



CLOSED CASE SUMMARY

ISSUED DATE: JULY 13, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0027

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.160. Observation of Officers. 2. People Have the Right to Record Police Officer Enforcement Activities	Not Sustained (Lawful and Proper)
# 2	5.001 - Standards and Duties 14. Retaliation is Prohibited	Not Sustained (Unfounded)
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	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:

The Complainant alleged that the Named Employee prevented the Subject from recording, retaliated against him, and acted unprofessionally.

SUMMARY OF INVESTIGATION:

OPA received an anonymous complaint concerning the conduct of Named Employee #1 (NE#1). The Complainant alleged that NE#1 engaged in unprofessional and retaliatory conduct against another individual – referred to here as the Subject. The Complainant also alleged that NE#1 prevented the Subject from recording video, which the Subject was permitted to do under policy and the law. The conduct at issue was recorded and later posted on YouTube. The Complainant provided OPA with a link to the YouTube video. OPA commenced this investigation.

As part of its review of this case, OPA read the underlying reports and watched BWV. OPA also interviewed NE#1, the Subject, and other witness officers.

OPA determined that officers, including NE#1, responded to a call of two individuals fighting with one armed with a knife. When the officers arrived, they investigated the incident and located the knife. The Subject arrived on scene and began filming in close proximity to officers. What happened next was captured in full on Body Worn Video (BWV) and, in part, by the videos recorded by the Subject and later posted on YouTube.

The video showed that the Subject was situated near the knife. NE#1 asked the Subject to move back, and the Subject refused to do so. NE#1 told the Subject: “You could give us some space though, this is a crime scene.” After further requesting that the Subject move back to give them space to conduct their investigation and the Subject’s refusal to do so, NE#1 extended his hand and pushed the Subject back. NE#1 moved the Subject back several feet



and then turned around and continued collecting and photographing evidence. The Subject objected when pushed and said that he was disabled. He kept recording from where he was moved to. From a review of the BWV, no officer ever told the Subject that he could not film what was occurring. Another officer told the Subject that he was moved away to protect the integrity of the crime scene.

The Subject continued to focus on NE#1. He yelled at and used profanity towards NE#1, including calling him and/or saying: "asshole"; "too bad you are a cop, cause you suck, you're a fucking asshole"; "happy fuck the cock's day, you mother fucker"; and "piece of shit." NE#1 did not initially respond to the Subject but ultimately did reengage with him. NE#1, who is African American, said that it did not sound that the Subject wanted a Black officer serving the community and told him to have a "good day." The Subject called NE#1 a "racist motherfucker." NE#1 got into his patrol vehicle, but then got back out and re-engaged with the Complainant, as well as other individuals associated with "Copwatch," who were also present at the time. Ultimately, NE#1 departed the scene. When he did so, he spoke to the Student Officer who was with him at the time and stated that he should not have engaged with the Subject and that he should have just walked away.

OPA contacted and spoke with the Subject. He stated that he began recording NE#1 and NE#1 did not appear to like this. NE#1 glared at him and, later, pushed him away. This almost caused him to fall. He stated that he is disabled, which made it even more inappropriate for NE#1 to have pushed him. The Subject said that he told NE#1 that he was a "tyrant" and that he should quit. The Subject stated that there was another video in which he yelled and cursed at NE#1. At one point, NE#1 called the Subject a racist; however, the Subject did not know what prompted NE#1 to make this statement. The Subject asserted that he had a constitutional right to film officers and had stare down with other officers in the past. He recorded video of those interactions.

When interviewed by OPA, NE#1 denied that he prevented the Subject from recording or that he retaliated against the Subject. He said that he moved the Subject after asking him multiple times to voluntarily do so and because of his concern that the Subject was in close proximity to the knife and was compromising the crime scene. He only physically touched the Subject because of the Subject's continued failure to step back. NE#1 explained that there was no indication that the Subject was disabled when he moved the Subject back. NE#1 asserted that his engaging with the Subject instead of just walking away fell short of his own expectations of his professionalism. He noted that he identified this in real time and told this to the Student Officer.

All of the other officers interviewed denied that NE#1 prevented the Subject from recording or retaliated against him. All agreed with NE#1 that the Subject was compromising the integrity of the crime scene by remaining as close as he was, and that NE#1 was warranted in moving the Subject back.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

5.160. Observation of Officers. 2. People Have the Right to Record Police Officer Enforcement Activities

Under SPD Policy 5.160-POL-2, community members have the right to record officers engaging in law enforcement activities. This right is also enshrined in City law. However, this right is not absolute. Officers are permitted to place reasonable restrictions on where community members are situated when recording to, for example, ensure officer safety and the integrity of a crime scene.



While both the Complainant and the Subject alleged that NE#1 violated the Subject's right to record video, this is not supported by the evidence. Most importantly, the video showed that no officer, including NE#1, ever told the Subject that he could not record but only that he needed to move back. At the time, the officers were actively collecting evidence and there was a knife on the ground. The Subject was within reach of that knife given where he was positioned. NE#1 was accordingly permitted to ask the Subject to move back. Moreover, when the Subject repeatedly declined to do so, NE#1 was allowed to physically move the Subject back.

Notably, there was no legitimate basis supporting the Subject's refusal to move. Stepping back several feet would not have impacted his ability to record what was ongoing. Instead, it appears to OPA that this interaction and, particularly, getting NE#1 to engage with him and physically move him back, was exactly what the Subject was seeking. In OPA's opinion, the interaction seemed engineered to be later posted on YouTube and to amass views. Ultimately, while the Subject had a right to record, he did not have the right to dictate where that occurred. NE#1 was permitted to move him back and did not violate policy when he did so. Lastly, this finding does not change simply because the Subject later stated that he was disabled. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #2

5.001 - Standards and Duties 14. Retaliation is Prohibited

SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-14.) SPD employees are specifically prohibited from retaliating against a person who engage in activities including, but not limited to, "oppos[ing] any practice that is reasonably believed to be unlawful or in violation of Department policy" or "who otherwise engages in lawful behavior." (*Id.*) Retaliatory acts are defined broadly under SPD's policy and include "discouragement, intimidation, coercion, or adverse action against any person. (*Id.*)

OPA interprets the Complainant and Subject to be alleging that NE#1 pushing the Subject was retaliation for the Subject recording him and other officers. Again, this is simply not supported by the evidence. The video showed that the Subject was not told that he was unable to record but was simply instructed to move back several feet. There was no indication from the video that NE#1 appeared to be upset because of the recording or that the push was based on anything other than NE#1's legitimate need to preserve officer safety and the integrity of the crime scene.

Given the above, OPA finds no basis to conclude that NE#1 retaliated against the Subject and recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

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

SPD Policy 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.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity



directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*) Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

In assessing whether NE#1 was unprofessional during this incident, OPA notes that he did not use profanity, he did not make contemptuous statements to the Subject, and he did not appear to have been disrespectful. To the contrary, the Subject was extremely verbally abusive towards NE#1, insulting him and referring to him using multiple curse words.

Notably, NE#1, himself, identified that he may have fallen short of SPD’s professionalism policy when he engaged and then re-engaged with the Subject instead of walking away. OPA agrees that the better course of action would have been to not interact with the Subject. However, OPA does not believe that NE#1’s failure to do so rose to the level of a violation of policy. OPA also commends NE#1 for recognizing at the time that what he did was a mistake and communicating that to the Student Officer. The totality of the circumstances and NE#1’s approach to this matter convinces OPA that training not discipline is the appropriate outcome. Accordingly, OPA recommends that this allegation be Not Sustained and issues the below Training Referral.

- **Training Referral:** To the extent deemed necessary by NE#1’s chain of command, NE#1 should receive retraining and counseling concerning how to not engage with insulting subjects in future situations. If the chain of command believes that NE#1 already fully understands what went wrong here and how to avoid such conduct in the future – which seems likely from his OPA interview – no further retraining or counseling is required. Any retraining or counseling that is conducted should be documented, and that documentation should be maintained in an appropriate database.

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