



## **CLOSED CASE SUMMARY**

ISSUED DATE:     APRIL 28, 2019

CASE NUMBER:     2018OPA-1044

### **Allegations of Misconduct & Director’s Findings**

**Named Employee #1**

<b>Allegation(s):</b>		<b>Director’s Findings</b>
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 6. Employees May Use Discretion	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 violated his rights when the Named Employee took the Complainant’s cell phone. The Complainant further alleged that the Named Employee failed to take action and arrest the Subject who the Complainant claimed assaulted him.

### **ADMINISTRATIVE NOTE:**

This case was designated as an Expedited Investigation. This means that OPA, with the OPA Auditor’s review and approval, believed that it could reach and issue recommended findings based solely on its intake investigation and without interviewing the Named Employee. As such, the Named Employee was not interviewed as part of this case.

### **ANALYSIS AND CONCLUSIONS:**

**Named Employee #1 - Allegation #1**

***5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy***

The Complainant was live-streaming a video with his cell phone on a public street. The Complainant professed to be a photo-journalist and stated that he was recording two officers for a project, one of whom was Named Employee #1 (NE#1). It is unclear what this “project” was. His video consisted of him narrating that the officers were standing in front of a 7-11 store, remarking on how he believed that they were blocking the entrance, commenting insultingly about individuals who spoke with the officers, and making other observations. While he was recording, the Complainant was approached by the Subject, who had been standing near the officers. The Subject expressed to the Complainant her dissatisfaction with being recorded. The Complainant continued to film her even though she asked that he not do so on multiple occasions. When he continued to record, the Subject removed the Complainant’s phone from his hands. The Subject was asked by the officers to return the phone to the Complainant



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and she did so. The Subject told the Complainant that if he continued to record her, she would break his phone. The Complainant told her to go ahead and break it.

The Complainant demanded that the Subject be arrested for assault. NE#1 and another officer – referred to here as Witness Officer #1 (WO#1) – approached the Complainant. The Complainant asked for their names and badge numbers and they provided that information. The Complainant told the Subject that he was going to follow her around and record her. The Subject told him that, if he did so, she would “beat” his “motherfucking ass.” The Complainant responded: “Please do, please do.” WO#1 asked the Complainant whether he wanted to file charges against the Subject and he said that he did. NE#1 rode up and told the Complainant that he did not believe that the Subject engaged in theft as she returned the phone. The Complainant responded: “She’s going to jail right now, or I am going to file a complaint on all of you, supervisor now, supervisor yes, right now. Either she’s going to jail, or I want a fucking supervisor, right now.”

WO#1 began interacting with the Complainant. He asked the Complainant whether he wanted to file a report. The Complainant requested a supervisor and asked WO#1 whether he was or was not going to arrest the Subject. WO#1 informed the Complainant that the only mandatory arrest was for a domestic violence offense. The Complainant again began arguing with the Subject. He turned back to WO#1 and accused WO#1 of protecting the Subject because she was a security guard. WO#1 asked if the Complainant wanted to file a report and the Complainant said that he did.

At that time, WO#1 requested that the Complainant provide his identification. The Complainant refused to do so and WO#1 asked how he was going to complete the report without the Complainant’s name listed as the victim. The Complainant told WO#1 to include “the general public” as the victim and WO#1 told the Complainant: “No, that’s not how this works.” The Complainant continued to refuse to provide his name and asked for a supervisor. WO#1 told the Complainant that he was not being cooperative. The Complainant said that he would provide his name once the Subject was in handcuffs. WO#1 then told NE#1 that it did not appear that they could do anything because the Complainant was not being cooperative.

NE#1 then walked up to the Complainant. He reached out and temporarily took the Complainant’s phone and handed it back. When he did so, he told the Complainant that this was what the Subject did and that those actions did not constitute assault. The Complainant then alleged that, because NE#1 did the same thing as the Subject, he also assaulted him. The Complainant walked directly up to NE#1 and began swearing at him and holding his phone in NE#1’s face. The Complainant got close to NE#1 and NE#1 told him multiple times to back away. A third officer – referred to here as Witness Officer #2 (WO#2) – rode up and placed himself between NE#1 and the Complainant. The Complainant asserted that WO#2 was touching him and WO#2 told the Complainant that he needed to move back. The Complainant continued to engage in a back-and-forth with NE#1. NE#1 told the Complainant to move back and, shortly thereafter, moved away.

A supervisor then arrived on-scene. WO#1 spoke to the supervisor about what occurred. The Complainant turned his attention to WO#2 and contended that his constitutional rights had been violated. He also stated that he could civilly sue the officers. The supervisor spoke with the Complainant. The Complainant alleged that he was assaulted by the Subject and that NE#1 violated his constitutional rights. He agreed to give his contact information to the supervisor. The Complainant told NE#1 “screw you” and said: “that’s your pension.” The supervisor told the Complainant that NE#1 got the Subject’s contact information for the report. The supervisor asked to see the video



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and the Complainant refused, stating that, if he turned off the video, he could be shot. The supervisor then went to speak with NE#1.

After speaking with NE#1, the supervisor walked back over to the Complainant. He asked the Complainant if the Complainant heard NE#1 ask the Subject to give the Complainant's phone back. The Complainant said that he did not. The supervisor asked whether this changed anything in the Complainant's mind and the Complainant stated that he still believed that NE#1 violated his constitutional rights. He asserted that he was doing a story on the officers and, by taking his phone, NE#1 acted contrary to law. The supervisor asked if the Complainant could provide him with the recording and the Complainant stated that he was not going to turn his phone off. The Complainant asserted that, had he tried to take the officers' cameras, they would have shot him. The Complainant told the supervisor that he was going to file complaints on all of the officers. The interaction then ended.

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. As discussed above, the Complainant alleged that NE#1 violated both his Fourth Amendment rights by seizing his property and his First Amendment rights by attempting to turn off the phone, thus briefly stopping the live stream. Further, the Complainant maintained that the act of taking the property also amounted to a strong-arm robbery due to the fact that NE#1 was armed with his duty weapon at the time.

OPA deals with each allegation in turn. First, there was no Fourth Amendment seizure when NE#1 momentarily took the Complainant's phone before returning it to him. In reaching this decision, I find the obvious intent of NE#1 to be dispositive. Based on my review of the video, NE#1 was not taking the phone to deprive the Complainant of its use or to seize it as evidence, instead, he was trying to demonstrate that the conduct described by the Complainant did not rise to the level of an assault. Second, the Complainant's First Amendment rights were also not violated. Here, while NE#1 temporarily held the Complainant's phone, he never stopped the recording or even attempted to do so. Indeed, the phone continued to record through the few seconds that NE#1 possessed it. Third, the conduct engaged in by NE#1 does not, by any means, constitute a strong-arm robbery. This is the case even though NE#1 was, as all on-duty officers are, armed with a service weapon at the time. For the above 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 6. Employees May Use Discretion***

The Complainant claimed that NE#1 should have arrested the Subject when the Subject allegedly physically and verbally assaulted the Complainant. As indicated in SPD Policy 5.001-POL-6, "[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-6.)

Based on a review of the video, it is evident that all of the officers at the scene did not believe that the Subject physically assaulted the Complainant. It is undisputed that she removed the Complainant's phone from his hand, which the Complainant alleged was an unwanted and offensive intentional touching. However, she did not push him, strike him, or otherwise harm him. Moreover, at no point did the Complainant appear to be in pain from the



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“assault” and he later stated that she did not injure him. In addition, the Complainant did not seem to be in fear of the Subject at any time, as he continued to record her and told her to both break his phone and physically harm him.

As correctly stated by WO#1, assault is not a mandatory crime for arrest unless it arises in a domestic situation. Here, based on what they observed, the officers did not believe that there was probable cause to take the Subject into custody. They did, however, offer the Complainant the opportunity to file a police report in which he would be listed as the victim. After initially stating that he would not provide his contact information, he did so and a report was generated.

Given the totality of the evidence, I do not find that NE#1 abused his discretion when he declined to arrest the Subject for assault. It is clear that both the Complainant and the Subject were at fault for the incident that occurred. The Complainant continued to record the Subject even though she repeatedly asked him not to do so and even though he saw that she was getting more and more upset. The Subject then took the Complainant’s phone without his permission. As such, I do not find it unreasonable that the officers declined to take the Subject into custody and, instead, chose to complete a report. For the above reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

**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.*)

Based on OPA’s review of the video, the Complainant’s demeanor and conduct created a negative situation and served to escalate this incident. However, NE#1’s response to the Complainant was, at times, unhelpful and counterproductive. For example, after the Complainant asserted that NE#1 assaulted him, NE#1 responded: “We don’t care. You’re special.” As another example, after taking the Complainant’s phone and before returning to his pocket, NE#1 stated: “Want your phone back?” NE#1 also could have removed himself from the situation significantly earlier than when he chose to do so and ignored the Complainant’s statements. By remaining in the Complainant’s near vicinity, he made it more likely that the situation would worsen.

To be clear, while I think that NE#1 could have better handled this situation, I do not believe that his conduct or any of the statements he made rose to the level of a violation of policy. In reaching this decision, I recognize that the Complainant continually insulted and used profanity towards NE#1 and the other officers at the scene. I further recognize that NE#1’s statements were borne out of frustration and exasperation, not an intent to engage in misconduct. Accordingly, I issue NE#1 the below Training Referral.



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- **Training Referral:** NE#1's chain of command should discuss this incident with him and they should watch the video of this incident together. NE#1's chain of command should counsel NE#1 on tactics and other approaches he could have used to handle this situation and raise with him the possibility of walking away from the Complainant sooner. This counseling and any associated retraining should be documented and this documentation should be maintained in an appropriate database.

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