



## ***CLOSED CASE SUMMARY***

ISSUED DATE: JANUARY 5, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0260

### **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	15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause	Not Sustained (Training Referral)
# 3	15.410 - Domestic Violence Investigation 3. Officers Will Make a Reasonable Effort to Protect the Victim and Arrest the Suspect	Not Sustained (Training Referral)
# 4	15.410 - Domestic Violence Investigation 5. The Department is Committed to a Thorough Primary Investigation of Domestic Violence Incidents	Not Sustained (Training Referral)
# 5	15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a Report	Allegation Removed
# 6	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

#### **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	15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause	Not Sustained (Unfounded)
# 3	15.410 - Domestic Violence Investigation 5. The Department is Committed to a Thorough Primary Investigation of Domestic Violence Incidents	Not Sustained (Unfounded)

#### **Named Employee #3**

Allegation(s):		Director's Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause	Not Sustained (Unfounded)

#### **Named Employee #4**

Allegation(s):		Director's Findings
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# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause	Not Sustained (Unfounded)

**Named Employee #5**

Allegation(s):		Director's Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause	Not Sustained (Lawful and Proper)

***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 engaged in biased policing when they failed to conduct adequate investigations into domestic violence incidents.

**SUMMARY OF INVESTIGATION:**

On April 8, 2020, A 911 report was made by an individual who claimed that his friend was becoming “violent” with him. The 911 caller said “stop it,” and then hung up. A return call went to voicemail. Named Employee #3 (NE#3) and Named Employee #4 (NE#4) arrived at the scene first. It was determined that this was a possible domestic violence (DV) incident. NE#4 spoke to the 911 caller. He told NE#4 that himself and another male – referred to here as the “Subject” – lived together in a van. The 911 caller said that the Subject began to get violent, scratched his hand, stole his money, and took possession of his cellphone. The 911 caller told NE#4 that the Subject was “forcing [him] to get back in the van” and threatened to kill his cat. The 911 caller showed how the Subject had bent his arm and started to twist it around. The 911 caller said that the incident started because he woke the Subject up. The 911 caller confirmed that he and the Subject had been in a dating relationship for several weeks. NE#3 spoke with the Subject. The Subject said that he was sleeping in the van when the 911 caller all of a sudden started the van and began driving away. He said that this woke him up and that he was “grouchy” as a result. The Subject denied becoming physical with the 911 caller at any point.

Named Employee #1 (NE#1), who was designated as the primary officer on this call, arrived on scene. Named Employee #2 (NE#2) also responded to the incident as NE#1’s partner. NE#1 received an update concerning the accounts provided by both the 911 caller and the Subject. NE#1 then spoke with the Subject. The Subject provided the same explanation he gave to NE#3 and again denied that he became physical with the 911 caller.

The officers conferred about the incident. NE#2 noted that the 911 caller had visible scratches to his hand; however, NE#2 opined that the injuries were more consistent with cat scratches than with his hand being wrenched backwards. NE#2 also asserted that it appeared that the 911 caller might be high, which, in the officers’ opinion, raised a question as to the veracity of his account. At one point during this conversation, NE#1 remarked that this appeared to be a “he-said, she-said” situation.



NE#1 returned to speak with the 911 caller. He told the 911 caller that he was getting two different stories and the 911 caller said that he expected that this would be the case. The 911 caller asked if he could be transported from the scene by NE#1 and NE#1 replied that they could not do that.

NE#1 did not look for potential video of the incident, even though the 911 caller opined that it may have been recorded on a security camera. NE#1 indicated to the 911 caller that the camera was pointed in the wrong direction and likely was not actually working. NE#1 did not complete a DV supplemental report or obtain formal statements from the 911 caller and the Subject. NE#1 discussed with the 911 caller the process of obtaining a DV order of protection and asked whether either he or the Subject owned firearms, but NE#1 did not appear to provide any DV pamphlets to the involved parties. NE#1 did not look at any property that was alleged to have been broken by the Subject, he did not examine or download the pictures of injuries referred by the 911 caller, and did not deeply explore any possible damage to the 911 caller's phone. The officers ran the Subject's name through the system but did not come back with any results; however, NE#1 took no further steps to determine whether the Subject had a DV history.

The officers told the Subject that he and the 911 caller needed a cooling off period. The 911 caller planned to drive away in the van and the officers offered the Subject the opportunity to get whatever he needed out of it before that occurred. The Subject asked the 911 caller if he could ride with him to a storage unit and the 911 caller said: "absolutely." NE#1 told them to "promise" not to engage in any further disputes as, if officers returned, one of them would be going to jail. Another officer asked if the 911 caller was okay with the Subject riding in his car and the Subject replied: "I don't have a gun to his head, swear to God." The 911 caller and the Subject drove away from the scene. After they left, NE#1 remarked to another officer concerning the 911 caller's account: "He's full of shit, is what it is. That story is fucking bullshit."

On April 30, 2020, the 911 caller again reported potential DV on the part of the Subject. He and a friend who was with him at the time – the Complainant in this case, asserted that the Subject had intentionally hit their vehicle with another vehicle and then fled the scene. Named Employee #5 (NE#5) was dispatched to that call and conducted an investigation. NE#5 searched for the Subject without success. He offered the 911 caller information on how to seek an order of protection, offered the 911 caller medical attention, and documented the incident in a report. That report was later approved by a supervisor.

That same day, an Anonymous Complainant initiated a complaint with OPA concerning the officers' handling of the incidents involving the 911 caller and the Subject. OPA later determined that this individual was the Complainant. She asserted that the officers did not take the incidents seriously and failed to properly arrest the Subject, who had engaged in abuse towards the 911 caller. She opined that this was due to the 911 caller and the Subject both being gay men.

Lastly, OPA determined that, on April 21, 2020, in between the two incidents outlined above, the Subject was assaulted by individuals, apparently at the behest of the 911 caller. The assailant was arrested and claimed that the 911 caller asked him to get the 911 caller's van back from the Subject "by any means necessary." The 911 caller denied that he was requesting that the assailant engage in violence.

#### **ANALYSIS AND CONCLUSIONS:**

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



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

The Complainant and the 911 caller both contended that the Named Employees did not take appropriate law enforcement action on April 8 and April 30 because of bias. Specifically, it was asserted that the Named Employee did not properly investigate these matters because the 911 caller and the Subject are gay men then in a domestic relationship.

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.*)

Based on a review of Body Worn Video (BWV), OPA finds no basis to conclude that the Named Employees’ actions or inactions were based on bias. With regard to NE#1, OPA concludes that he did a poor job in this case. However, this does not appear to have been driven by any bias. It was just sloppy. With regard to NE#5, OPA finds that he fully and fairly investigated the April 30 incident. There was no indication of any bias on his part. Lastly, with regard to the other officers, they were not primary during this incident and did not drive what decisions were ultimately made. Regardless, the BWV indicated that all of them were respectful and did not engage in biased policing.

Again, while the 911 caller and the Complainant have a right to be upset about some of the shortcomings of NE#1’s investigation, this does not, without more, constitute bias.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against all of the Named Employees.

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

**Named Employee #1 - Allegation #2**

**15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause**

SPD Policy 15.410 generally governs the investigations into DV incidents. SPD Policy 15.410-POL-2 requires that officers make arrests in DV cases where probable cause exists. Both SPD Policy 15.410-POL-2 and SPD Policy 15.410-POL-3, which mandates that officers make a reasonable effort to protect the victim and arrest the suspect, set forth a number of tasks that must be performed during a DV investigation. Additional investigatory requirements are delineated in SPD Policy 15.410-POL-5, which sets forth the Department’s commitment to the thorough investigation of DV incidents.

Based on OPA’s review of the evidence, OPA finds that whether probable cause existed was a close question. While the 911 caller said that his hand was pulled back by the Subject, he did not have any injuries consistent with that report and the injuries he did have were more akin to cat scratches. Moreover, the Subject consistently denied using physical force towards the 911 caller. Ultimately, the lack of any third-party witnesses yielded these disputes of fact largely irreconcilable and precluded a finding of probable cause. However, in reaching this conclusion, OPA notes that there were additional steps that NE#1 could have and should have conducted. Most notably, OPA struggles to understand why he took no steps to verify whether there was security video. Even crediting NE#1’s belief that the camera was pointed in a direction that would not have captured the incident and was likely not actually recording,



he still should have checked to make sure that this was the case. While it may not have changed the outcome, it was a significant shortcoming.

With regard to the investigation that he did conduct, OPA notes that there were numerous required steps that NE#1 did not complete. As examples, he did not appear to do any of the following: complete a DV supplemental report; obtain formal statements of the 911 caller and the Subject; provide any DV pamphlets to the involved parties; look at the property that was alleged to have been broken by the Subject; examine or download the pictures of injuries referred to by the 911 caller; substantively assess any possible damage to the 911 caller's phone; conclusively verify whether the Subject had a DV history; and transport the 911 caller from the scene at his request.

The failure to do one of these would be problematic but, perhaps, understandable, but the failure to address all of these raises significant concerns for OPA. At his OPA interview, NE#1 recognized that he could have taken further investigatory steps. However, the question remains for OPA why he did not do so here and whether this constitutes misconduct warranting discipline or mistakes made by a newer officer that, while worrisome, can be corrected through retraining and prevented in the future.

While it may seem outcome determinative, OPA finds it important that probable cause did not exist here. Had there been probable cause and, thus, a mandatory arrest situation, OPA would have concluded that NE#1's investigation was so deficient so as to warrant discipline. Under the circumstances of this case, OPA instead concludes that, while NE#1's investigation violated policy, retraining rather than discipline is the appropriate result. In reaching this finding, OPA warns NE#1 that any similar conduct in the future will result in an investigation and the likelihood of substantial discipline.

- **Training Referral:** NE#1's chain of command should debrief his investigation of this incident with him and examine its shortcomings. NE#1 should be reminded of the requirements of the relevant DV-investigation policies and should be counseled that any future non-compliance will not be tolerated. 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**

***15.410 - Domestic Violence Investigation 3. Officers Will Make a Reasonable Effort to Protect the Victim and Arrest the Suspect***

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 #1 - Allegation #4**

***15.410 - Domestic Violence Investigation 5. The Department is Committed to a Thorough Primary Investigation of Domestic Violence Incidents***



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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 #1 - Allegation #5**

***15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a Report***

As with NE#1's overall investigation in this case, OPA also found that his report was lacking in content. However, as this is already fully subsumed in the analysis of Allegations #2 through #4, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**

**Named Employee #1 - Allegation #6**

***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.*)

There were three main ways in which NE#1 was alleged to have violated this policy. First, it was alleged that his reference to the incident as a "he-said, she-said" was offensive given the involved parties both identifying as gay men. Second, it was alleged that his comments after the fact concerning the veracity of the 911 caller's account were improper. Third, it was alleged that his overall handling of this DV incident undermined public trust and confidence in him and in the Department as a whole.

With regard to the first allegation, OPA believes it clear from the BWV that he was using "he-said, she-said" as common parlance and was not making a derogatory remark. With regard to the second allegation, while NE#1's language was undesirable, he was entitled to assert his opinion concerning this incident outside of the presence of the 911 caller and the Subject. Even if OPA does not like the way he did so, it did not violate policy. With regard to the third allegation, NE#1's poor investigation into this incident is already fully captured in Allegations #2 through #4 and to opine on it again here would be unduly duplicative.

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

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

**Named Employee #2 - Allegation #1**

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

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



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

**Named Employee #2 - Allegation #2**

***15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause***

Based on OPA's review of the BWV, the documentation and reports, and the OPA interviews provided by the involved officers, OPA concludes that NE#1, as the primary officer, drove the decisions during the investigation of the April 8 incident. He, not NE#2, NE#3, or NE#4, determined that the Subject would not be arrested and decided what evidence would be sought and reviewed. As such, NE#1, not these other officers, bears ultimate responsibility for the potential failure to make an arrest here and the overall problems with the investigation.

However, as indicated above, OPA concurs that, given the evidence adduced during the investigation, the probable cause standard was not met, even if a close call and based in part on NE#1's subpar work. In reaching this finding, OPA credits the testimony of NE#2, NE#3, and NE#4, all of whom believed that they did not have enough to make the arrest.

Regardless, given that they were not the ultimate decision-makers during this incident, OPA recommends that this allegation be Not Sustained – Unfounded as against NE#2, NE#3, and NE#4.

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

**Named Employee #2 - Allegation #3**

***15.410 - Domestic Violence Investigation 5. The Department is Committed to a Thorough Primary Investigation of Domestic Violence Incidents***

While NE#2 was NE#1's partner on April 8 and though the BWV indicated that they conferred throughout their response to this incident, the evidence clearly indicates that NE#1 drove the decisions and made the final calls concerning the investigatory steps completed and the lack of an arrest.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded as against NE#2.

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

**Named Employee #3 - Allegation #1**

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

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

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

**Named Employee #3 - Allegation #2**

***15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause***





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For the reasons stated above (see Named Employee #2 – Allegation #2), OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #4 - Allegation #1**

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

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

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

**Named Employee #4 - Allegation #2**

***15.410 - Domestic Violence Investigation 2. Officers Make Arrests with Probable Cause***

For the reasons stated above (see Named Employee #2 – Allegation #2), OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #5 - Allegation #1**

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

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

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

**Named Employee #5 - Allegation #2**

***15.410 - Domestic Violence Investigation 5. The Department is Committed to a Thorough Primary Investigation of Domestic Violence Incidents***

Unlike with NE#1's investigation of the April 8 incident, OPA finds that NE#5 properly investigated the April 30 call for service. Notably, upon arrival on scene, he interviewed the 911 caller and the Complainant, completed an area search for the Subject, provided them with DV pamphlets, and counseled the 911 caller on how to seek a DV protection order. This met the requirements of the policy.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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