



CLOSED CASE SUMMARY

ISSUED DATE: FEBRUARY 23, 2018

CASE NUMBER: 2017OPA-0880

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	5.001 - Standards and Duties 13. Retaliation is prohibited	Not Sustained (Unfounded)
# 3	5.001 - Standards and Duties 5. Employees May Use Discretion	Not Sustained (Inconclusive)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times	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 Named Employee #1 was biased towards the subject and gave him a ticket in order to retaliate against him. OPA added the allegation that Named Employee #1 may have improperly exercised his discretion in this case. The Complainant further alleged that Named Employee #2 was unprofessional towards the subject and may also have retaliated against the subject.

ADMINISTRATIVE NOTE:

A current OPA sergeant was the Department supervisor who responded to the scene, spoke to the subject and his wife, and initiated an OPA complaint on the subject’s behalf. Several months after this incident, the sergeant was assigned to OPA. While the sergeant was not a named or witness employee in this case, OPA did not discuss the substance of this investigation or findings recommended herein with him or involve him in any way in this matter.

STATEMENT OF FACTS:

The Complainant is the owner of a motel located on Aurora Avenue. On the date in question, the Named Employees responded to a report of a woman who was walking into traffic and who was possibly intoxicated or in crisis. The officers located the woman in the near vicinity of the motel. The woman was determined to be in crisis. She was paranoid and in fear and had fresh cuts on her body. She told the Named Employees that officers were trying to kill her and that employees of a gas station were trying to cut her.



At this time, the subject came outside of the motel. He stood and watched the officers' interaction with the woman while smoking. At this point, the subject was separated from the Named Employees and the woman in crisis by a metal divider. Named Employee #1 (NE#1) approached the subject and informed him that he was not permitted to smoke within 25 feet of a business pursuant to State law. NE#1 and the subject engaged in a short back and forth conversation before NE#1 asked him for his identification and issued him a citation for smoking. The subject returned to the motel and NE#1 went inside to explain the violation. The subject and his wife complained about the citation. During this conversation, the subject asked NE#1 for his name and badge number and NE#1 again asked for the subject's identification. NE#1 then walked outside to assist Named Employee #2 (NE#2) with the woman in crisis.

The subject later exited the motel and stood by the metal divider near the entrance way. He then walked outside of the entrance area near where the officers were dealing with the woman who was in crisis. At that point, he had the citation in his hand and was discussing it with the officers. NE#2 informed the subject that if he did not return to the motel and allow them to perform their law enforcement duties he would place the subject under arrest for obstruction. After a period of time, the subject walked away.

A sergeant arrived on the scene, apparently in response to the subject's allegation that the Named Employees had engaged in biased policing. The sergeant spoke with the subject and his wife and, based on that conversation and at the subject's behest, filed an OPA complaint. The Complainant, who was not present during the incident, also filed an OPA complaint on the subject's behalf. This investigation ensued.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

Both the Complainant and the subject alleged that NE#1 had engaged in biased policing. The subject alleged that NE#1 was biased because he gave him a ticket for smoking but did not similarly ticket other white people that were also smoking. The Complainant contended that NE#1 acted with bias based on a language barrier between NE#1 and the subject and NE#1's lack of patience with the subject due to this fact.

NE#1 denied engaging in biased policing. He stated that, in his opinion, there was no language barrier between him and the subject. From my review of the ICV, I tend to agree. It appears to me that the subject and NE#1 were able to adequately communicate concerning the ticket and the prohibition on smoking within 25 feet of the business. Moreover, from my review of the ICV, I cannot tell whether or not other individuals, specifically white people, were smoking within 25 feet of the business and did not receive tickets. While the Complainant asserts that there were, he was not at the scene at the time. NE#1 asserted that there was only one other person smoking near the business, but NE#1 stated that he was a sufficient distance away from the business in the vicinity of an ashtray and was not in violation. This appears to be supported by NE#1's statements that were captured on the ICV. NE#1 did not describe the race of this individual.

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 policy provides guidance as to when an allegation of biased policing occurs, explaining that: "an



allegation of bias-based policing occurs whenever, from the perspective of a reasonable officer, a subject complains that he or she has received different treatment from an officer because of any discernable personal characteristic..." (*Id.*)

From my review of the record, there is insufficient evidence to establish that NE#1 engaged in bias towards the subject. It appears instead that NE#1's actions were based, whether rightly or wrongly, on the circumstances facing him on that day and what he perceived as the subject's failure to comply with his orders. NE#1's decision-making in this regard is discussed more fully below; however, it does not, in my opinion, indicate biased policing. I find no support for the contention, as the subject suggests, that NE#1 treated him differently based on a language barrier. Moreover, there is insufficient evidence to establish that NE#1 disparately treated the subject because he did not ticket other similarly situated white individuals.

For these reasons, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #2

5.001 - Standards and Duties 13. Retaliation is prohibited

The Complainant alleged on the subject's behalf that NE#1 issued the subject a ticket after the subject asked for NE#1's badge number. Accordingly, the Complainant alleged that the ticket was issued based on NE#1 retaliating against the subject. NE#1 denied retaliating against the subject and stated that he had a lawful basis to issue the ticket.

SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-13.) SPD employees are specifically prohibited from retaliating against a person who engages 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.*)

Here, it was undisputed that the subject was smoking in violation of the law. Based on my review of the ICV, NE#1 made the decision to cite the subject and asked for his identification. The subject then walked into the motel. NE#1 followed him inside and engaged in further discussion with the subject and the subject's wife. NE#1 explained the citation to both individuals. NE#1 can be heard stating his last name on the ICV, presumably in response to a request from the subject or the subject's wife. NE#1 then asked again for the subject's identification. NE#1, the subject and the subject's wife continued to discuss the citation. The subject and his wife appeared, at least from my review of the ICV, to be angry.

I note that the allegation of retaliation was made by the Complainant, who was not actually at the scene. Moreover, the allegation was that the ticket was issued based on the subject's request for NE#1's name and badge number. As discussed above, this is clearly inconsistent with the ICV. Accordingly, and based on the nature of the specific allegation made by the Complainant, I recommend that this allegation be Not Sustained – Unfounded.

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



Named Employee #1 - Allegation #3

5.001 - Standards and Duties 5. Employees May Use Discretion

During its intake, OPA alleged that NE#1 may have improperly exercised his discretion when he issued the subject a citation.

As indicated in SPD Policy 5.001-POL-5, “[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment.” This policy further states that “[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed.” (SPD Policy 5.001-POL-5.)

Based on a review of the ICV, the subject was smoking within 25 feet of the business in violation of State law. That does not mean, however, that NE#1 was required to cite him. Instead, NE#1 could have politely asked the subject to stop smoking or ignored the smoking all together. The issuance of the ticket made an already stressful situation more stressful and more volatile. Based on my review of the record, there is clearly some history between NE#1 and the subject that caused NE#1 to act the way he did and as quickly as he did. This was further reflected during NE#1’s OPA interview.

That being said, and without necessarily agreeing with his decision-making, I understand the logic behind NE#1’s concern that the woman in crisis could become violent and that having the subject in the near vicinity could have possibly made the scene more unsafe. Concurrently, I think there was a better way to handle this situation. However, that I may disagree with NE#1’s decision or believe it to have been ill-considered does not, in and of itself, mean that he violated policy. I was not at the scene and did not experience what NE#1 experienced. Moreover, it is undisputable that he had a lawful basis to issue the citation. Ultimately, based on my review of the record, I cannot make a conclusive determination as to whether NE#1 improperly exercised his discretion in this case. As such, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #2 - Allegation #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited

The subject alleged that NE#2 retaliated against him when he threatened to arrest him because the subject was going to file a “grievance over the ticket.”

From my review of the record, there is insufficient evidence to establish that NE#2 knew that the subject was going to file a grievance over the ticket, let alone that he retaliated against him on that basis. While NE#2 did threaten to arrest the subject for obstruction, this was based on the subject’s refusal to reenter the motel when he was told to do so by the officers. The officers ordered him to do so because believed that he was interjecting himself into their investigation to debate the ticket and they reported that they were concerned that this made the scene more unsafe given that the woman they were dealing with was in crisis and the officers had been cautioned that she was a possible threat to physical safety.



I do not necessarily share the concern the officers had regarding the subject standing in front of the motel. Notably, for much of the time, he was separated from the officers and the woman by a metal waist-high divider. Even when he walked to the other side of the divider, the scene appeared under control based on my review of the ICV and it is unclear how the subject was making the scene more unsafe simply by standing several feet from the officers. Moreover, even had the officers arrested the subject, I think it possible that such an arrest would not have ultimately been supported by probable cause.

That being said, I do not think that the threat of arrest was made in retaliation for the subject's displeasure or grievance concerning the ticket and, as such, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #2

5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times

The subject alleged that NE#2 was unprofessional when he threatened to place him under arrest for obstruction.

SPD Policy 5.001-POL-9 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-9.) The policy further states that: “Employees will avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*) Lastly, the policy states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they shall not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*)

As indicated above, while I do not necessarily believe that the threat of arrest was warranted or that an arrest would have been supported by probable cause, I do find that NE#2 believed that the subject's presence was making the scene more dangerous. As such, even if I disagree with the method, I find that NE#2 made the threat of arrest in good faith and not for some other improper reason. Accordingly, I do not find that NE#2's behavior in this instance was unprofessional and I recommend that this allegation be Not Sustained – Unfounded.

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