



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 21, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0163

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.140 – Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	15.180 – Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence	Not Sustained (Training Referral)
# 3	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)

Named Employee #2

Allegation(s):		Director's Findings
# 1	5.140 – Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	15.180 – Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence	Not Sustained (Training Referral)
# 3	16.110-POL-3 CIT – Certified Officers 2. CIT-Certified Officers Will Take the Lead, When Appropriate, In Interacting with Subjects in Behavioral Crisis	Not Sustained (Unfounded)

Named Employee #3

Allegation(s):		Director's Findings
# 1	15.080-POL-2 – Follow-Up Unit Investigation 1. Follow-Up Investigations Will Include Certain Minimum Components	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 Employees and an unknown SPD employee failed to properly investigate an assault against him. He also alleged that the Named Employees engaged in biased policing against him. OPA further alleged that Named Employee #1 may have engaged in unprofessionalism.



SUMMARY OF INVESTIGATION:

The Complainant called 911 to report that he had been assaulted by a security guard at a club. The Complainant said that the security guard pushed him to the ground and hit him in the head. The 911 operator indicated in the call notes that the Complainant may have been intoxicated.

Officers, including Named Employee #1 (NE#1) and Named Employee #2 (NE#2), were dispatched to the scene. Their investigation into this incident was recorded on Body Worn Video (BWV).

The video depicted that the officers first spoke to the Complainant and a female who was with him. They told the officers that the security guard grabbed the Complainant out of line and then hit him, which caused the Complainant to hit his head on the ground. Both the Complainant and the female said that the security guard was the primary aggressor. NE#2 asked the Complainant if he wanted/needed medical assistance, and he said yes. NE#2 called for the Seattle Fire Department (SFD) to come to the scene. NE#1 remained with the Complainant and the female while NE#2 went to speak with the security guard.

NE#1 asked the female how much the Complainant had to drink that evening. She responded that he was “pretty drunk.” She said that the security guard did not have to hit the Complainant. NE#1 stated: “Yeah, but you know people aren’t allowed to act stupid in the club though.” NE#1 told the Complainant that medics were coming. The Complainant, who had begun recording the incident on his phone, asked NE#1 for his name and NE#1 provided this information. NE#1 suggested that the Complainant sit down because he was bleeding from his head. The Complainant responded: “Please don’t talk to me. Please don’t talk to me right now.” The Complainant asked NE#1 whether he was going to evaluate the intoxication level of the security guard. NE#1 replied: “You don’t tell me what to do...I’ll do my investigation as I see fit. And you said not to talk to you, so I’m not going to talk to you.”

At the same time that NE#1 was interacting with the Complainant, NE#2 spoke to the security guard and another witness. The security guard told NE#2 that he was instructed to remove the Complainant from the club because the Complainant was “acting the fool” while in line. He told the Complainant that he had to go and the Complainant started fighting with him. He then began to physically remove the Complainant from the club. The Complainant hit him, and he defended himself, knocking the Complainant to the ground. Another person – a club patron – provided a similar account to NE#2. He described the Complainant “talking shit.” He recounted that, when the security guard tried to remove the Complainant, the Complainant started videotaping with his phone and then swung at the security guard. NE#2 asked the security guard whether he wanted to be the victim in a report, and the security guard said that he did not. The security guard asked that the Complainant be removed from the area. NE#2 later reported observing a mark on the security guard’s face that he believed was consistent with a strike from the Complainant. Neither NE#2 nor NE#1 took photographs of the mark.

NE#2 returned to where the Complainant and NE#1 were situated. At that time, the Complainant said that he did not feel “comfortable” talking to NE#2. In response, NE#2 told the Complainant that he needed to move away from the club and that medical assistance would be provided to him in that other location. NE#2 informed the Complainant that, based on what he learned during his investigation, the Complainant appeared to be the primary aggressor. He informed the Complainant that there was another witness who corroborated this. The Complainant asked NE#2 if he reviewed security video. NE#2 said that he did not. The Complainant queried how NE#2 could determine what occurred without reviewing the video, and NE#2 again pointed to the independent witness. Both the Complainant and the female said that they wanted a report documenting the incident and the security guard’s conduct. NE#2 stated



that there was nothing to report as the Complainant's allegations were unsupported by the evidence. They continued to discuss what occurred and the female contended that the security guard punched the Complainant first. NE#1 responded to the Complainant: "Listen, you don't like the outcome...I understand you don't like the outcome...You had a little bit too much to drink. How about you accept accountability for your behavior...and just follow the rules and you wouldn't have this issue. Plain and simple." NE#2 again asked the Complainant whether he wanted medical assistance. The officers discussed the investigation together while standing apart from the Complainant. They both agreed that the Complainant appeared to be the primary aggressor.

SFD personnel arrived on scene and made contact with the Complainant. The Complainant was intermittently hostile towards them. However, they ultimately spoke with him. SFD later documented that the Complainant had "minor appearing abrasions" on his head and complaints of pain on his head and shoulder. The Complainant continued to complain about the officers and their failure to properly investigate this matter.

The Complainant later initiated an OPA complaint concerning this matter. He alleged that the Named Employees failed to sufficiently investigate what occurred and blamed him without fully assessing the evidence. The Complainant also spoke with an SPD lieutenant and told her that he believed that the Named Employees' conduct was based on bias. Specifically, he alleged that the Named Employees' decision-making was biased against him because he identified as gay and Hispanic. Lastly, the Complainant alleged that an unknown SPD employee, who he believed to be a detective, later told him over the phone that the incident would not be further investigated by a follow-up unit. He felt that this was improper.

OPA subsequently commenced this investigation. OPA reviewed the documentation generated by the officers, SFD records, and information concerning the 911 call. OPA further reviewed the BWV recorded by the officers. Lastly, OPA interviewed the Complainant, the security guard, and the Named Employees.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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.*)

The Complainant asserted that the Named Employees' actions and decision-making during this incident were biased and, specifically, were due to the Complainant's status as gay and Hispanic. Both NE#1 and NE#2 denied that this was the case and stated that their actions were based on their investigation and not the Complainant's membership in any protected class.

There is insufficient evidence in the record to establish bias on the Named Employees' part. Most notably, the BWV showed no indication that the officers' evaluation of the case or treatment of the Complainant was due to bias. While OPA has some concerns with the completeness of the Named Employees' investigation and NE#1's professionalism, neither indicates bias.



Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against both NE#1 and NE#2.

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

Named Employee #1 - Allegation #2

15.180 – Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence

SPD Policy 15.180-POL-1 requires that, in primary investigations, officers conduct a thorough and complete search for evidence. The policy further requires officers to collect evidence and states that only evidence that it impractical to collect shall be retained by the owner. (SPD Policy 15.180-POL-1.) Such evidence should be photographed. (*Id.*)

The Complainant's fundamental concern with the Named Employees' conduct was their alleged failure to conduct a thorough investigation.

In assessing the Named Employees' compliance with this policy, OPA notes that they interviewed the involved parties – including the Complainant, the female, the security guard, and the independent witness. NE#2 further evaluated the mark on the security guard's face, which he believed was consistent with being struck by the Complainant. Looking at this same evidence, OPA does not disagree with the Named Employees' preliminary conclusion. However, OPA finds that their investigation was not complete for four main reasons.

First, the officers did not initially intend to write a report and told this to the Complainant. This was the case even though SPD Policy 15.180-POL-5 indicated that they should have done so. The decision to write a report was only reached when the Sergeant ordered it be done.

Second, OPA believes that the officers should have made an attempt to review the security video or, at the very least, to see if it existed and obtain a copy. While they clearly credited the account of the security guard, reasonably relying on the statement from the witness, they should have watched the video to confirm that this was appropriate.

Third, the officers did not take sufficient steps to assess the credibility of the witness to the incident. While the witness said that he was independent, he was identified by the security guard who went into the club to get him.

Fourth, the officers should have photographed the mark on the security guard's face. This was a big part of why they ultimately deemed the security guard's account to be more supported by the evidence. The failure to do so constituted a gap in the investigation.

When reviewing the investigation in the totality, OPA does not believe that it was so deficient to warrant a finding that it violated policy. OPA's determination is predominantly based on the fact that, given the information available to them, the officers made a reasonable determination under the circumstances. Instead, OPA concludes that they both would benefit from retraining and counseling to provide them guidance on how to ensure that their investigations are more complete in the future.

- **Training Referral:** The Named Employees' chain of command should discuss this incident with them and, specifically, review the gaps in their investigation. The chain of command should also go over the issues identified by OPA above. Both officers should be counseled to perform more complete investigations in the



future and should be given any retraining deemed appropriate by the chain of command. 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 #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.”

From OPA’s review of the video, it is clear that the Complainant was intoxicated and, at times, argumentative. However, from OPA’s perspective, NE#1 handled their interaction poorly and made statements that skirted the line of unprofessionalism.

First, prior to interviewing any witnesses or reviewing video or other evidence, NE#1 made a statement suggesting that the Complainant was the primary aggressor and was at fault. This included characterizing the Complainant’s behavior as “acting stupid.” This statement was made in the presence of the Complainant and appeared to set the tone for their subsequent negative interaction.

Second, he then engaged in a back and forth with the bleeding and upset Complainant that was counterproductive and did not appear to serve any legitimate law enforcement purpose. Indeed, arguing about who was in charge of the investigation to be conducted was a discussion that was unnecessary to have and only increased the Complainant’s agitation level. The same goes for NE#1’s comment concerning the Complainant not wanted to speak with him.

OPA notes that, while NE#1’s comments to the Complainant were misplaced, he did not insult the Complainant, direct profanity towards him, or use contemptuous or derogatory language. Given this, and while OPA has concerns with NE#1’s approach to this incident, OPA does not believe that his comments rose to the level of a violation of policy. OPA further notes that NE#1 has not been disciplined or retraining for similar professionalism in the past. Accordingly, OPA concludes that this is a performance matter that is best addressed by retraining and counseling and issues the below Training Referral.

- **Training Referral:** NE#1’s chain of command should review with him the video of his interaction with the Complainant. The chain of command should specifically discuss the comments identified by OPA and go over the reasons why NE#1 made those statements. The chain of command should counsel NE#1 on the fact that such comments can serve to unduly escalate a subject and, if repeated, will result in a Sustained finding and the potential 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 #2 - Allegation #1



5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

For the same reasons as stated above (see Named Employee #1 – Allegation #1), OPA recommends that this allegation be Not Sustained - Unfounded.

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

Named Employee #2 - Allegation #2

5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

OPA recommends that this allegation be Not Sustained and refers to the above Training Referral (see Named Employee #1 – Allegation #2).

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

Named Employee #2 - Allegation #3

16.110-POL-3 CIT – Certified Officers 2. CIT-Certified Officers Will Take the Lead, When Appropriate, In Interacting with Subjects in Behavioral Crisis

SPD Policy 16.110-POL-3(2) concerns the role of CIT-certified officers and states that, when appropriate, such officers will take the lead with subjects in behavioral crisis.

At his OPA interview, NE#2, who is CIT-certified, stated that, in his estimation, the Complainant was intoxicated but was not in behavioral crisis. OPA agrees with NE#1 that this was the case. As such, this policy is inapplicable to this incident and OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #3 - Allegation #1

15.080-POL-2 – Follow-Up Unit Investigation 1. Follow-Up Investigations Will Include Certain Minimum Components

SPD Policy 15.080-POL-2(1) sets up the general minimum requirements of follow-up investigations.

Here, the Complainant expressed his concern that he was told by an unknown SPD employee – a detective assigned to a follow-up unit – that the case would not be further investigated. He specifically contended that the unknown SPD employee told him that this was the case because of the nature of the allegation.

First, OPA found no evidence corroborating that a phone call occurred between the Complainant and an unknown SPD employee assigned to a follow-up unit.

Second, even if this conversation did occur and it took place exactly as described by the Complainant, it would not have violated SPD policy. It is within the purview and discretion of follow-up unit detectives to assess whether there is sufficient probable cause to determine whether a crime has been committed and, if not, to choose not to forward the case to a prosecutor. That is what occurred here.



Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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