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**Issued Date:** APRIL 23, 2024

**From:** Director Gino Betts, Jr.   
Office of Police Accountability

**Case Number:** 2023OPA-0482

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

### **Named Employee #1**

- 1. Allegation #1:** 5.140 - Bias-Free Policing, 5.140-POL-2 Officers Will Not Engage in Bias-Based Policing  
**Finding:** Not Sustained - Unfounded
  
- 2. Allegation #2:** 5.001 – Standards and Duties, 5.001-POL-2. Employees Must Adhere to Laws, City Policy, and Department Policy  
**Finding:** Not Sustained - Management Action

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**This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections may be written in the first person.**

### **Executive Summary:**

The Complainant—a street preacher—approached pro-Israel protesters to preach that non-Christians are going to hell, inciting disturbances between himself and the protesters. Named Employee #1 (NE#1)—a lieutenant—ordered the Complainant to relocate across the street. The Complainant refused to comply and was arrested for obstruction. The Complainant alleged his arrest was religiously biased and violated his right to free speech.

### **Administrative Note:**

On March 12, 2024, the Office of Inspector General certified OPA's investigation as thorough, timely, and objective.

### **Summary of Investigation:**

On October 29, 2023, the Complainant filed an OPA complaint, alleging that SPD officers harassed and arrested him for preaching at Occidental Park. The Complainant also included a link to a YouTube video capturing his arrest. That video was consistent with the events captured on NE#1's body-worn video (BWV), summarized below.

OPA investigated the complaint, reviewing BWV, NE#1's supplement report, and email correspondence. OPA requested the Complainant's participation in an interview, but he elected to email OPA instead. OPA interviewed NE#1.

NE#1 approached the Complainant and activated his BWV, capturing the following:

NE#1 introduced himself and said:

*So, understanding your...freedom of speech, and their freedom of speech, we do have reasonable time, place, manner [restrictions]. We've had three disturbances where they've come at you. To try to avoid any further disturbances, I'm asking you to go across the street. They'll still be able to hear you. They'll still be able to understand your message. We're not restricting anything you're doing or saying. We're just asking you to go to a reasonable spot, which is right across the street.*

The Complainant said he was in a public place without sound amplification. The Complainant refused to relocate, citing his First Amendment right to preach. The Complainant said he was previously unconstitutionally arrested for the same reason. NE#1 replied that the Complainant was arrested for obstruction, not free speech. The Complainant attempted to resume preaching, but NE#1 interjected, saying, "Nope. I'm asking you to stand over there, sir. NE#1 pointed to an area across the street. You can speak, but you're gonna speak over there. That is a reasonable spot to do it." The Complainant repeatedly said, "No," and continued preaching loudly. NE#1 attempted to interrupt, telling the Complainant to move across the street or be arrested for obstruction. The Complainant kept preaching loudly. NE#1 issued a final warning, which the Complainant ignored. NE #1 directed officers to arrest the Complainant for obstruction. Officers handcuffed the Complainant.

NE#1's supplement report was consistent with the events captured on BWV. NE#1 wrote that the Complainant's proximity, volume, and message angered the protesters, causing disturbances that appeared physical. NE#1 wrote that he and a sergeant attempted to de-escalate the Complainant and the event attendees. NE#1 wrote that a time, place, and manner restriction was warranted based on the number of disturbances and the increasing likelihood of assault. NE#1 concluded, "Due to the fact that [the Complainant] came to where the rally was and not the other way around, and the size of the rally versus [the Complainant] being one person, I determined the most reasonable thing was to move [the Complainant] across the street from the rally. [The Complainant] would still be able to preach and was still close enough that the rally could hear him." NE#1 also noted three other peaceful preacher groups in the area.

On November 7, 2023, the Complainant emailed OPA, writing that the time, place, and manner restriction was "incorrectly implemented" and discriminated against his religious beliefs. He wrote that officers should protect the speaker if people were angry over his speech, not silence him. On November 9, 2023, the Complainant emailed OPA, writing that officers should have left him alone because he violated no law. He questioned why a time, place, and manner restriction was imposed when he violated no law.

On February 14, 2024, OPA interviewed NE#1, whose statements were consistent with the abovementioned evidence. NE#1 said that during protests, police minimized intervention unless

public safety concerns arose. NE#1 said the police could restrict unreasonably exercised First Amendment conduct, like protesters blocking a major street during rush hour. NE#1 said that in situations like that, police could order protesters to relocate.

NE#1 said he knew the Complainant from prior events. NE#1 said the Complainant purposefully injected himself into crowds, inciting confrontations. NE#1 noted “mild disturbances” and angry protesters after the Complainant entered this pro-Israel rally, though no assaults were reported. NE#1 said the protesters directly engaged the Complainant because he was close to them. NE#1 noted that the protesters were there first. NE#1 said the Complainant injected himself into the crowd to interrupt them, increasing the chances of violence. NE#1 said he ordered the Complainant to relocate for his safety and the protesters’ safety, not because of his message. NE#1 said his goal was to prevent a physical altercation and avoid police force.

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## **Analysis and Conclusions:**

### **Named Employee #1 – Allegation #1**

#### ***5.140 – Bias-Free Policing, 5.140-POL-2. Officers Will Not Engage in Bias-Based Policing***

The Complainant alleged that NE#1 discriminated against his religious beliefs, constituting bias-based policing.

Biased policing means “the different treatment of any person by officers motivated by any characteristic of protected classes under state, federal, and local laws as well as other discernible personal characteristics of an individual.” SPD Policy 5.140-POL. It includes different treatments based on religion. See *id.* Employees are forbidden from making decisions or taking actions influenced by bias, prejudice, or discriminatory intent. See SPD Policy 5.140-POL-2.

Here, the evidence suggests that NE#1’s decision was motivated by public safety concerns after he observed three disturbances between the Complainant and the protesters. NE#1 told the Complainant to relocate to prevent further disturbances. NE#1 also told the Complainant he could preach across the street where protesters would still hear him. NE#1 said, “We’re not restricting anything you’re doing or saying. We’re just asking you to go to a reasonable spot, which is right across the street.” NE#1 told OPA that he ordered the Complainant to relocate for his safety and the protesters’ safety. NE#1 also told OPA that his order had nothing to do with the Complainant’s message. OPA found no evidence that NE#1 was motivated by the Complainant’s religious beliefs.

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

Recommended Finding: **Not Sustained - Unfounded**

### **Named Employee #1 – Allegation #2**

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

The Complainant alleged that NE#1 violated his right to free speech.

Employees must adhere to laws, City policy, and Department policy. SPD Policy 5.001-POL-2. When a demonstration or assembly leaves the realm of legal protest and becomes an abridgment on the life-safety and property rights of others, SPD's response will always be based upon the conduct of those assembled, not the content of their speech or affiliation. SPD Policy 14.090-POL-1. The Department is committed to providing officers and supervisors with crowd management and intervention strategies that permit peaceable expression of federal and state rights while simultaneously removing individuals whose illegal behavior jeopardizes the safety of lawful activity. *Id.*

SPD training provides: "When the exercise of free speech involved conduct unrelated to the content of the message, governments undoubtedly may act to restrain the conduct that interferes with public safety or order." SPD training permits police action if the action has "nothing to do with the content of the speech" and demonstrators' and spectators' safety "may be at risk." Time, place, and manner restrictions must (1) be content-neutral, (2) be narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels for communicating the speaker's message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

NE#1 sought to impose a "time, place, and manner" restriction on the Complainant's speech when he ordered the Complainant to relocate across the street. The evidence indicates NE#1 attempted to comply with SPD policy and training. NE#1 sought and obtained his supervisor's approval and appeared intent to prevent further physical altercations. Furthermore, NE#1 did not move other preachers delivering similar messages because they were not involved with disturbances warranting police intervention. NE#1's order was intended to create distance between the Complainant and the protesters to decrease the possibility of a physical altercation. NE#1's order provided one alternative channel for communicating the Complainant's message. The Complainant was ordered to relocate across the street—less than 100 feet away—where protesters could still see and hear him.

Additionally, NE#1's order was consistent with SPD training, permitting content-neutral police action "to restrain the conduct that interferes with public safety or order." NE#1's order was motivated by public safety concerns after NE#1 observed three disturbances between the Complainant and the protesters. NE#1 noted that the Complainant came to the rally and injected himself into the crowd to interrupt them, increasing the chances of a physical confrontation. Thus, NE#1 ordered the Complainant to relocate to prevent a physical altercation and to prevent its officers from applying force to neutralize an in-progress physical altercation. NE#1 said he ordered the Complainant to relocate for everyone's safety, denying it had anything to do with his message. The circumstances suggest NE#1's order was consistent with SPD training.

However, a recent Ninth Circuit ruling found that a nearly identical police order constituted a content-based "heckler's veto." See *Meinecke v. City of Seattle*, 23-35481, 2024 WL 1666696 (9th Cir. Apr. 18, 2024). A heckler's veto is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent audience reaction. See *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966); see also *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992). In *Meinecke v. City of Seattle*, 23-35481, 2024 WL 1666696 (9th Cir. Apr. 18, 2024), the Ninth Circuit held that SPD burdened a street preacher's First Amendment right by ordering him to relocate based on his message provoking the

protesters. The Ninth Circuit noted no threats came from the street preacher, and no protester was arrested for physical altercations or threats of assault. The Ninth Circuit also noted that the street preacher—like those participating in the protest—had the right to use public sidewalks and streets to espouse his views peacefully. The Ninth Circuit held that SPD's order—and the street preacher's subsequent arrest for failing to comply—constituted an impermissible heckler's veto because it was a "content-based burden on [the street preacher's] expressive activity because [SPD] did so only in response to the actual and potential reaction of the audience."

*Meinecke* provides that a restriction on speech is justified only if the government demonstrates that it is narrowly tailored to serve a compelling state interest. If a less restrictive alternative would serve the government's purpose, the government must use that alternative. In that case, the Ninth Circuit described several less restrictive alternatives to achieve public safety: (1) SPD could have required the protesters to step back from the street preacher; (2) SPD could have called for more officers, which they did following the street preacher's arrest; (3) SPD could have erected a free speech barricade; (4) SPD could have warned the protesters that any physical altercation would result in the perpetrators' arrests; and (5) SPD could have arrested the individuals who ultimately assaulted the street preacher.

While NE#1 acted consistently with SPD policy and training, his actions were inconsistent with recent Ninth Circuit case law. Accordingly, SPD policy and training should incorporate the Ninth Circuit's less restrictive alternatives to achieve public safety when they respond to physical disturbances resulting from First Amendment activity. Finally, SPD policy and training should emphasize that time, place, and manner restrictions must apply to all speech regardless of content and generally involve the enforcement of generally applicable statutes enacted ahead of time—like noise ordinances, park operating hours, street closures, buffer zones, and protest zones—and not reactionary or discretionary restrictions.

Accordingly, OPA recommends this allegation be Not Sustained – Management Action.

Recommended Finding: **Not Sustained - Management Action**