



To: Andrew Myerberg, OPA Director
CC: Mark Grba, Deputy Director of Investigations; Grainne Perkins, Investigations Supervisor
From: Lynn Erickson, Public Safety Auditor/Investigator
Date: 6/5/2020
Re: Partial Certification for 2019OPA-0687

CERTIFICATION:

This case was initially routed to the OIG on 4/23/2019, and on 5/1/2020, OIG directed additional investigative steps needed in order to assess all three elements of the pending certification: timeliness, thoroughness and objectivity. That request for additional information provided OPA with an opportunity to identify ways in which potentially problematic aspects of the investigation could be cured. A follow up discussion with OPA was held on 5/7/2020 to clarify OIG's request. On 5/19/2020, OPA promptly routed the case back to OIG and provided additional information responsive to the OIG's requests.

OIG appreciates the willingness of OPA to address multiple issues raised by OIG. However, ultimately, after reviewing the additional information provided by OPA, OIG cannot certify the investigation as thorough or objective, but OIG does certify the investigation as timely.

Per 3.29.260 F, no further investigation is being directed at this time because OIG finds that the deficiencies of the investigation with respect to thoroughness and objectivity cannot be remedied.

Suggestions for techniques OPA can consider are made under each element below. These techniques could help to avoid the noted investigative deficiencies in the future.

Thoroughness:

When assessing thoroughness, OIG considers whether all allegations were identified and whether each allegation was sufficiently addressed, to include:

- Whether interviews were comprehensive;
- whether investigation steps were clearly documented;
- whether evidence is accurately reflected in the OPA report; and
- whether relevant evidence is preserved.

OIG's concerns related to the thoroughness of this investigation center primarily on the interview with the NE not being comprehensive, and on relevant evidence not being preserved. Despite multiple interviews documenting the specific allegations of the Complainants, the existence of witnesses, and objective evidence that corroborated those allegations, the OPA interview with the NE failed to ask specific and direct questions about many aspects of the allegations.



The OPA manual states that unless the policy violation being investigated is dishonesty, the evidentiary standard relied upon is preponderance of the evidence. The manual also articulates the expectations for questioning a NE about the specific allegations being made. They include the following (emphasis added):

- Interview questions *should address the elements present in the allegation(s) raised against the name employee* (p.31)
- Specific and sometimes direct questions must be asked *in order to address the elements present in each allegation* (p.30)

The above requirements were not followed by OPA during this investigation. In OIG's request for additional information dated 5/1/2020, OIG queried OPA on why OPA did not pursue lines of questioning with the NE that were consistent with the details of the allegations provided by the Complainants, or with the details of the allegations and policy violations as described in the 11/5/2019 classification letter OPA sent to the NE. This issue was thereafter discussed on 5/7/2020 during which OPA indicated that they did not ask the NE more specific or pressing questions related to the allegations because they did not have "hard evidence." OPA has since updated the investigation report to indicate that OPA intentionally chose the line of questioning used during the NE's interview because OPA determined there were no "hard facts to use against the NE". This phrasing appears to rely on a higher evidentiary standard than the preponderance standard stated in the OPA manual. OPA's articulated position on this matter has resulted in the NE not being interviewed in a comprehensive manner consistent with the expectations of the OPA manual.

Additionally, on October 30, 2019, during the preliminary investigation, OPA investigators were allowed by the Complainants to go to their apartment, and while there, were shown text messages wherein the NE allegedly admitted to having "wronged" the Complainant. At the same time, OPA copied 196 photos from the Complainant's laptop, which had been obtained from the NE. However, OPA did not obtain a copy (or photo) of the text messages or take a screenshot (or photo) of the file with the photos to confirm the download date and file path. OPA did not follow up to request this perishable evidence from the Complainants for almost three months. By that point, the Complainants were no longer cooperative with OPA, and the evidence was no longer available.

An example of a technique to ensure thorough investigations is outlined in the accountability ordinance, where it is required that every OPA investigation utilize an investigation plan and that plan include the witnesses to be interviewed, the perishable evidence to be prioritized, and the approach to addressing *each* allegation of possible policy violation or misconduct (emphasis added).

In this case, there was no separate or standalone investigation plan completed, instead, there is a single report that combines the intake, investigation plan and case summary into one document. The investigation plan section indicated (erroneously) that this investigation did not involve any perishable evidence, and that there was no "other evidence".

A fully developed investigation plan allows an investigator the opportunity to outline the elements and standard of proof relevant to each allegation. Additionally, investigators can summarize the areas of questioning for each witness and NE and have those reviewed in advance by a Supervisor



to ensure they adequately address the necessary elements. A fully developed investigation plan is also a critical tool to identify timely investigative steps and strategies to avoid the loss of perishable evidence.

Objectivity

When assessing objectivity, OIG considers whether:

- OPA language and analysis exhibit potential bias;
- conflicting testimony has been addressed;
- interviews use leading or suggestive questions; and
- the intake and investigative process complied with the policies set forth in the OPA Manual.

While thoroughness and objectivity are separate elements, they can be interrelated. When an investigation is not thorough, this can at times lead to evidence for both sides being considered in an imbalanced manner. Here, the lack of thoroughness for OPA to collect perishable and corroborating evidence from the Complainants and an interview approach that relied upon the use of leading questions, resulted in conflicting testimony between the Complainants and the NE not being adequately addressed.

With regard to OPA language and analysis exhibiting potential bias, in OIG's 5/1/2020 request for additional information, OPA was asked about the "Conclusion of Facts" section of OPA's Intake, Investigation Plan & Case Summary, which states "the Complainants could not provide any proof of the allegations" and "did not participate in follow up interview or requests for evidence". OIG noted that OPA's statements appeared to contradict the fact that between September 2019 and January 2020 (leading up to and immediately following the interview with the NE) the Complainants participated in numerous interviews and were willing to provide evidence when asked. It is therefore unclear how OPA arrived at these "conclusions of fact", particularly given OPA's lack of follow up to corroborate or obtain some of the evidence the Complainants made available prior to the interview with the NE (as referenced above). While OPA made a statement on 5/7/2020 that they agreed the noted statements in the report appeared subjective, the statements are still included in the updated report.

Even if the above statements are removed from the Conclusions of Fact section, similar sentiments were echoed by OPA during discussions with OIG about their attempts to resolve conflicting testimony. OPA articulated several times that the Complainants did not cooperate with the investigation, described them as "hostile" and claimed they did not provide any evidence to support their allegations. OPA was therefore asked to articulate how they had arrived at an assessment that the Complainants were not credible prior to the interview with the NE, and to provide an explanation as to what factors OPA relied on to assess their credibility. OPA has not responded to that request or provided any objective information that lends reasonable doubt to the reliability of the allegations made against the NE.

The OPA manual indicates that statements made by involved parties must be carefully weighed and evaluated as to relevance and credibility, and care should be taken to mitigate the effects of bias, to



include given greater or lesser weight of credence to an individual's testimony because of that person's position (including employment by SPD). *Only objective criteria relating directly to the truthfulness or credibility of the person should be used in deciding what weight is to be given to his or her testimony* (emphasis added).

The OPA manual further outlines that investigators must take extra care to show the public that despite being peers of those against whom complaints are filed, all aspects of OPA's work is conducted fairly and scrupulously. In this case, early on in the investigative process, the Complainants expressed skepticism that their allegations involving the NE would be fully or fairly investigated by OPA/SPD, as they had reported prior concerns about the NE to SPD chain of command and no action had been taken. That skepticism appears to have grown after OPA waited two months to interview the NE and three months to collect perishable evidence. After the NE's interview, the NE told one of the Complainants that he had lied to OPA and "denied everything". The Complainants brought this additional allegation forward to OPA but appear to have discontinued their cooperation with the investigation after that point.

Regarding whether interviews use leading or suggestive questions, additional elements related to objectivity in the OPA manual include (emphasis added):

- Focus on obtaining *as much information and evidence as possible* (p. 30)
- *Ask open-ended and probing follow up questions* (p.30)
- Use questions like Who? What? When? Where? How? Why? (p. 31)
- *Leading questions should be avoided, and typically can be answered with a "yes" or "no", or the answer is implied in the question – the Investigator is, in effect, providing a rationale or explanation to the witness while asking the question* (p.31)
- Interviews should move from broad to more specific questions (p.31)
- Where there is discrepancy between the interviewee's testimony and other testimony or evidence, *question the interviewee about the discrepancy* (p. 33)

The transcript of the NE's interview lends an appearance of a lack of objectivity because not only was the NE not questioned thoroughly regarding the elements of the allegations but was asked leading and suggestive questions. Leading questions are problematic because they invite yes/no answers, and therefore provide a convenient mechanism by which to deny allegations. That concern was born out here after the Complainants came forward with an additional allegation that the NE had lied to OPA during his interview. Asking only yes/no questions or suggestive questions also makes it very difficult to assess credibility, because details and nuances of conflicting statements cannot be compared to evaluate material differences.

Regarding whether the intake and investigative process complied with the policies set forth in the OPA Manual has already been discussed above.

In addition to following OPA's guidelines, an example of a technique that can be employed when there is conflicting evidence during an investigation is to conduct witness credibility assessments. This entails relying on standard principles to assess the statements and corroborating evidence related to the reliability of Complainants, witnesses and NEs. After material evidence is identified



(relevant to each allegation), any disputed evidence can then be evaluated according to accepted factors. However, in order to employ this technique appropriately, it is essential to first conduct thorough and objective interviews, and to collect all relevant evidence.

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