



OFFICE OF PROFESSIONAL ACCOUNTABILITY

Closed Case Summary

Complaint Number OPA#2015-0655

Issued Date: 08/11/2016

Named Employee #1	
Allegation #1	<u>Seattle Police Department Manual</u> 5.001 (VII.A.1) Standards and Duties: Professionalism – Exercise of Discretion (Policy that was issued 05/12/09)
OPA Finding	Not Sustained (Inconclusive)
Allegation #2	<u>Seattle Police Department Manual</u> 6.240 (VII.A.1) Use of Force (Policy that was issued 07/16/09)
OPA Finding	Sustained
Allegation #3	<u>Seattle Police Department Manual</u> 5.001 (III.A.1) Standards and Duties: Knowledge and Adherence to Laws and Department Policies and Procedures (Policy that was issued 05/12/09)
OPA Finding	Sustained
Final Discipline	10 day suspension

Named Employee #2	
Allegation #1	<u>Seattle Police Department Manual</u> 5.001 (VII.A.1) Standards and Duties: Professionalism – Exercise of Discretion (Policy that was issued 05/12/09)
OPA Finding	Not Sustained (Unfounded)

Allegation #2	<u>Seattle Police Department Manual</u> 6.240 (VII.A.1) Use of Force (Policy that was issued 07/16/09)
OPA Finding	Not Sustained (Lawful and Proper)
Allegation #3	<u>Seattle Police Department Manual</u> 5.001 (III.A.1) Standards and Duties: Knowledge and Adherence to Laws and Department Policies and Procedures (Policy that was issued 05/12/09)
OPA Finding	Not Sustained (Unfounded)
Final Discipline	N/A

INCIDENT SYNOPSIS

The Named Employees were dispatched to a disturbance call at a bar.

COMPLAINT

The complainant, a supervisor within the Department, alleged that the Named Employees committed one or more criminal acts in connection with their use of physical force on or about 11/4/2010 and that some or all of the force used was not necessary and reasonable to effect a lawful purpose, contrary to Seattle Police Manual Section 6.240, which was in effect at the time of this incident.

INVESTIGATION

The OPA investigation included the following actions:

1. Review of the complaint memo
2. Search for and review of all relevant records and other evidence
3. Review of In-Car Videos
4. Interviews of SPD employees

ANALYSIS AND CONCLUSION

Named Employee #1 was acting at the time of this incident as the Field Training Officer (FTO) for Named Employee #2 who was a Student Officer at the time. The two of them, along with a third officer (Officer #3) were dispatched to a disturbance call at a bar. They were told that two men had been thrown out of the bar and were hanging around outside causing the bar owner (the 911 caller) to be concerned for her safety. The three officers arrived at roughly the same time in two different cars and made contact with the caller who pointed out the two subjects seated in a car parked in a nearby bank parking lot. None of the officers inquired further of the caller to determine the precise cause of her safety concerns. Named Employee #1 and Named

Employee #2 drove their police car to the bank parking lot and positioned their patrol car facing the driver's side of the red car. As the police car pulled into the lot, the emergency lights were activated, signaling to the men in the red car that they were being contacted by the police and were not free to leave. Named Employee #2 approached the driver's side of the red car and told the driver (Witness #1) to place his hands on the steering wheel. Named Employee #2 told the passenger seated in the rear seat of the car on the driver's side (Witness #2) to put his hands on the headrest in front of him. While Named Employee #2 was engaged with Witness #1 and Witness #2, Named Employee #1 walked to the passenger side of the red car and stood near the rear door on that side. He shined his flashlight into the passenger compartment of the car and told Witness #2 to pay attention to Named Employee #2. After a few moments, Named Employee #1 walked over to the driver's side of the red car, opened the rear door and removed Witness #2 by taking hold of his left arm, guiding him out of the car and around to the back of the red car. The actions of the officers up to that point clearly communicated to both men in the car that they were being detained and were not free to leave. Named Employee #1 further extended this detention by placing Witness #2 into handcuffs. At about the same time, a male (Witness #3) and a female (Witness #4) exited the front doors of the bank and walked toward the red car. Officer #3 engaged them in conversation and eventually told Witness #3 to move back, at the same time using her hand to push him back away from the car and toward the bank. Both Officer #3 and Named Employee #1 report that Witness #3 used his hand to bat away Officer #3's arm. Named Employee #1 walked towards Witness #3, grabbed him and pushed him back to the front doors of the bank. Witness #3 resisted and a struggle ensued between Witness #3 and Named Employee #1, with Officer #3 quickly coming to assist Named Employee #1. All three of them (Named Employee #1, Witness #3 and Officer #3) went down onto the sidewalk between the front doors of the bank and the red car. At issue here, with respect to Named Employee #1's exercise of discretion in this incident, was his decision to forcefully engage with Witness #3 by grabbing and pushing him back up against the front doors of the bank. While the situation was not stable when Named Employee #1 took this action, things quickly cascaded out of control after Named Employee #1 shoved Witness #3 back several feet. Assuming Witness #3 did push Officer #3's hand away, Named Employee #1 had the lawful authority to use reasonable and necessary force to push Witness #3 back and arrest him for assault on Officer #3. At the same time, it could be reasonably argued that Named Employee #1 could have used a less forceful and intrusive means to accomplish the same end and exercised poor judgment by unnecessarily provoking all four of the subjects and precipitating what turned into a dangerous and avoidable conflict.

Judging Named Employee #1's actions and decision-making in light of the SPD policies and training in effect in 2010, the OPA Director could not find a preponderance of evidence to either support or refute this allegation.

SPD Policy 6.240 (VII.A.1) states, "Officers may, in the performance of their official duties, use only the amount of force necessary and reasonable to effect the lawful purpose intended. When determining the necessity for force and the amount of force required, officers shall consider known circumstances, including, but not limited to, the level of threat or resistance presented by the subject, the danger to the community, and the seriousness of the crime." This same policy

defined “necessary” as being a circumstance in which, “no reasonably effective alternative to the use of force appeared to exist, and the amount of force used was reasonable to effect the lawful purpose intended.” The use of force by officers was authorized by RCW sections 9A.16.020 Use Of Force – When Lawful; RCW 9A.16.040 Justifiable Homicide Or Use Of Deadly Force By Public Officer, Peace Officer Or Person Aiding; and RCW 70.96A.120(2) Peace Officer Duties. Use of force, to include deadly force, less lethal force, or any other force option, may not be used where statutory requirements for the use of force cannot be satisfied.

Based on the video evidence and the testimony of all witnesses, including Named Employee #1, the OPA Director identified seven separate occasions during this incident when Named Employee #1 used force (excluding any *di minimis* uses of force). For the purpose of evaluating whether or not these seven distinct uses of force were consistent with SPD Policy 6.240 (VII.A.1), the OPA Director examined each one separately.

1. Named Employee #1’s punching of Witness #3 as he struggled with Witness #3 in front of the bank doors

This punch cannot be seen on the In-Car Video (ICV) of the incident given the distance, lighting and obstacles in the way. Equally obscured are the actions of Witness #3 immediately after he was pushed back by Named Employee #1 as well as the precise positioning of Witness #4 and Officer #3. Witness #3, who was interviewed over the phone through an interpreter, admitted to resisting and physically struggling with Named Employee #1. Based on the preponderance of the available evidence, it is the OPA Director’s opinion that this single punch by Named Employee #1 was necessary (as understood by SPD Policy at the time) in order to take Witness #3 into custody for assaulting both Officer #3 and Named Employee #1.

2. Named Employee #1’s taking of Witness #3 down to the ground in front of the bank doors

As was the case with the single punch by Named Employee #1 discussed above and in light of the continued physical resistance and struggle by Witness #3, it is the OPA Director’s opinion that Named Employee #1’s use of physical force to take Witness #3 to the ground was also necessary (as understood by SPD Policy at the time).

3. Named Employee #1’s biting of Witness #4’s finger

Unfortunately, little of what took place immediately before this bite can be seen on the ICV because it took place behind the red car. Named Employee #1 told OPA that Witness #4 got on his back as he was struggling on the ground with Witness #3, placed her finger like a “fishhook” into his mouth and began to pull on his mouth. Witness #4, who was interviewed in person through an interpreter, recalls facing Named Employee #1 and merely gesturing with her hand in front of his face when he bit her without, in her opinion, any provocation. The OPA Director could not find sufficient evidence to determine whether or not this particular use of force was consistent with SPD use-of-force policy at the time.

4. Named Employee #1's taking of Witness #2, who was already in handcuffs, down to the ground on the sidewalk between the back doors and the red car

In his OPA interview, Named Employee #1 said he became aware Named Employee #2 was struggling with Witness #1 at the front of the red car. He realized he needed to come to the aid of Named Employee #2, a student officer at the time, but felt uncomfortable leaving Officer #3 alone with three subjects he considered combative, Witness #2, Witness #3 and Witness #4. Named Employee #1 was particularly concerned Witness #2 might attempt to harm Officer #3 by head-butting or kicking her. According to Named Employee #1, he quickly pushed Witness #2 to the ground to lessen the risk Witness #2 might harm Officer #3 while he ran to the other side of the red car and assisted Named Employee #2. Given the totality of the circumstances at that time, it is the OPA Director's opinion that Named Employee #1's use of physical force to take Witness #2 to the ground was necessary (as understood by SPD Policy at the time).

5. Named Employee #1's kick to the midsection of Witness #1

In his OPA interview, Named Employee #1 admitted to kicking Witness #1 immediately after he (Named Employee #1) came around the back of the red car to the driver's side. The video clearly shows this kick as Witness #1 and Named Employee #2 were struggling on the ground. At the time, Witness #1 was physically resisting Named Employee #2's efforts to control him. This situation was readily apparent to Named Employee #1 as he rounded the corner to the driver's side of the red car. Named Employee #1's only justification for kicking Witness #1, as articulated during his OPA interview, was to let Witness #1 know, "that there was another officer there and that he was going to be subdued, and that was one of the ways I was going to subdue him" (OPA interview page 10 of 28). Some use of physical force by Named Employee #1 to help control Witness #1 was reasonable and necessary to prevent injury to Named Employee #2 and help take Witness #1 into custody. SPD policy at the time defined "necessary" as "no reasonably effective alternative to the use of force appeared to exist, and the amount of force used was reasonable to effect the lawful purpose intended." Named Employee #1 had a number of alternative ways to communicate his presence to Witness #1, some involving less force than a kick and some using no force at all (such as speaking to him). Perhaps the following statement made by Named Employee #1 during his OPA interview in reference to this kick is most indicative of his state of mind and possible motive when he kicked Witness #1, "I just, I was just in a fight with a guy over there and he's throwing punches at me and everything else. I mean, I'm, I'm a little bit riled-up right there, and I'm gonna make sure this guy right here gets taken into custody." After giving careful consideration to all the evidence and the totality of the circumstances known to Named Employee #1 at the time, the OPA Director concluded this kick served no lawful purpose and was not "necessary" as understood by SPD Policy 6.240 (VII.A.1) in effect at the time of this incident.

6. Named Employee #1's approximately seventeen (17) punches to Witness #1's face and head

Following his kick to Witness #1's side, Named Employee #1 knelt down next to Witness #1, who was lying on his back and swinging his hands at Named Employee #2. Named Employee #1 attempted to get hold of Witness #1's hands as Named Employee #2 delivered two punches to Witness #1's head. It appears that Named Employee #2 was then able to get hold of Witness #1's right hand and roll him slightly onto his (Witness #1's) left side. At this point, Named

Employee #1 delivered three punches to the right side of Witness #1's head. The evidence shows Witness #1 was actively resisting the officers' efforts to restrain him. It is less clear whether Witness #1's flailing hands were an indication of assaultive or defensive behavior. Nonetheless, it was not unreasonable for Named Employee #1 to view this behavior as assaultive. Given SPD's use-of-force policy at the time and the force training SPD officers had been given prior to this incident, the OPA Director found the first three punches by Named Employee #1 to the right side of Witness #1's head were not unreasonable as understood by SPD Policy 6.240 (VII.A.1) in effect at the time of this incident. Named Employee #1 then placed his knee and some of his weight onto Witness #1's right shoulder/neck area and took hold of Witness #1's left hand (Witness #1's upper left arm was pinned beneath his left side by the weight of Named Employee #1's knee). Over the course of the next several seconds, Named Employee #1 punched the face of Witness #1 approximately 14 more times. Witness #1 was no longer assaultive once Named Employee #1 pinned him to the ground and as both officers held his arms. He was defenseless and unable to shield his face from the repeated blows Named Employee #1 was delivering to his face. Photographs of Witness #1's face taken later that night documented the extent of the injuries he sustained as a result. After Named Employee #1 stopped hitting Witness #1, he told Named Employee #2 to get a handcuff on Witness #1's right wrist, which he did. Named Employee #1 then removed his weight from Witness #1 and the two officers rolled Witness #1 over onto his stomach and finished handcuffing him. Named Employee #1 was unable to explain to OPA why, once he and Named Employee #2 had hold of Witness #1's hands and had pinned him to the ground, it was necessary for Named Employee #1 to punch Witness #1 in the face 14 times before rolling him onto his stomach and handcuffing him. The OPA Director found these punches were unnecessary and inconsistent with SPD Policy 6.240 (VII.A.1) in effect at the time of this incident.

7. Named Employee #1's kick or stomp to Witness #3 who was still handcuffed and located on the sidewalk between the back doors and the red car

The ICV of the incident shows Named Employee #1 get up from helping handcuff Witness #1 on the driver's side of the red car and walk around the back of the car. A few seconds before this, viewed through the windows of the red car, someone's head and shoulder appears from behind the car and then go back down out of view just as Named Employee #1 was rounding the back of the red car heading toward the sidewalk. The person seen through the window appears to be Witness #3. As Named Employee #1 walked around the right rear corner of the red car and began to disappear from camera view, it looks like Named Employee #1 pulled his right foot back as if in preparation to deliver a kick. The movement of NE#'s upper body seen through the car windows combined with the sound of a groan appear to be indicators that Named Employee #1 kicked or otherwise struck someone with his foot. Named Employee #1 told OPA he used his foot to push Witness #3 back down onto the ground. OPA was unable to find any other evidence or witness testimony to prove whether this action by Named Employee #1 was a kick delivered to a handcuffed prisoner (Witness #3) or a push to keep that prisoner safely on the ground.

The preponderance of evidence supports the conclusion that some of Named Employee #1's use of force was consistent with SPD Policy 6.240 (VII.A.1) in effect at the time of this incident.

Some of the force used by Named Employee #1 could not be determined to be consistent with policy due to insufficient evidence. However, the OPA Director did find that a preponderance of evidence exists to show that some of the force used by Named Employee #1 was not consistent with SPD policy. Specifically, Named Employee #1's kick to Witness #1's midsection and the approximately 14 punches to Witness #1's face as he lay restrained and pinned to the ground were not consistent with SPD Policy 6.240 (VII.A.1) in effect at the time of this incident.

Force necessary to overcome resistance, bring about an arrest or otherwise further a lawful purpose is, by definition, lawful force (see RCW 9A.16.010, 9A.16.020 and 10.31.050). For the purpose of evaluating whether or not Named Employee #1 violated the law, this analysis will focus only on that use of force the OPA Director already had concluded was not necessary and which, as a result, violated SPD Policy 6.240 (VII.A.1). Specifically, this analysis will focus on the kick by Named Employee #1 to Witness #1's midsection and the approximately 14 punches by Named Employee #1 to Witness #1's face as he lay restrained and pinned to the ground. Both the RCW (9A.36.041 – assault in the fourth degree) and the SMC (12.06.010 – assault) list assault as misdemeanor criminal offenses. While neither code specifically defines the term “assault,” Washington State case law and jury instructions define assault as an unlawful or offensive touching or striking (actual battery). The issue to be addressed in this particular instance is whether or not Named Employee #1's kick and/or his 14 punches amounted to an assault of Witness #1. To be lawful, either one would need to have been “necessary” (see RCW 9A.16.010). As has already been stated above, the preponderance of the evidence from this investigation shows that neither the kick to Witness #1 by Named Employee #1 nor the 14 punches to Witness #1's face while he was pinned to the ground with both hands restrained were necessary to bring about some lawful purpose. For this reason, the OPA Director recommended a finding of sustained for this allegation.

The preponderance of the evidence supports the conclusion that Named Employee #2 (Named Employee #2), a student officer at the time, took no law enforcement action during this incident that constituted an inappropriate exercise of discretion.

Nearly all of the force used by Named Employee #2 during this incident was *de minimis* and considered non-reportable under SPD policies in place at the time. Examples of this sort of force used by Named Employee #2 were using his hands to grab, push or pull, along with his use of his leg to “sweep” Witness #1 to the ground. Given the preponderance of the evidence from this investigation the OPA Director found this use of force by Named Employee #2 to have been necessary to control the various subjects, prevent injury to the other two officers and complete a lawful arrest of Witness #1 for assaulting Named Employee #1. Once Witness #1 was on the ground on the driver's side of the red car, Named Employee #2 struck Witness #1 twice with his fists; once to the chest and once to the face. At the time, Witness #1 can be seen on the ICV flailing his hands and moving about on his back. Named Employee #2 stated in his initial use-of-force report and again during his OPA interview that Witness #1 hit him on the right ear after they went to the ground. While it was not possible to see actual contact between Witness #1 and Named Employee #2's right ear, contact of this sort would have been consistent with what can be seen on ICV. For this reason, the OPA Director found the preponderance of

the evidence shows Named Employee #2's two punches were necessary and consistent with SPD Policy 6.240 (VII.A.1) in effect at the time of this incident. Finally, Named Employee #2 also reported he delivered a knee strike to the stomach of Witness #1 while Witness #1 was still struggling with the two officers. This strike was also not clearly visible in the ICV, but was reported to have occurred while Witness #1 was still actively struggling with the officers and before his hands were both restrained. Under these conditions, a knee strike would be necessary to gain control as defined by SPD Policy 6.240 (VII.A.1) in effect at the time of this incident.

In light of the fact that the OPA Director found the use of force by Named Employee #2 to be consistent with SPD Policy 6.240 (VII.A.1) in effect at the time of this incident, the OPA Director also found that the preponderance of the evidence from this investigation supports the conclusion that Named Employee #2 did not commit a criminal assault in any of his use of force.

FINDINGS

Named Employee #1

Allegation #1

There was no preponderance of the evidence to either support or refute this allegation against Named Employee #1. Therefore a finding of **Not Sustained** (Inconclusive) was issued for *Standards and Duties: Professionalism – Exercise of Discretion*.

Allegation #2

The evidence showed that Named Employee #1 violated SPD policy. Therefore a **Sustained** finding was issued for *Use of Force*.

Allegation #3

The evidence showed that Named Employee #1 violated SPD policy. Therefore a **Sustained** finding was issued for *Standards and Duties: Knowledge and Adherence to Laws and Department Policies and Procedures*.

Discipline imposed: 10 day suspension

Named Employee #2

Allegation #1

The preponderance of the evidence supports the conclusion that Named Employee #2, a student officer at the time, took no law enforcement action during this incident that constituted an inappropriate exercise of discretion. Therefore a finding of **Not Sustained** (Unfounded) was issued for *Standards and Duties: Professionalism – Exercise of Discretion*.

Allegation #2

The preponderance of the evidence showed the force used by Named Employee #2 to have been necessary and proportional. Therefore a finding of **Not Sustained** (Lawful and Proper) was issued for *Use of Force*.

Allegation #3

The preponderance of the evidence from this investigation supports the conclusion that Named Employee #2 did not commit a criminal assault in any of his use of force. Therefore a finding of **Not Sustained** (Unfounded) was issued for *Standards and Duties: Knowledge and Adherence to Laws and Department Policies and Procedures*.

NOTE: The Seattle Police Department Manual policies cited for the allegation(s) made for this OPA Investigation are policies that were in effect during the time of the incident. The issued date of the policy is listed.