



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 30, 2020

CASE NUMBER: 2017OPA-0481

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	Force - Use - 8.200 Using Force 1. Use of Force: When Authorized	Allegation Removed
# 2	Force - Use - 8.200 - Using Force 4. Use of Deadly Force	Not Sustained (Lawful and Proper)
# 3	Bias-free Policing - 5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 4	Force - Use - 8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Not Sustained (Lawful and Proper)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	Force - Use - 8.200 Using Force 1. Use of Force: When Authorized	Allegation Removed
# 2	Force - Use - 8.200 - Using Force 4. Use of Deadly Force	Not Sustained (Lawful and Proper)
# 3	Bias-free Policing - 5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 4	Force - Use - 8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	Investigations and Reports - 15.180 - Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence	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 Complainants alleged that Named Employee #1 and Named Employee #2 used excessive force against the Subject, that their decision to use force was based on the Subject’s race, and that they failed to de-escalate prior to using force. The Complainant further alleged that Named Employee #3 – the incident commander, failed to properly collect and document evidence at the scene.



ADMINISTRATIVE NOTE:

Two complaints were submitted to OPA on February 21, 2017 and March 14, 2017, respectively. However, under the collective bargaining agreement with SPOG, the 180-day period began running on the date of the incident – February 21, 2016 – which is the date that SPD supervisors knew or should have known of potential misconduct. At that time, SPD’s Force Investigation Team (FIT) supervisors reviewed the In-Car Video (ICV) and conducted witness interviews. Notably, the former OPA Director and OPA staff were also present for this review and knew of the substance of the interviews. Accordingly, the 180-day deadline for this case expired on August 19, 2016, 180 days after the incident and over six months prior to the first of the complaints being filed.

At the time this case was initiated, OPA had extremely high caseloads and staffing shortages. As the 180-day deadline was expired when this case was initiated, OPA focused its efforts on other cases, including potential sustained cases that were timely filed. All of these factors contributed to the significant delay in submitting this DCM. OPA is mindful that this delay has caused stress, inconvenience, and frustration for all involved. Such a delay is never optimal, particularly in a case that holds as much importance as this one does. In summary, OPA apologizes for the lateness of this submission.

Lastly, while OPA does not recommend that any of the findings herein be Sustained, OPA notes that it would have been unable to do so given the untimeliness of the initial complaints.

SUMMARY OF INVESTIGATION

This investigation concerns a shooting that occurred on February 21, 2016. On that date, two SPD employees – Named Employee #1 (NE#1) and Named Employee #2 (NE#2) – fatally shot an individual, referred to here as the Subject. The shooting was initially investigated by FIT and was then reviewed by the Force Review Board. Subsequently, an inquest was conducted in King County District Court, and findings of fact were entered by the inquest jury on February 10, 2017. On February 21, 2017 a member of the public filed an OPA complaint alleging that NE#1 and NE#2 failed to de-escalate and used excessive force against the Subject. The complaint also alleged that the Crime Scene Investigation (CSI) unit, functionally led by the FIT commander – Named Employee #3 (NE#3), failed to properly document and collect evidence at the scene of the incident. On March 14, 2017, the Subject’s brother also made an OPA complaint, alleging that the officers’ actions were motivated by the Subject’s race. To support his complaint, the Complainant brother asserted that the inquest jury “voted unanimously that [the Subject] complied with [officers].” This OPA investigation ensued.

A. The Officers’ Initial Contact with the Subject

On February 21, 2016, NE#1 and NE#2 were surveilling an apartment building for an outstanding drug warrant against an individual (not the Subject), who was believed to live therein. NE#1 and NE#2, who were assigned to SPD’s North Precinct Anti-Crime Team, were in an unmarked police vehicle with tinted windows and were dressed in plain clothes with Department overlay. While at that location, they observed a large amount of pedestrian and vehicular traffic involving the apartment, which they believed was consistent with drug activity.

At approximately 3:30 p.m., NE#1 and NE#2 observed a black Dodge Magnum arrive from the south and park on the east side of the street. NE#1 recognized the vehicle as being similar to the one depicted in photos posted on the Subject’s social media page. Both officers were familiar with the Subject and knew that he had recently been released



from prison where he had been incarcerated for a felony. The officers observed the Subject exit the vehicle and NE#2 saw he was carrying a holstered handgun on his right hip. NE#2 notified NE#1 that the Subject was armed. NE#1 and NE#2 verified that it was unlawful for him to carry a firearm due to prior felony convictions. OPA notes that, as a general matter, a subject's criminal history is not relevant when evaluating whether force, and particularly deadly force, was consistent with policy. Here, the existence of the Subject's felony warrant is relevant only insofar as it informed the officers' conclusion that the Subject was precluded from lawfully possessing a handgun and it provided the officers with the legal authority to attempt to effect the arrest of the Subject. However, the felony warrant is not factored into OPA's analysis as to whether NE#1 and NE#2 violated policy when they used deadly force on the Subject.

NE#1 and NE#2 observed the Subject cross the street and enter the apartment building they were surveilling. They called their supervisor and discussed changing their focus to take the Subject into custody. The supervisor advised NE#1 and NE#2 to call marked units to back them. They called for backing officers assist in the arrest. They formulated a plan to arrest the Subject when he exited the building and before he could return to his car. Then the Subject exited the apartment and spoke with two individuals outside. A vehicle arrived and parked in front of NE#1 and NE#2, partially obstructing their view of the Subject. The Subject then left the immediate area. Shortly afterward, a white sedan arrived and parked behind the Subject's car. NE#1 and NE#2 saw the Subject exit the front passenger seat of the white sedan. There were two other individuals in the car, a male driver and a female passenger sitting in the back seat.

At approximately 4:15 p.m., NE#2 radioed for the backing officers to move in and assist in arresting the Subject. The Subject was standing next to the curb between the open car door and the front passenger compartment of the white sedan. ICV from the patrol vehicle of one officer recorded what occurred next. NE#1 and NE#2 exited their vehicle and moved toward the white sedan. As they approached the Subject, they directed the Subject to get on the ground. They also directed him to put his hands up. ICV from one of the backing officer's patrol vehicles showed the Subject briefly raising his hands in response to the officer's commands. It then showed the Subject's body position moving downward and also depicted the Subject moving his right hand down toward his belt. NE#1 and NE#2 fired their weapons, hitting the Subject several times.

Officers broadcasted "shots fired" over the radio. NE#1 and NE#2 took the male driver and female passenger out of the sedan and into custody. Officers called the Seattle Fire Department (SFD) to render assistance to the Subject. Backing officers moved in to handcuff the Subject. While doing so, one officer observed a handgun on the floor of the front passenger seat of the car. The officer audibly announced that he saw the handgun, and this was recorded on ICV. After the subject was handcuffed, an officer provided CPR. Approximately seven minutes after shooting, SFD personnel arrived and provided medical aid to the Subject. Both the officer who provided CPR and SFD personnel observed that the Subject had an empty holster on the inside of his belt. Shortly after arriving, SFD transported the Subject to Harborview Medical Center where he later succumbed to his injuries.

B. FIT and CSI Investigations

At approximately 5:00 p.m., the CSI unit responded to the scene of the OIS. CSI personnel mapped the scene and took photographs. FIT also arrived and took command over the incident. NE#3, who was then assigned to FIT as a lieutenant, was the commanding officer at the scene for most of the evening.

A walkthrough of the scene was conducted with witness officers. Placards were used to mark the approximate locations of the Named Employees, the Subject, and other involved individuals at the time of the shooting, and where



physical evidence was situated. The physical evidence included rifle and shotgun cartridges, items of clothing belonging to the Subject, and the empty black holster that the Subject had been wearing.

As part of the evidence collection process, NE#3 ordered that the handgun, which was seen inside of the sedan, be photographed at the scene. However, CSI personnel reported that the handgun could not be clearly photographed from the outside of the sedan because the handgun was partially under the passenger seat. The CSI photographer also reported to NE#3 that he believed he needed a warrant to enter or even break the plane of the sedan and to photograph the gun.

The CSI Sergeant consulted with NE#3 and they agreed that they needed a warrant to enter the sedan, even to take photographs. A CSI detective took photographs of the exterior of the sedan. She also attempted to take photographs of the interior of the vehicle but was unsuccessful in capturing the handgun given its placement inside. NE#3 ultimately ordered that the sedan be towed to SPD's Vehicle Processing Room rather than attempting to obtain a warrant at the scene. At approximately 9:38 p.m., and after the scene was fully processed, the sedan was towed from the scene.

At 9:30 p.m. on February 21, 2016, FIT detectives interviewed NE#1. That interview stretched into the following day. At 12:10 a.m. on February 22, 2016, FIT interviewed NE#2. NE#1 and NE#2 were re-interviewed on March 3, 2016.

During his interview, NE#1 stated that he was familiar with the Subject due to prior drug-related contacts in the Aurora Avenue area. He said that he recognized the Subject's Dodge Magnum from social media postings the Subject made. NE#2 stated that, when he observed the Subject exit the Dodge Magnum, the Subject was carrying a handgun in a holster inside his pants. NE#2 stated that he clearly saw the Subject's handgun and that his vest was tucked behind the handgun's grip. NE#1 and NE#2 knew that the Subject was prohibited from carrying a handgun due to previous felony convictions. NE#1 stated that he and the other officers were concerned that, since the Subject potentially faced extended jail time due to his prior record, the Subject might flee in his vehicle. Once they observed the Subject getting out of the white sedan, NE#1 stated that he and other officers were concerned that the Subject might also take hostages.

Both NE#1 and NE#2 stated that, when they approached the Subject, they saw him turn so his right hip was facing away from them. Both officers explained that, as the Subject's body position moved downward, they saw him move in a manner consistent with reaching for his handgun. The officers articulated their belief that they were at risk of imminent serious harm or death. They stated that they then fired their duty weapons, striking the Subject.

FIT also interviewed the individuals who were in the sedan at the time of the incident. The female passenger stated that the Subject did not raise his hands when ordered to by NE#1 and NE#2. She stated that she observed him reach for a gun in his pants. The male driver did not see the shooting because he was looking away at the time but stated that he felt and heard approximately five shots.

On February 22, 2016, at 3:04 a.m., FIT and CSI obtained a search warrant for the sedan. CSI conducted a search that same day. During the search, CSI located the handgun under the right front passenger seat and photographed it. The handgun was of a type consistent with the holster worn by the Subject. CSI and FIT further determined that NE#1 fired his rifle six times during this incident and that NE#2 fired his shotgun once.



C. Inquest and Findings

An inquest was held in King County District Court to reach factual findings about the circumstances of the shooting death of the Subject. On February 10, 2017, the eight-member inquest jury entered findings of fact. The jury answered 55 interrogatories regarding the incident. Relevant to OPA's investigation, the jury found:

- NE#2 saw that the Subject had a holstered handgun on his right hip (6 yes and 2 unknown).
- NE#2 told NE#1 about the existence of the holstered handgun (unanimous).
- NE#1 and NE#2 verified that it was illegal for the Subject to possess a handgun (unanimous).
- NE#1 and NE#2 requested backing units to assist in taking the Subject into custody and backing units arrived on scene (unanimous).
- NE#1 and NE#2 came up with a tactical plan concerning the Subject's arrest (unanimous).
- Prior to attempting to effectuate the arrest of the Subject, NE#2 requested that the backing units move into the arrest location to assist (unanimous).
- NE#1 and NE#2 gave the Subject commands to show his hands and to get on the ground (unanimous).
- The jury was evenly split on whether these commands were given simultaneously (4 yes and 4 no).
- The Subject showed his hands and his body position moved downward (unanimous).
- The Subject had room to get down on the ground from where he was standing (unanimous).
- The Subject moved his hand to his right hip area (six yes and two unknown).
- NE#1 believed at the time that the Subject was drawing a handgun from the holster on his hip (unanimous).
- When he fired his rifle, NE#1 believed that the Subject "posed a threat of death or serious bodily injury to himself, NE#2, or others (seven yes and one unknown).
- NE#2 did not see the Subject move his right hand to his hip area (unanimous).
- NE#2 believed, however, that the Subject was attempting to draw a handgun from his holster (six yes and two unknown).
- When he fired his weapon, NE#2 believed that the Subject posed an imminent threat of death or serious bodily injury to NE#2, NE#1, or others (six yes, one no, and one unknown).
- Minutes after the shots were fired, one of the backing officers observed a handgun on the floorboard of the front passenger seat of the white sedan (unanimous).
- SFD personnel saw the empty holster on the Subject's belt and cut it off while providing medical assistance (unanimous).
- The handgun was later recovered from the front passenger seat of the white sedan (unanimous).

D. OPA Investigation

As discussed above, after the conclusion of the inquest proceedings, OPA received two complaints about this incident and initiated an investigation. This involved watching ICV, reviewing the FIT investigation and interviews, and analyzing the results of the inquest. OPA further conducted interviews of NE#1, NE#2, NE#3, and the CSI Sergeant. OPA also interviewed both of the Complainants to obtain further detail concerning their allegations.

At his OPA interview, NE#1 described the arrest plan for the Subject. According to NE#1, he and NE#2 originally planned to surround the Subject when he left the apartment and walked to his vehicle. Unbeknownst to officers because their view was obscured, the Subject instead left from the rear of the apartment and walked to an adjacent



trailer park, where he was picked up by the male driver in the white sedan. They then returned to where the Subject's vehicle was parked, and the Subject exited the sedan. NE#1 and NE#2 ordered units to move in and arrest the Subject.

NE#1 and NE#2 described the de-escalation techniques they used. They indicated that they called for uniformed backup in marked cars to demonstrate that they were SPD officers, and attempted to structure the arrest to prevent the Subject from fleeing or taking hostages. They stated that they gave the Subject commands to show his hands and get on the ground. NE#1 noted that these commands followed SPD training and that he had conducted other arrests where he had given these same commands. In his opinion, the commands were not contradictory. NE#2 also stated that he had given the commands to raise hands and get on the ground in other arrest situations.

NE#1 stated that he saw the Subject reach towards his hip in the direction of the holstered handgun. NE#1 said that, at that time, he believed that the Subject was in the process of drawing the handgun. NE#1 explained that, when he fired, he believed that he and others were in imminent danger of death or serious physical harm.

NE#2 asserted that he saw the Subject begin to crouch slightly and saw his right elbow raise up. NE#2 could not see his right hand at the time, but given what he knew about the handgun, NE#2 believed that the Subject was actively drawing the handgun from the holster. He stated that, at this point, he believed that he and others were at risk of death or serious harm. He specifically referenced the two individuals inside of the white sedan. He stated that this informed his decision to fire his weapon.

At his OPA interview, NE#3 explained why he ordered the white sedan towed from the incident scene. He stated that SPD personnel obtained the male driver's consent to search the vehicle, but that SPD had not verified that the driver was the true owner of the vehicle and that he therefore was unsure of the driver's legal authority to consent to a search. He stated that "in an important case, we probably shouldn't rely on a consent to search on something like that." NE#3 stated his opinion that a search warrant was the most legally sound basis for the search. He also noted that, as the night wore on, the weather began to turn to rain, creating a concern about contamination of evidence. Finally, he believed the vehicle would have to be processed anyway for bullet fragments.

NE#3 also noted that, in reaching his decision, he obtained and relied on advice from CSI and a Narcotics Unit sergeant. The crux of that advice was that the best process from an evidence-collection standpoint was to seal the car at the scene and transport it to the vehicle processing room, which was a secure environment, and to perform the search there.

OPA also interviewed the CSI Sergeant. He stated that, based on his understanding of policy and the law, CSI could not enter the vehicle absent a warrant for any reason, including to take photographs. He stated that a CSI detective attempted to take photos of the car's interior from outside the vehicle, but that she was unsuccessful in capturing the gun on film due to its placement. However, he verified that the gun was, in fact, recovered from the vehicle and that it matched the holster worn by the Subject.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

Force - Use - 8.200 Using Force 1. Use of Force: When Authorized

NE#1 and NE#2 did not use force during this incident other than the deadly force that is analyzed in the context of Allegation #2, below. As such, this allegation is duplicative and OPA recommends that it be removed as against both NE#1 and NE#2.

Recommended Finding: **Allegation Removed**

Named Employee #1 - Allegation #2

Force - Use - 8.200 - Using Force 4. Use of Deadly Force

SPD Policy 8.200-POL-4 governs the use of deadly force by SPD employees. It states that: "Deadly force may only be used in circumstances where threat of deadly or serious physical injury to the officer or others is imminent." The policy defines an imminent danger as when an objectively reasonable officers believes that: (1) "A suspect is acting or threatening to cause death or serious physical injury to the officer or others"; (2) "The suspect has the means or instrumentalities to do so"; and (3) "The suspect has the opportunity and ability to use the means or instrumentalities to cause death or serious physical injury." (SPD Policy 8.200-POL-4.)

As a threshold matter, this case is unique because it was initiated with OPA after an inquest jury issued findings of fact. Generally, the process happens in reverse, where OPA conducts its administrative investigation and issues recommended findings prior to an inquest being held. Due to the procedural posture here, OPA believes that it must give substantial deference to the inquest findings and that they serve to conclusively establish facts in the record. Based on OPA's evaluation of the totality of the evidence and, again, when substantially deferring to the factual findings issued by the inquest jury, OPA concludes that the application of deadly force by NE#1 and NE#2 was consistent with policy.

First, the jury found that, when NE#1 and NE#2 used deadly force, the Subject was armed with a handgun and engaged in a motion that both officers reasonably believed was the Subject reaching for his weapon. The jury further determined that both officers believed at that moment and prior to firing that the Subject presented an imminent threat of serious harm or death to themselves and others. This is congruent with the accounts provided by NE#1 and NE#2 to FIT and OPA.

Second, as referenced above, the jury found that the Subject was armed with the handgun when he was shot. As such, the jury functionally determined that the Subject had the instrumentality to cause imminent serious harm or death to the officers or others.

Third and last, given the Subject's proximity to the officers at the time, his access to the handgun, and the jury's finding that he engaged in motions consistent with reaching for the handgun and which reasonably caused the officers to believe that he was doing so, the Subject had the ability to use the handgun to cause imminent serious harm or death to the officers or others.



Ultimately, we will never know what the Subject was thinking at the time of the shooting and when he reached towards his hip. One possibility is that he was intending to draw the handgun to secrete it in the sedan. It is also possible that he was not reaching towards his handgun and that his movements just made it seem like he was doing so. A third possibility is that he was reaching for the handgun to shoot the officers or others. However, the determinative question is not what the Subject's intentions were. Instead, it is what did the officers perceive at the time and were their perceptions reasonable under the totality of the circumstances? When applying the findings of fact reached by the jury after the inquest and when balancing this against the ICV and the officers' statements, OPA finds that the officers perceived a deadly threat at the time of the shooting and that their perceptions were reasonable.

While the death of the Subject represented a significant loss for his family and his community, OPA concludes that the officers' use of deadly force fell within policy and their training. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both officers.

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

Named Employee #1 - Allegation #3

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

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.*)

OPA finds insufficient evidence to support a finding that NE#1 and NE#2 took actions towards the Subject based on his race. OPA reaches this determination for two main reasons. First, NE#1 and NE#2 did not initially intend to arrest the Subject and only did so after developing probable cause based on his illegal possession of a firearm. They did not target the Subject specifically for enforcement because of his race. Second, as the inquest found, the force used by NE#1 and NE#2 was predicated on their belief that the Subject was drawing his weapon. To the contrary, there is no evidence suggesting that this force was used because of the Subject's race.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against both NE#1 and NE#2.

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

Named Employee #1 - Allegations #4

Force - Use - 8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

“De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.” (SPD Policy 8.100-POL-1.)

The policy further instructs that: “When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.”



(*Id.*) Officers are also required, “when time and circumstances permit,” to “consider whether a subject’s lack of compliance is a deliberate attempt to resist or an inability to comply based on factors” such as “mental impairment...drug interaction...[and/or] behavioral crisis.” (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident “when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.” (*Id.*)

The policy gives several examples of de-escalation, which include: mitigating the immediacy of the threat to give officers time to use extra resources and to call more officers or specialty units; and increasing the number of officers on scene to thus increase the ability to use less force. (*Id.*) Other examples of de-escalation include, but are not limited to:

- Placing barriers between an uncooperative subject and officers;
- Containing the threat;
- Decreasing exposure to the potential threat by using distance, cover and concealment;
- Avoidance of physical confrontation unless immediately necessary to protect someone or stop dangerous behavior;
- Using verbal techniques, such as “Listen and Explain with Equity and Dignity” (LEED) to calm an agitated subject and promote rational decision making;
- Calling extra resources, including CIT officers and officers equipped with less-lethal tools; and
- Using “any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject.

(*Id.*) De-escalation is inarguably a crucial component of the Department’s obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department’s policy and expectations.

As with the above allegations, the inquest jury’s findings of fact are again determinative here. The jury found that, prior to taking law enforcement action towards the Subject, NE#1 and NE#2 created a tactical plan, which involved calling other uniformed backing units to come to the scene. The tactical planning and summoning of additional resources constituted de-escalation. Moreover, when they decided to approach the Subject, they did so in a deliberate manner. They gave the Subject loud instructions to put his hands up and get on the ground. These actions and statements also constituted de-escalation.

While the Complainants believed that these orders were conflicting, NE#1 and NE#2 disagreed and explained that they had given similar directions to individuals numerous times in their careers without incident. While the inquest jury was evenly split as to whether the directions to the Subject to put his hands in the air and to get onto the ground were made at the same time, the jury did not explicitly find that those instructions were confusing to the Subject or that the Subject could not comply with them. To the contrary, the jury found that the Subject had ample room to get down to the ground and that he did, in fact, begin to raise his arms and lower his body. The jury further found, however, that, shortly after doing so, the officers perceived the Subject move his hand to his hip as if to access his handgun. At that point, and as NE#1 and NE#2 expressed in their FIT and OPA interviews, further de-escalation was no longer safe or feasible.



Given the above and when evaluating the findings of fact reached by the inquest jury, OPA concludes that NE#1 and NE#2 acted consistent with the Department's de-escalation policy during this incident. As such, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both NE#1 and NE#2.

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

Named Employee #2 - Allegations #1

Force - Use - 8.200 Using Force 1. Use of Force: When Authorized

For the same reasons as above (see Named Employee #1 – Allegation #1), OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**

Named Employee #2 - Allegation #2

Force - Use - 8.200 - Using Force 4. Use of Deadly Force

For the same reasons as above (see Named Employee #1 – Allegation #2), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #3

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

For the same reasons as above (see Named Employee #1 – Allegation #3), OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegations #4

Force - Use - 8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

For the same reasons as above (see Named Employee #1 – Allegation #3), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegations #1

Investigations and Reports - 15.180 - Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence

SPD Policy 15.180-POL-1 requires that, in primary investigations, officers conduct a thorough and complete search for



evidence. The policy further requires officers to collect evidence and states that only evidence that it impractical to collect shall be retained by the owner. (SPD Policy 15.180-POL-1.) Such evidence should be photographed. (*Id.*)

The Complainants alleged that NE#3, as the incident commander, was grossly negligent when he failed to photograph the handgun prior to having the white sedan towed to the Vehicle Processing Room. They advanced several theories under which NE#3 might have been permitted to sanction a vehicle search without a warrant.

However, the consensus among the officers at the scene, including NE#3 and the CIS Sergeant, was that a warrant was needed before they could access the sedan and there was no exception to the warrant requirement that was applicable. In evaluating the exceptions, OPA cannot say that NE#3 was clearly wrong in this respect.

First, there was no exigency to enter the sedan as the occupants were outside of the sedan and the scene was secured. Second, open view was inapplicable because the handgun was in the sedan and was, thus, not in an area open to the public. Third, plain view was also inapplicable because the officers did not believe that they had a lawful reason to be inside of the vehicle. Fourth, while the officers had a consent to search form that was executed by one of the occupants of the vehicle, NE#3 and the CSI Sergeant both explained that there was confusion as to who actually owned the sedan and, thus, whether consent was valid.

After further discussions between multiple SPD supervisors, NE#3 decided that the safer course of action was to obtain a warrant. NE#3 also chose to tow the sedan to the Vehicle Processing Room rather than to leave it where it was and wait for search warrant. Given NE#3's belief that inclement weather was approaching, it was not unreasonable for NE#3 to have the sedan towed, rather than leave it outside while waiting for the warrant. Indeed, there was other forensic evidence in the sedan that could have been undermined or destroyed and it was arguably in the best interest of the investigation to move the sedan to a controlled environment.

OPA notes that, shortly after this incident, the Washington Supreme Court held that a limited intrusion into a vehicle was permitted to secure an unsecured firearm or another item likely to burn, explode, or otherwise cause harm during a tow. *State v. Duncan*, 185 Wn.2d 430, 440-441 (2016). However, as this decision was issued after this incident, NE#3 could not have been aware of this exception at the time. Though in the future, the *Duncan* holding would provide a basis to seize a handgun in a case such as this one.

Ultimately, OPA finds that NE#3's decision-making the policies and law in place at the time. OPA further finds that his determination was made in good faith and with an intent to best preserve the evidence. NE#3 made his decisions in real-time and did not have the benefit of hindsight analysis or access to legal research. He had to make the best call that he could based on his training, experience, and the advice he obtained from other supervisors. He did so here and, accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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