his firearm drawn and at his side. The Complainant described the officer as a large African American male. The Complainant asked the officer: "Why did you pull your firearm out?" The officer held out his hand as if motioning the Complainant to stop walking towards him. The Complainant turned around, got back into his car, and drove to the front of the Safeway. He went inside to do some shopping and, when he exited, the officer was no longer there.

The Complainant was frustrated that the officer pulled his firearm and felt that this was unnecessary and improper. The Complainant, who is African American, also opined that if the officer did that to him, he probably engaged with other African Americans similarly.

OPA was able to identify the involved officer as NE#1. OPA determined that NE#1 was parked in the Safeway back parking lot and was accompanied by WO#1. As part of its investigation, OPA looked for Body Worn Video (BWV) and In-Car Video (ICV) that may have captured the incident but could not locate any.



OPA interviewed both NE#1 and WO#1. NE#1 said that he was with WO#1 in the Safeway parking lot. This was described as a high crime location in which drug dealing and shootings had occurred with some frequency. He recalled that, while he was seated in the patrol vehicle with WO#1, he observed an SUV drive into the parking lot at a relatively high rate of speed and stop in front of his patrol vehicle. The windows of the SUV were tinted, and he could not see inside. He observed a male – the Complainant – get out and walk around the back of the SUV, which was the long way around. This concerned NE#1. He explained that he could not see what the Complainant was doing and where he was once the Complainant went around the rear of the SUV. NE#1 stated that, given his developing safety concerns and because he did not want to be a sitting target in his patrol vehicle, he got out. This coincided with the Complainant coming out from behind his SUV and proceeding towards the officers. NE#1 acknowledged that he had his handgun drawn and at his side. He stated that he did not ever raise his handgun or point it at the Complainant.

NE#1 confirmed that he did not record his actions on either ICV or BWV. With regard to ICV, he stated that, at the time, they were not engaging in law enforcement activity. As such, the ICV was not activated. With regard to BWV, he stated that the incident unfolded so quickly that he did not have time to turn it on. He acknowledged that the BWV was activated by a double tap.

NE#1 told OPA that he wished he could have spoken to the Complainant and explained why he did what he did. However, the Complainant virtually immediately walked away. NE#1 said that he spent a lot of time in that neighborhood and generally had a very good relationship with the community.

Lastly, NE#1 denied that his actions violated Department policy on the drawing of firearms, or that it constituted unprofessionalism. NE#1 also denied that he engaged in bias towards the Complainant or that he treated the Complainant disparately because of the Complainant's race.

At his interview, WO#1 provided a substantially similar account to that relayed by NE#1. He recalled seeing the Complainant's SUV drive up and park, the Complainant get out, and then the Complainant walk behind the SUV and disappear from view. WO#1 felt that this was anormal as most people who wanted to contact officers sitting in a patrol vehicle tried to make contact from the front. WO#1 also felt concerned for his safety given the Complainant's actions and got out of the car with NE#1. He stated that, once they did so, he recognized the Complainant. He stated that the Complainant regularly interacted with officers, sometimes interfering in their work, and referred to himself as the "mayor" of that area.

WO#1 told OPA that, once out of the car, he heard the Complainant mention that he had Ensure for SPD and SFD. WO#1 advised the Complainant to give the Ensure to SFD and then noted that he might want to give it to a homeless shelter as they might need it more. In WO#1's perspective, he felt that this was not what the Complainant wanted to hear, and he began to turn away. The Complainant then stated to NE#1: "Oh, you pulled your gun on me, you pulled your gun on me." WO#1 asserted that NE#1 never pointed his firearm at the Complainant. The Complainant then walked away, got into his car, and drove from the parking lot.

As indicated above, there was no BWV or ICV concerning this incident. OPA obtained security footage from the Safeway that was taken from a distance. The ten second video showed the Complainant's light-colored SUV drive up to the officers and stop horizontally in front of them. The Complainant got out of the driver's seat and walked around the SUV to the rear. He then walked towards the patrol vehicle. Simultaneously, NE#1 got out of the patrol



vehicle and stood by the door. It was unclear given obstructions where WO#1 was standing. NE#1 and the Complainant appeared to speak for a few seconds prior to the Complainant turning around, walking back to his SUV, and driving away. While blurry and imperfect, the video did not show NE#1 appearing to raise his arm at the Complainant consistent with pointing his handgun and did not show the Complainant recoil or react in a manner that would suggest that a handgun had been pointed at him.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.300 - Use of Force Tools 5. An Officer May Draw their Firearm in the Line of Duty When the Officer Reasonably Believes It May Be Necessary for His or Her Own Safety or for the Safety of Others

SPD Policy 8.300-POL-3(5) states that: "An officer may draw their firearm in the line of duty when the officer reasonably believes it may be necessary for his or her own safety or for the safety of others." The policy further instructs that: "Unnecessarily or prematurely drawing their firearm may limit an officer's alternatives in controlling a situation, may create unnecessary anxiety on the part of the public, and may result in an unwarranted or unintentional discharge of the firearm." Lastly, the policy states that: "Officers shall not draw their firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with policy on the use of firearms."

Here, NE#1 acknowledged drawing his firearm and holding it by his side. He stated that he did so because he was concerned by the Complainant's actions in driving up to his patrol vehicle, which was parked behind the Safeway, getting out, and then proceeding behind the SUV. NE#1 explained that he felt like a target sitting in the patrol vehicle and got out to protect himself and to prevent himself from being ambushed. Both NE#1 and his Guild Representative cited that the location of the Safeway was a high crime area with drug dealing and gang-related violence. NE#1 stated that, while placing his gun back in his patrol vehicle, the Complainant said that the gun was pointed at him. NE#1 told OPA that when he turned around to address the Complainant, the Complainant walked back to his SUV and drove off. WO#1 echoed NE#1's concerns and also felt that the Complainant's initial approach to the patrol vehicle was concerning and warranted being on guard.

The Complainant, on the other hand, felt that this was totally unnecessary. He explained that he was simply trying to see if the officers wanted some cases of Ensure. He said that he presented no threat to the officers and, even though the handgun was not pointed at him, the drawing of the gun was, itself, improper.

OPA understands the perspectives raised by all involved parties. OPA can understand why NE#1 and WO#1 may have felt on edge and may have, if even only for moments, felt that the Complainant could present a threat. Similarly, OPA understands why this would have been so bothersome and concerning to the Complainant, as he knew that he did not present a threat and only wanted to donate items. This case would have been perfect for mediation. Unfortunately, due to complications surrounding COVID, this did not occur. Mediation would have allowed both sides to see and hear each other and likely would have been the best remedy to this complaint.

When weighing the evidence and, admittedly, from a civilian perspective, OPA tends to believe that NE#1's drawing of his firearm during this incident was an overreaction, albeit one made in good faith. In reaching this finding, OPA believes that NE#1 could have taken other steps to ensure his safety prior to drawing his firearm, including opening his door and standing behind it. This would have given him more time to assess the threat level. Likely, he would



have been able to quickly determine that the Complainant meant him no harm – and may perhaps have even recognized the Complainant – and would not have drawn his handgun.

The above being said, OPA does not conclude that NE#1 violated the actual provisions of the policy and, even if he did, that it was not an intentional and knowing violation. Accordingly, OPA issues NE#1 the below Training Referral.

- **Training Referral:** NE#1's chain of command should discuss this incident with him, including going over other approaches he could have taken to protect his safety short of drawing his firearm. The chain of command should ensure that NE#1 is aware of the impact that the drawing of a firearm, even if not pointed, can have on a community member. Lastly, NE#1 should be encouraged to reach out to and speak with the Complainant concerning this incident and to explain what occurred from his perspective and to hear how it affected the Complainant. If this is not feasible, NE#1's chain of command should do so and inform the Complainant of the steps taken to resolve this matter. This retraining, counseling, and steps taken to meet with the Complainant should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #1 - Allegation #2

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.*)

Based on a review of the evidence, there is no indication that NE#1 engaged in biased policing towards the Complainant. Even though OPA believes that the drawing of the firearm may have been an overreaction during this incident, these acts were based on NE#1's good-faith interpretation of the Complainant's conduct and perception of a potential threat, not bias. Moreover, and while not a preclusion of bias in and of itself, it is important to note that both NE#1 and the Complainant are African American. This, coupled with the other evidence, indicates that no bias was present here.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity b. When Employees Record Activity

SPD Policy 16.090-POL-1(5)(b) states that when safe and practical, employees will record ICV and BWV during “on-view infractions and criminal activity.” Here, NE#1 indisputably did not do so.

With regard to the failure to record ICV, OPA does not believe that this was contrary to policy. The officers were not engaged in law enforcement activity at the time they parked and prior to being approached by the Complainant.



Moreover, they did not activate their light bar or engage in other actions that would have automatically turned on the ICV system.

OPA has more concerns with NE#1's failure to record BWV. Notably, activating BWV is simple and is comprised of two taps to the camera. There is no reason why NE#1 could not have turned on his BWV here and he did not provide any justification that, in OPA's perspective, would have excused him from complying with this policy.

This being said, OPA notes that NE#1 quickly made the decision to exit his car and approach the Complainant and, given this, may have felt some exigency. In addition, OPA recognizes that NE#1 has never previously failed to record BWV when required.

Accordingly, OPA believes that a Training Referral is the appropriate result.

- **Training Referral:** NE#1's chain of command should remind him of the obligation to record BWV and should counsel him concerning his failure to do so here. NE#1 should be notified that future non-compliance with this policy may result in a Sustained finding and the imposition of discipline. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #1 - Allegation #4

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

The concerns raised by the professionalism allegation are already fully addressed in the context of Allegation #1 and the Training Referral issued above. As such, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**