



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 19, 2019

CASE NUMBER: 2019OPA-0008

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited	Not Sustained (Unfounded)
# 2	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 3	5.010 - Civil Actions VII. Fiscal Unit Notification	Not Sustained (Training Referral)
# 4	5.010 - Civil Actions III. Involvement / Participation in Civil Actions - Generally	Not Sustained (Lawful and Proper)
# 5	5.001 - Standards and Duties 15. Employees Obey any Lawful Order Issued by a Superior Officer	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:

The Complainant alleged that the Named Employee retaliated against her by appearing as a witness at a hearing between her and her ex-husband. The Complainant also opined that the Named Employee may have been biased against her because of her gender. Further, the Complainant contended that the Named Employee violated policy when he informed her ex-husband’s attorney about an ongoing OPA investigation against him. The Complainant additionally asserted that the Named Employee’s appearance at the civil proceeding was contrary to Department policy. Lastly, it was alleged that the Named Employee may have failed to report his appearance at the civil proceeding to the Fiscal Unit.

ADMINISTRATIVE NOTE:

SMC 3.29.260(G) states the following: “If the OIG has not advised OPA of concerns with the investigation within ten days after being notified that an investigation has been preliminarily completed the OPA Director may certify the case and issue findings. In these instances, OIG is precluded from requiring further investigation.” OPA routed this case to the Office of Inspector General for Public Safety (OIG) for review and certification on May 15, 2019. At that time, OPA indicated that its investigation was complete. However, as of the date of this Director’s Certification Memo and more than ten (10) days after the date of provision of the case to the OIG, the OIG has not responded to certify the case or to direct that additional investigation be completed. Accordingly, consistent with the SMC, I certify this investigation as thorough, objective, and timely and proceed to issue the recommended findings set forth herein.



SUMMARY OF INVESTIGATION:

This is the second OPA complaint that the Complainant has filed against Named Employee #1 (NE#1). In the first, which was investigated under 2018OPA-1075, the Complainant alleged that NE#1 engaged in various misconduct in connection with his investigation of a domestic violence (DV) incident. The Complainant and her ex-husband were the involved parties to that incident. Specifically, the Complainant alleged that NE#1 failed to complete a supplemental DV report, did not perform all of the steps required as part of a DV investigation, and did not inform her of the option of marking “do not disclose” on the reporting for this incident so as to prevent her personal information from being publicly available. The Complainant also stated that NE#1’s reports concerning this incident were inaccurate. The Complainant further contended that NE#1 recorded a phone conversation between them on his In-Car Video (ICV) and that he did not inform her that he was doing so and get her consent prior to recording. In addition, the Complainant asserted that NE#1 lied to her during a phone conversation. Lastly, the Complainant told OPA that NE#1 appeared at hearings between her and her ex-husband and did so on behalf of the ex-husband and without being subpoenaed. It was alleged that this suggested a possible personal relationship between the ex-husband and NE#1 and constituted a potential conflict of interest.

That investigation resulted in a number of Training Referrals relating to NE#1 not completing some of the steps required for a DV investigation (he incorrectly but in good faith thought that the investigation into a violation of a DV order was not a DV investigation as contemplated by policy), as well as for failing to notify the Complainant that she was being recorded and for failing to ask if she wanted her personal information disclosed when completing his report. OPA deemed unfounded the allegations that NE#1 engaged in a conflict of interest and was dishonest in his communications with the Complainant. OPA further found that the reports he wrote were accurate.

Prior to the conclusion of 2018OPA-1075, the Complainant initiated this complaint which set forth several additional allegations against NE#1. Specifically, she contended that NE#1 appeared at one of her court appearances for the purposes of retaliating against her. She further alleged that NE#1 was biased against her because of her gender. She additionally alleged that NE#1 failed to comply with the Department’s procedural requirements regarding court appearances while on-duty. Lastly, she alleged that NE#1 violated a lawful Department order when he notified her ex-husband’s attorney about the general facts concerning 2018OPA-1075.

As part of this investigation, OPA interviewed NE#1. OPA further reviewed: numerous emails from the Complainant; various court records, including the court proceedings during which NE#1 testified; and an “anonymous dossier,” which appears to set forth evidence contradicting some of the Complainant’s claims against her ex-husband and undercutting a number of her assertions concerning her court proceedings.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited

The Complainant alleged that NE#1 violated the Department’s retaliation policy when he appeared at a court proceeding and testified favorably for her ex-husband. She asserted that NE#1 did so to seek retribution for the prior OPA complaint that she filed against him.



SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-14.) SPD employees are specifically prohibited from retaliating against a person who engage in activities including, but not limited to, “oppos[ing] any practice that is reasonably believed to be unlawful or in violation of Department policy” or “who otherwise engages in lawful behavior.” (*Id.*) Retaliatory acts are defined broadly under SPD’s policy and include “discouragement, intimidation, coercion, or adverse action against any person. (*Id.*)

While it appears that the Complainant sincerely believes that NE#1 appeared at court in order to retaliate against her, he denied doing so and stated that he was required to appear in order to comply with subpoenas. OPA obtained copies of both subpoenas issued to NE#1. Moreover, OPA reviewed NE#1’s eventual trial testimony in which it was confirmed that his appearance was pursuant to a subpoena.

Given the above, the evidence conclusively establishes that NE#1 did not engage in retaliation against the Complainant when he testified at court. As such, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #2

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

The Complainant alleged that NE#1 was biased against her due to her gender. In support of this assertion, the Complainant stated that NE#1 went “the extra mile” to reach out to her ex-husband during the ongoing court proceedings and offered to testify against her.

NE#1 denied that he engaged in biased policing towards the Complainant or that her gender played any role in how he treated her, how he handled the calls for service involving her, or his appearance at court to provide testimony. NE#1 denied that he reached out to the ex-husband or the ex-husband’s attorney and stated that, instead, they contacted and later subpoenaed him. He confirmed that the trial testimony that he ultimately provided was given pursuant to that subpoena.

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 OPA’s review of the record, there is no evidence supporting a finding that NE#1 discriminated against the Complainant or was biased towards her based on her gender. Indeed, the evidence indicates that NE#1 responded to the ex-husband’s attorney’s inquiries and attended the court proceeding based on his receipt of a subpoena.

Moreover, and as a general matter, OPA knows of no evidence at all that supports the belief that NE#1 has ever engaged in law enforcement activity based on bias towards women. OPA notes that NE#1 currently works with a female partner and that they have been paired together for approximately three years. NE#1’s choice to work every day in high-stress and potentially dangerous situations with a female partner indicates, in OPA’s opinion, that NE#1 does not hold a bias against women.



For the above reasons, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

5.010 - Civil Actions VII. Fiscal Unit Notification

SPD Policy 5.010(VII)(A) states that: “In all cases where an employee makes a civil action related appearance (e.g., interview, conference, deposition, judicial proceeding), on-duty or off-duty, at the request of a private party (a party other than the City, Department, or other government agency), the Fiscal, Property and Fleet Management Section will collect fees from the private party.” The policy further provides that, in order to facilitate billing by the Fiscal Unit, the employee must provide various notifications. (SPD Policy 5.010(VII)(A).)

Here, NE#1 was subpoenaed by a private party to appear at a civil proceeding. For his attendance at the proceeding, he was paid overtime by the Department. However, NE#1 did not notify the Fiscal Unit of his appearance and, as such, he did not provide sufficient information to allow the Fiscal Unit to bill the private party.

At his OPA interview, NE#1 stated that the proceeding was not civil and, accordingly, he had no responsibility to notify the Fiscal Unit. OPA’s investigation indicated that this belief was incorrect. A DV protection order renewal hearing is a civil, not criminal, proceeding. As such, he was required to report his appearance and, when he did not do so, he acted contrary to policy.

The above being said, there was confusion even within OPA as to whether the proceeding in question was civil or criminal. If OPA was unsure of this, NE#1 cannot be faulted for being similarly unclear as to whether he needed to report. For these reasons, I recommend that he receive a Training Referral rather than a Sustained finding.

- **Training Referral:** NE#1 should be reminded that he is required to notify the Fiscal Unit whenever he appears at a civil proceeding and he should be informed that a DV protection order renewal hearing is a civil matter. This counseling and retraining should be documented and this documentation should be maintained in an appropriate database.

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

Named Employee #1 - Allegations #4

5.010 - Civil Actions III. Involvement / Participation in Civil Actions - Generally

SPD Policy 5.010(III) generally concerns the involvement of Department employees in civil action. The policy specifically instructs that: “No employee shall volunteer to aid any private party in any manner in a civil action, and no employee shall participate in any manner in a civil action except as provided by Department policy and due process of law.” (SPD Policy 5.010(III)(A).) The policy further states that: “No employee shall confer or consult with any person outside the Department or participate in any activity or proceeding related to a civil action, except in response to a subpoena or at the request of a Department Legal Advisor, City Attorney, or private attorney representing the City.” (SPD Policy 5.010(III)(C).)



Based on OPA's investigation, there is no indication that NE#1 volunteered to aid the ex-husband in his civil proceeding. To the contrary, the evidence suggests that NE#1 was subpoenaed on multiple occasions by the ex-husband's attorney and appeared at the civil proceeding in response to those subpoenas. Moreover, while NE#1 admittedly spoke with the ex-husband's attorney, he did not act contrary to policy when he did so given that none of the conversations were in connection with the subpoena that he received.

For the above reasons, I find that NE#1 acted in compliance with this policy. As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #5

5.001 - Standards and Duties 15. Employees Obey any Lawful Order Issued by a Superior Officer

The Complainant alleged that NE#1: "disobeyed a command from the Chief of Police by discussing my misconduct complaint with my ex-husband's attorney during an open and active OPA investigation and/or encouraging her to publicly disclose this during a hearing."

SPD Policy 5.001-POL-15 states that: "Officers obey any lawful order issued by a superior officer." The failure to do so constitutes insubordination. Specifically at issue here is the order that NE#1 received at the commencement of OPA's investigation into 2018OPA-1075 directing him to maintain the confidentiality of the investigation and "not to disclose information pertaining to this investigation except with your representative or attorney."

NE#1 explained that, when the ex-husband's attorney initially contacted him to conduct a defense interview, NE#1 did not disclose the OPA investigation. However, once he received a subpoena to testify, NE#1 did divulge the generalities of the investigation to the ex-husband's attorney to let her know what he could and could not speak about. He believed that this was done as part of a court proceeding.

Notably, at the conclusion of his OPA interview from 2018OPA-1075, NE#1 received the following instruction: "To maintain confidentiality of this investigation, you are advised not to disclose the information discussed during your interview, except with your representative or attorney, unless otherwise required by law or in a court proceeding." The purpose of this instruction is to permit officers to testify concerning otherwise confidential OPA proceedings when they are required to do so by function of a subpoena or court order. Here, NE#1 received a subpoena for his testimony. As such, he was permitted, based on direction provided by OPA, to discuss his pending OPA investigation. When he did so, he did not violate any policy or act contrary to a lawful order.

For these reasons, I recommend that this allegation be Not Sustained – Unfounded.

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