



CLOSED CASE SUMMARY

ISSUED DATE: OCTOBER 10, 2019

CASE NUMBER: 2017OPA-0059

Allegations of Misconduct and the Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	Force – Reporting – 5.002 – Responsibilities of Employees Concerning Complaints of Possible Misconduct 6. Employees Must Otherwise Report Misconduct	Not Sustained (Training Referral)
# 2	Force – Investigation – 8.300-POL-3 Type II Investigations 6. Where, After Investigation, a Use-of-Force is Found to be Out of Policy, or the Investigation of the Incident is Lacking, the Chief or Designee will	Allegation Removed

Named Employee #2

Allegation(s):		Director’s Findings
# 1	Force – Reporting – 5.002 – Responsibilities of Employees Concerning Complaints of Possible Misconduct 6. Employees Must Otherwise Report Misconduct	Not Sustained (Training Referral)
# 2	Force – Investigation – 8.300-POL-3 Type II Investigations 6. Where, After Investigation, a Use-of-Force is Found to be Out of Policy, or the Investigation of the Incident is Lacking, the Chief or Designee will	Allegation Removed

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:

It was alleged that the Named Employees did not ensure that an unknown officer’s failure to report force was referred to OPA.

SUMMARY OF INVESTIGATION:

This case arose from May Day 2015. It was alleged that an unknown officer used force on a demonstrator and failed to report that force. OPA initiated this investigation to determine whether this, in fact, occurred and, if so, whether the failure to report constituted a violation of policy.

A Sergeant performed the overall investigation for all uses of force during May Day 2015. In that review, the investigating Sergeant noted that an unknown bicycle officer had used force when the officer pulled a demonstrator behind a bicycle line and onto the ground and placed him into custody. The investigating Sergeant noted that, while she tried to identify the unknown officers by requesting assistance from personnel from multiple bicycle units, she was unable to do so. In her review, she concluded: “At this time, I suggest the matter be referred to OPA for further investigation on the unidentified bicycle officer.”



The investigating Sergeant had a later conversation with a then-Acting Lieutenant – Named Employee #1 (NE#1) – who told her that another then-Lieutenant – Named Employee #2 (NE#2) – determined that no referral should be made and that the force should just be documented and reviewed by the chain of command. Based on this discussion and the guidance provided by the Named Employees, the investigating Sergeant did not make an OPA referral.

A community member later made an OPA complaint concerning the use of force. During its intake investigation, OPA determined that, while the lack of force reporting was identified by the investigating Sergeant, no OPA referral was ever made. As such, OPA initiated an investigation into the lack of reporting against the Named Employees, given that they were the individuals who decided not to make an OPA referral.

NE#1 told OPA that she was the designated “use of force Lieutenant” for the incident. This meant that she was required to perform the secondary review of all uses of force after the investigating Sergeant. NE#1 acknowledged that the decision was made to not refer the failure to report force to OPA. She stated that this decision was screened with and approved by NE#2, who she stated was the incident commander. NE#1 did not know whether NE#2 screened his decision with the Captain who was the “overall manager” of the incident.

NE#2 informed OPA that he was the bicycle commander for May Day 2015, but that he was not the incident commander. He stated that a Captain was the incident commander and an Assistant Chief was the city-wide commander. He recalled discussing the use of force by an unknown bicycle officer with NE#1. He did not recall specifically discussing whether an OPA referral should be made. However, he acknowledged that he told NE#1 that the force should be sent forward for review by the chain of command and the Force Review Board (FRB) and that those entities would have the opportunity to evaluate the force, determine whether any misconduct occurred, and, at that time, could make any appropriate OPA referrals. NE#2 rationalized that it was necessary not to make an immediate OPA referral for three main reasons: (1) this was a very large investigation that involved uses of force of varying levels by numerous officers and making a referral could have delayed the force investigation, of which timely completion was in the public interest; (2) the force could have been used by an officer from another jurisdiction and the failure of a non-SPD officer to report would not have required an OPA referral; (3) it was possible that the officer only used de minimis force and heard no complaint of pain, which would have not triggered a reporting requirement for that officer. NE#2 believed that it was more appropriate to let the chain of command and the FRB fully explore these issues.

This incident was later evaluated by the FRB. Notably, the FRB disagreed with the determinations made by the Named Employees and confirmed that the investigating Sergeant should have made an OPA referral at the time the failure to report force was identified, rather than waiting for the chain of command and the FRB to review the case.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

Force – Reporting – 5.002 – Responsibilities of Employees Concerning Complaints of Possible Misconduct 6. Employees Must Otherwise Report Misconduct

SPD Policy 5.002-POL-6 requires that SPD employees report potential misconduct to OPA. Such reporting must be completed in a timely fashion.

There were a few inconsistencies between the accounts provided by NE#1 and NE#2. Most notably, NE#2 was not the incident commander for May Day 2015 as NE#1 posited and was, instead, the bicycle commander. Second, while NE#1 stated that she discussed whether or not to make an OPA referral with NE#2, he did not recall that specific conversation. However, these inconsistencies do not prevent OPA from reaching conclusive findings in this case. Ultimately, based on a review of the Named Employees' OPA interviews and the documentation concerning this matter, it is clear that the Named Employees were aware that there was a potential failure to report force. It is further clear that the Named Employees decided to not make an OPA referral at that time, even though the failure to report force was potential serious misconduct that was required by policy to be sent to OPA. OPA agrees with the FRB that the failure of the Named Employees to make an OPA referral here was inconsistent with policy.

However, for several reasons, OPA does not believe that Sustained findings are warranted. First, OPA recognizes that this was a massive incident that resulted in a very complex force investigation. Second, in 2015, the expectations concerning force reporting and OPA referrals in the context of large-scale demonstrations were still being perfected and finalized. Third, even if OPA does not find that NE#2's stated reasoning excuses the need to have made an OPA referral, it is certainly persuasive and provides some mitigation of his and NE#1's culpability. Fourth, and last, I have no doubt that, were this situation to occur today, the Named Employees were properly make an OPA referral.

Given the above, OPA recommends that the Named Employees receive the below Training Referral rather than Sustained findings.

- **Training Referral:** The Named Employees should be reminded of the obligation to make an OPA referral when required and as soon as practicable, and that it is not appropriate to defer doing so pending a chain of command review of an incident. To the extent deemed necessary by their respective chains of command, the Named Employees should be retrained on the applicable policies concerning force reporting in large-scale demonstrations and the reporting of potential misconduct identified in such force investigations. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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



Named Employee #1 - Allegation #2

Force – Investigation – 8.300-POL-3 Type II Investigations 6. Where, After Investigation, a Use-of-Force is Found to be Out of Policy, or the Investigation of the Incident is Lacking, the Chief or Designee will...

OPA concludes that this allegation is duplicative of Allegation #1 and, as such, recommends that it be removed.

Recommended Finding: **Allegation Removed**



Named Employee #2 - Allegations #1

Force – Reporting – 5.002 – Responsibilities of Employees Concerning Complaints of Possible Misconduct 6. Employees Must Otherwise Report Misconduct

OPA recommends that this allegation be Not Sustained and, for the same reasons as stated in Allegation #1, issues the above Training Referral (see Named Employee #1, Allegation #1).

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

Named Employee #2 - Allegation #2

Force – Investigation – 8.300-POL-3 Type II Investigations 6. Where, After Investigation, a Use-of-Force is Found to be Out of Policy, or the Investigation of the Incident is Lacking, the Chief or Designee will...

OPA concludes that this allegation is duplicative of Allegation #1 and, as such, recommends that it be removed.

Recommended Finding: **Allegation Removed**