



CLOSED CASE SUMMARY

ISSUED DATE: AUGUST 7, 2018

CASE NUMBER: 2018OPA-0175

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	Title 8 - Use of Force 1. Use of Force: When Authorized	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	8.400 - Use of Force Reporting and Investigation 3. The Sergeant Will Review the Incident and Do One of the Following:	Sustained

Imposed Discipline

Oral Reprimand

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 Named Employee #1 subjected the Complainant to excessive force. It was further alleged that Named Employee #2 failed to properly classify and investigate an allegation of force and complaints of pain.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

8.200 - Use of Force 1. When Authorized

Named Employee #1 (NE#1) was flagged down by an individual who complained that a male – who was later identified as the Complainant – was casing cars and had taken a motorcycle helmet from a neighbor’s home. The individual pointed out the Complainant, who was approximately one block away. NE#1 got back into his car and drove up to where the Complainant was. NE#1 got out and began following the Complainant. NE#1 motioned to the Complainant and asked the Complainant to come speak with him; however, the Complainant then fled. NE#1 ran after the Complainant and observed that the Complainant was dropping items as he fled. A civilian witness then tackled the Complainant into some bushes in a parking lot. NE#1 held the subject down and attempted to control his body and take him into custody. During this time, the Complainant made multiple complaints of pain. Other officers responded to the scene and the Complainant was handcuffed. At the time of his arrest, the Complainant alleged that he had been punched in the face. He stated: “hey, I’m not resisting arrest or anything and this guy just punched me in the fucking face” and “this guy just punched me in the mouth.” At that point, it was unclear whether the Complainant was referring to NE#1 or the civilian witness. The Complainant then clarified that he was referring to NE#1 when he stated to NE#1: “why’d you punch me dawg?” NE#1 responded to this assertion by stating: “I didn’t



punch you, but just so you know, you are being audio/video recorded.” As discussed more fully below, NE#1 disclosed the allegation of force and the complaints of pain to his supervisor, Named Employee #2 (NE#2).

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Whether force is reasonable depends “on the totality of the circumstances” known to the officers at the time of the force and must be balanced against “the rights of the subject, in light of the circumstances surrounding the event.” (SPD Policy 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

Virtually the entirety of NE#1’s interaction with the Complainant and the force he used was captured on Body Worn Video (BWV). The BWV is consistent with NE#1’s account of the incident. It showed that a civilian witness, not NE#1, used force to tackle the Complainant to the ground. Notably, NE#1 used only de minimis force to keep the Complainant under control and to place him into handcuffs. There is no evidence that NE#1 or, for that matter, the civilian witness ever punched or otherwise struck the Complainant. Indeed, in my opinion, the BWV conclusively establishes the opposite. For these reasons and given that the force alleged by the Complainant did not occur, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegations #1

8.400 - Use of Force Reporting and Investigation 3. The Sergeant Will Review the Incident and Do One of the Following:

As discussed above, after the Complainant was placed under arrest, NE#2 came to the scene. At that time, he spoke with NE#1 to determine what had happened. Their conversation was captured on BWV. During that discussion, NE#1 stated, with regard to the Complainant’s allegations:

He’s also alleging that I punched him in the face and that I was hurting him. I didn’t punch him in the face. That guy in the gray over there actually tackled him. I was chasing the guy and catching up to him through here and then he just came this direction out of nowhere and just tackled him into the bush.

NE#1 and NE#2 then walked over to the patrol vehicle and NE#1 said to him: “I didn’t do anything other than just holding onto his arms, but he was yelling that I was hurting him and punching him in the face.”

Notably, during NE#2’s conversation with NE#1, the scene was calm and under control, there were no loud ongoing noises or traffic, there was no yelling or people talking over each other, and NE#1 spoke clearly and at a normal pace and volume. Further, the first time that NE#1 told NE#2 about the Complainant’s allegation of force and complaints of pain, NE#2 stated: “ok.” Moreover, NE#2 repeated the allegation back to NE#1, conclusively establishing that he heard it. In addition, the second time that NE#1 communicated the subject’s assertions, NE#2 asked a follow up question concerning whether the Complainant’s statements were made when he was being held down by the civilian witness. This again establishes that NE#2 did, in fact, hear and comprehend what NE#1 said to him.



Even though the video established that NE#2 heard what NE#1 said to him, NE#2 did not classify the allegation of a punch to the face and the complaint of pain as reportable force, did not conduct any investigation into that force, and did not direct NE#1 to generate any reporting as to the alleged force and complaint of pain.

SPD Policy 8.400-POL-3, which concerns the requirements for sergeants to properly classify each use of force and to ensure that the appropriate investigation is conducted. SPD Policy 8.400-POL-1 sets forth the categories of force and examples of each. Relevant to this case, force “reasonably expected to cause injury” constitutes Type II force and a complaint of transient pain falls into the category of Type I force. Both must be investigated and, for both, NE#2 was required to ensure that NE#1 completed a use of force report. He indisputably failed to do so here.

At his OPA interview, NE#2 acknowledged that he heard NE#1’s statements concerning the alleged force but stated that he did not hear the portion of the statements concerning the complaints of pain. In this regard, NE#2 told OPA the following:

I am in my late fifties, I spent eight years in the Marine Corps, five in the Mortar Platoon, I was patrol rifle, and I was in SWAT for three and a half years, and I am a, assist with the firearms training with the range, but again, if that’s—I did not hear that hurt word during my interview with—or even the review ‘til it was brought up just now [prior to the OPA interview].

Later during his OPA interview, NE#2 stated that he had documented hearing loss. When asked for specifics concerning this condition, he stated: I, I went to a recent [hearing assessment], if I remember correctly, and, and yeah, there’s some decline. You could see the, on the graph.” He further told OPA: “And I remember we did one while I was in SWAT. I do recall doing one—if I remember correctly—was earlier this year, and on the graph there was some decline. Yes.”

Even if NE#2 has documented hearing loss, which OPA was not able to confirm or deny during its investigation, he admittedly knew that the Complainant alleged that NE#1 punched him in this face. This allegation constituted, at the very least, Type I force and, potentially, rose to the level of Type II force. This was the case regardless of whether NE#1 told NE#2 that he did not punch the subject. Indeed, if an officer’s simple denial that force was used provided a basis for not reviewing and investigating that force, it would vitiate the policy. Moreover, at the time of NE#1’s denial, NE#2 had not reviewed any of the Department or third party video of this incident and had no justifiable basis to decide not to investigate the force.

For these reasons, NE#2’s failure to investigate the allegation of force and to ensure that NE#1 completed a use of force report was in violation of policy. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**