Seattle
Office of Police
Accountability

CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 4, 2018

CASE NUMBER: 2018OPA-0219

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 17. Employees Must Avoid Conflicts of Interest	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication	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:

On March 9, 2018, the Complainant submitted a complaint to OPA concerning the conduct of Named Employee #1 (NE#1). The complaint arose out of NE#1's participation as a witness in an OPA investigation stemming out of May Day 2015. The Complainant asserted two primary claims against NE#1: first, that NE#1 violated policy "when he engaged in a conflict of interest when acting as an 'expert witness' in a case in which he was potentially at risk of potential legal liability and disciplinary action"; and, second, that NE#1 engaged in various dishonesty during his interview in that prior case.

ADMINISTRATIVE NOTE:

NE#1's Guild Representative made several objections during his OPA interview that I believe are necessary to address here. First, the Guild Representative appeared to contend that there was a violation of the 180-day period because OPA initiated an investigation of a May 2015 incident in March 2018. This represents, in OPA's opinion, a fundamental misunderstanding of the contract. The 180-day period only controls whether discipline can be imposed as the result of an OPA investigation. It does not preclude OPA from actually conducting an investigation, especially where, as here, the investigation was initiated within the three-year statute of limitations set forth in the contract.

Second, the Guild Representative asserted that OPA classified the incorrect policy section for Allegation #1. When classifying allegations, OPA uses the policy section in force at the time of the incident. In May of 2015, the correct policy section was 5.001-POL-17. In March of 2018, this section was changed to 5.001-POL-18. As such, the policy initially listed by OPA was appropriate.

Third, the Guild Representative stated that 5.001-POL-11, which concerns dishonesty, is only applicable to statements made by an officer to the public, not those made by an officer to another Department employee. From the plain language of this policy and how it has been interpreted since its existence, there is absolutely no support for this contention.

Fourth and last, I strongly disagree with the Guild Representative's assertion that this OPA investigation was based on some undefined improper motive. The Guild Representative stated that because NE#1 did not "play ball" with the Department, "he has been harassed by the hammer of OPA ever since." I literally have no idea what this means or what this is referring to. Here, a community member made a complaint and OPA investigated that complaint. End of story. No one at OPA, including myself, has any animus towards NE#1 and to believe the contrary is to accept conspiracy theories or ignorance, neither of which have any merit.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1
5.001 - Standards and Duties 17. Employees Must Avoid Conflicts of Interest

SPD Policy 5.001-POL-17 requires that Department employees avoid conflicts of interest. The Complainant alleged that, when NE#1 provided an interview to OPA as an "expert witness," he provided information that was purposed to help him to avoid possible disciplinary action and/or civil liability that could have resulted from his own use of a blast ball during May Day 2015.

In 2015OPA-0643, NE#1 received an interview notice from OPA and then subsequently received a re-issued notice. The re-issued notice listed NE#1 as a "witness – subject matter expert." As set forth in the notice, this constituted an order for NE#1 to appear for the interview and to testify as a subject matter expert – it did not provide the option for him to do so. Moreover, the interview notice was sent to NE#1 by OPA. There is no evidence that he, to the contrary, requested that he be interviewed as a subject matter expert.

I believe that it was inadvisable for NE#1 to have been interviewed by OPA as an expert witness in that prior case for several reasons. First, the prior case involved the use of blast balls by unknown officers. Given that and as NE#1 did use a blast ball on that date, it is possible that NE#1 could have been one of those unknown officers. As such, having NE#1 testify as a subject matter witness in a case that he could have been involved in was a poor decision. Second, while NE#1 was a Department trainer on the use of blast balls and perhaps the most knowledgeable Department employee in this area, he was not assigned to the Training Unit at that time. Any expert opinion should have been designated by the Department, not OPA, and should have optimally been given by someone assigned to or officially designated by the Training Unit. Third, OPA should be judicious when utilizing any Department employees as such witnesses may give the appearance of bias towards other officers, even if this bias does not exist in reality.

This being said, given that NE#1 was compelled to testify by OPA, he cannot be found to have engaged in a conflict of interest. NE#1 was put in a challenging spot – either comply with an order to be interviewed upon pain of discipline or offer testimony that could plausibly be construed as being conflicted. He was required to do the former. Thus, even assuming the Complainant's assertion that the substance of NE#1's interview represented a conflict of interest to be true, OPA bore ultimate responsibility for that failing, not NE#1.

With regard to NE#1's conduct in this prior case and concerning the question of whether he engaged in a conflict of interest, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #2
5.001 - Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication

SPD Policy 5.001-POL-11 requires Department employees to be truthful and complete in all communication.

With regard to this allegation, the Complainant made two general assertions. First, he claimed that, when NE#1 stated at his OPA interview in 2015OPA-0643 that blast balls were unlikely to cause injuries, this was inconsistent with the manufacturer's own warnings. As such, the Complainant contended that NE#1 "should have never qualified as an 'expert.'" Second, the Complainant claimed that NE#1 engaged in deception when: he stated that the use of blast balls was "not hurting anybody and [are] actually saving a lot of people from injury"; and when NE#1 failed to mention to OPA that the manufacturer had stated that blast balls are "intended to cause varying degrees of pain and injury."

In evaluating this allegation, OPA reviewed the following materials: NE#1's OPA interview from 2015OPA-0643; NE#1's use of force report from May Day 2015; the briefing provided by SPD employees to the Seattle City Council on August 15, 2016; the Patrol CART PowerPoint presentation; and the manufacturer's warning for the Combined Tactical Systems blast ball.

NE#1's Interview in 2015OPA-0643

During his interview in 2015OPA-0643, NE#1 set forth his credentials as an expert witness, which included his designation as a Master Trainer for Defense Technologies, a Senior Master Training for Taser International, and his experience as a SPD less-lethal force trainer for a number of years. NE#1 also disclosed that he owned a company that specialized in testing and evaluating less-lethal devices.

NE#1 explained that SPD training for demonstrations was one of the most advanced in the United States. He stated that SPD has fewer officers than other major metropolitan areas and, as a result, SPD places an emphasis on less-lethal devices as a means of crowd control. NE#1 recounted that SPD used to use "Sting ball grenades," which were similar to a blast ball but contained .32 caliber pellets inside. These pellets would disperse once the grenade exploded. NE#1 stated that SPD determined that blast balls would achieve the same effect as the sting balls, with the benefit of no pellets. As such, the potential risk of harm from these devices was lower. NE#1 also explained that the use of blast balls was preferred to going hands-on with protestors. He stated that going hands-on resulted in more risk of injury.

NE#1 described the mechanism of how blast balls worked. He further explained that the purpose of blast balls was to create distance and space and to control movement, as well as to "create an environment that [was] just uncomfortable to minimize the risk of injury."

He was asked the following question by the assigned OPA investigator: "You mentioned that there's been no, there were no reported complaints and/or injury from these previous incidents where you deployed blast balls. Is that correct?" NE#1 responded: "I have no awareness of it whatsoever for the last 15 years until this recent May Day." NE#1 explained that in 1999, when these types of less-lethal devices were newer, there was little to no testing as to their impacts. As a result, NE#1 stated that he created a company to conduct such testing. He told OPA that in nearly

15 years of testing he had never experienced an injury resulting from a blast ball, including in scenarios where he exploded blast balls directly at people's feet.

The OPA investigator showed NE#1 photographs of an injury to an individual's ankle. NE#1 was asked whether this wound appeared to be consistent with a blast ball and said that it did not. He explained that, as discussed above, he had conducted thousands of tests on blast balls over 15 years and had never seen an injury like that. He stated that redness could occur, but he had never seen bruising consistent with that depicted in the photograph. NE#1 clarified, however, that he could not say with absolute certainty that the injury was not caused by a blast ball. NE#1 engaged in a similar analysis with two other series of photographs that he was shown. With regard to one injury, NE#1 believed that it was more consistent with other less-lethal munitions (bean-bag). When asked if he was an expert on wound identification from less-lethal devices, NE#1 responded: "I don't know if I'd say I was an expert." He explained, however, that he had conducted years of testing and saw no evidence of injuries occurring from blast balls. NE#1 referenced the manufacturer's warning and contended that it was more of a business practice rather than an acknowledgment that the blast balls did, in fact, cause injury.

Lastly, NE#1 disclosed during his interview that he was present during May Day 2015. He further recounted that he dispersed a blast ball and described the circumstances under which he did so. This recounting was consistent with the content of his use of force report.

Other Evidence Reviewed

During the briefing by SPD to the City Council, both the SPD Chief Operating Officer and a Department Lieutenant echoed NE#1's statements concerning blast balls being less likely to cause injury than hands-on tactics, such as batons. It was explained that the use of blast balls had made baton use in demonstrations mostly non-existent. Lastly, the Lieutenant asserted that the risk of injury from blast balls was miniscule, again echoing NE#1's statements.

The Patrol CART PowerPoint was a presentation generated by NE#1. In that presentation, he discussed the theory of less-lethal devices – "A concept of planning and force application which meets operational objectives, with less potential for causing death or serious injury than conventional police tactics." In defining the desired responses for the use of blast ball, the presentation listed: "psychological v. physical engagement"; "decrease the need for physical interaction"; "distance = increased safety for all parties"; and "control movement in a desired direction." The presentation, which was made in 2014, also referenced that there was a "history of no injuries" from the use of blast balls. The presentation lastly referenced some of the tests conducted by NE#1 (using gelatin) that did not demonstrate injury.

Lastly, OPA reviewed the manufacturer's warning for the blast ball device. The warning, which applies generally to all of the company's products, states that "they are intended to cause varying degrees of pain and injury, which are temporary." The warning indicated that the products were purposed to be used "to gain compliance, disperse crowds, restore order, or temporarily incapacitate dangerous persons." Lastly, the warning instructed that: "In rare circumstances, CTS less-lethal products may cause damage to property, serious bodily injury or death." The warning does not specifically state that blast balls, themselves, can cause such injuries.

NE#1's OPA Interview

At his interview, NE#1 denied that he engaged in a conflict of interest. He stated that he was ordered to appear at that prior OPA interview. He asserted that the assigned investigator was aware that he had staffed the demonstration and deployed a blast ball. He did not think that this represented a conflict.

NE#1 addressed the manufacturer's warranty and stated that it represented the "worst case scenario." He further stated that he was not aware of a burn injury suffered by an officer from a blast ball and opined that the injury could have been caused by a flare (pursuant to that officer, the injury was caused by a blast ball).

NE#1 lastly contended that he did not engage in dishonesty in this matter and that he was truthful and accurate during his prior OPA interview.

Analysis of the Complainant's Allegations

Analyzing the Complainant's allegation in turn, I find that NE#1's statement that blast balls were "unlikely" to cause injury was not necessarily inconsistent with the manufacturer's warning. The warning stated that the products were purposed to cause temporary pain and injury. This could be anything from ringing in the ears to redness and bruising. I interpret the term "temporary" to suggest minor injuries, rather than those more serious injuries that would necessitate medical attention. NE#1, himself, acknowledged that blast balls were loud and disorienting. He further acknowledged that they could cause redness. He stated that he had no experience with blast balls causing serious bruising, but he stated that he could not conclusively say that this could not occur. Moreover, NE#1 reported conducting over 15 years of experiments on blast balls. NE#1 recounted that these experiments, which numbered in the thousands, yielded no evidence of serious injuries being caused by blast balls. While OPA did not review each and every one of these investigations and cannot verify the methodology used, there is no evidence in the record suggesting that they were somehow unreliable. While I do not opine herein whether NE#1 is an expert on blast balls and less-lethal devices, I do not believe that any of the above constitutes intentional and material dishonesty.

I further find that NE#1's statement that the use of blast balls was "not hurting anybody and [are] actually saving a lot of people from injury" was hyperbole not dishonesty. NE#1 was aware that blast balls had caused injury during May Day 2015 and mentioned that fact several times during his OPA interviews. His point, however, was that even if blast balls do cause rare injuries, there is a significantly higher risk of injuries were officers to go hands-on with demonstrators, including using impact weapons. This assertion was supported by the testimony provided by SPD to the City Council. The concept that the use of blast balls in demonstration management actually reduces the possibility of harm makes logical sense to me. That being said, I know of no evidence establishing this to be true. I note, however, that SPD policy identifies strikes with impact weapons (which would include batons) as constituting deadly force in certain circumstances and when certain body parts are struck. The use of less-lethal devices is viewed as non-lethal, Type II force. Even if anecdotal, this seems to support NE#1's point. Regardless, his opinion, even if established to be incorrect, does not establish dishonesty.

Moreover, I disagree with the Complainant's contention that NE#1 failed to raise the manufacturer's warranty to OPA during his prior OPA interview. Indeed, I find that he referenced it on pg. 17 of that interview. Moreover, throughout the interview, he repeatedly explained the testing he had done concerning injuries from blast balls (or the lack thereof), while stating that he could not conclusively discount the possibility that they caused injuries and

stating that he was not a wound identification expert. I note that, even had NE#1 failed to make any mention of the warranty, this would have not have constituted dishonesty given the totality of his interview.

Based on the above, I see no evidence that NE#1 engaged in dishonesty. This is particularly the case given the higher quantum of proof required to prove this allegation. As such, I recommend that this allegation be Not Sustained – Unfounded.

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