



## CLOSED CASE SUMMARY

ISSUED DATE: NOVEMBER 30, 2018

CASE NUMBER: 2017OPA-0119

### Allegations of Misconduct & Director's Findings

**Named Employee #1**

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Management Action)
# 2	5.120 - Secondary Employment II. Responsibilities I. All employees working off-duty or secondary employment must be equipped with their portable radio [...]	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:

On 2/2/2017 NE#1 was working in an off-duty capacity at the Fred Meyer store located at 100 NW 85 St. At about 1450 hours he was informed by loss prevention that a male subject had concealed a bottle of alcohol inside his jacket and was heading for the store exit. NE#1 contacted the subject along with store loss prevention after the subject had passed through the first set of exit doors and subsequently activating the anti-theft sensors. The subject returned the bottle of alcohol to loss prevention and was asked to come back into the store by loss prevention in order to be identified and processed. The subject refused and attempted to flee. NE#1 attempted to physically detain the suspect. The suspect broke free from NE#1 and ran to a waiting vehicle. While the subject was fleeing, NE#1 deployed his TASER which was ineffective. Prior to this incident, NE#1 had not logged into service as an off-duty "Victor" unit.

### ADMINISTRATIVE NOTE:

For the reasons stated below, OPA amended its decision in this case and changed the Sustained finding in Allegation #1 to a Management Action Recommendation.

### ANALYSIS AND CONCLUSIONS:

#### **Named Employee #1 - Allegation #1**

#### **Force – Use, 8.200 - Using Force 1. Use of Force: When Authorized**

In the initial DCM issued in this case, the former OPA Director recommended that this allegation be Sustained. His reasoning is set forth below:

In this particular instance, the Named Employee (NE) sought to arrest a subject for the misdemeanor crime of theft. The NE and a loss prevention officer confronted the subject and, when he tried to get away, the NE grabbed the subject's arms to prevent him from



leaving. The subject was able to overcome the NE's efforts to take him into custody and fled down a set of stairs. It was at this point, when the subject was fleeing down the stairs, that the Named Employee chose to deploy his TASER in an effort to apprehend the subject.

At the point when the NE deployed the Taser, the subject was no longer a threat to himself or others, nor did the interests of public safety dictate that the subject needed to be taken into custody. The subject was simply fleeing from apprehension for a minor property crime. Given that the totality of the circumstances, in particular that the subject was fleeing from arrest for a misdemeanor property crime and the NE had no reasonable basis to believe the subject was an immediate threat to him (the NE) or to the public, I find this use of force (TASER deployment) was not objectively reasonable, necessary, or proportionate. For this reason, I recommend a finding of Sustained.

After this case was investigated and this decision issued, OPA evaluated a similar case – 2017OPA-0318. In that case, the subject was involved in a pursuit and crashed his vehicle into oncoming traffic. He ran from the vehicle and was chased by an officer. The subject came to a fence and the officer pulled him backwards. The subject and the officer circled each other and the subject then ran away. While the subject was running away on the paved road, the officer tased him in the back, causing him to fall down and suffer injuries. OPA initially found that the officer had violated the use of force and Taser policies and recommended that this allegation be Sustained. At the discipline meeting, the Chain of Command indicated their disagreement with OPA's decision and opined that the officer had acted consistent with training. As a result, OPA agreed to conduct additional investigation to look at the training to determine if the Chain of Command was correct. Given the factual similarities between 2017OPA-0318 and this case, OPA agreed that, depending on what its additional investigation yielded, it may be appropriate to also reconsider the Sustained finding here.

Based on its additional investigation, OPA determined that both NE#1 and the officer in 2017OPA-0318 acted consistent with their training when they used their Tasers. That being said, OPA still had concerns with the officers' actions and the lack of any specific discussion in training of tasing individuals on or around stairs or individuals running on concrete. This was the case even though both scenarios were cautioned against in Taser's own user manual. OPA further noted that, while it was in the Department discretion to allow such conduct, it seemed that the courts were trending towards finding such Taser applications to be in violation of the Fourth Amendment. OPA's reservations aside, given its conclusions, OPA reversed its finding in 2017OPA-0318 from a Sustained finding to a Management Action Recommendation. OPA similarly reverses its finding here and recommends that this allegation also be Not Sustained – Management Action Recommendation.

- **Management Action Recommendation:** OPA refers to the Management Action Recommendations issued in 2017OPA-0318 and 2018OPA-0061, wherein OPA recommended that the Department amplify its Taser training. OPA specifically recommended that the Department train officers regarding the scenarios faced in this case and in 2017OPA-0318 (subject running away from the officer on concrete). Lastly, in 2018OPA-



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0061, OPA recommended that the Department review the second prong set forth in SPD Policy 8.300-POL-3(4) and consider whether it is unworkably broad.

Recommended Finding: **Not Sustained (Management Action)**

**Named Employee #1 - Allegation #2**

**Secondary Employment - 5.120 - Secondary Employment II. Responsibilities I. All employees working off-duty or secondary employment must be equipped with their portable radio [...]**

According to the NE, this incident occurred just prior to his shift starting at 1500. Given the nature of the store configuration which created poor radio reception in the store, the opportunity to radio was not afforded to the NE prior to the unfolding of events. Given these facts, I recommend a finding of Not Sustained (Unfounded).

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



# Seattle Office of Police Accountability

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December 18, 2018

Chief Carmen Best  
Seattle Police Department  
PO Box 34986  
Seattle, WA 98124-4986

Dear Chief Best:

Please see the below Management Action Recommendation.

**Case Number**

- 2017OPA-0119

**Topic**

- Use of Force Tools (Taser)

**Summary**

- It was alleged that the Named Employee violated *SPD Policy 8.300 (4) – Use of Force Tools* by deploying a Taser without an objectively reasonable cause.

**Analysis**

- SPD Policy 8.300-POL-3 mandates that Tasers only be used when objectively reasonable, and refers to Policy 8.000, which specifically delineates two scenarios in which Taser use is appropriate: 1) “When a subject causes an immediate threat of harm to the officer or others”; and 2) “When public safety interests dictate that a subject needs to be taken into custody and the level of resistance by the subject is likely to cause injury to the officer or to the subject if hands on control tactics are used.”
- OPA determined that in this case the employee acted consistent with training when he deployed his Taser. However, there are still concerns with the officer’s actions considering the subject was fleeing from arrest for a misdemeanor property crime and the officer had no reasonable basis to believe the subject was an immediate threat to him or to the public.

**Recommendation(s)**

- Review the second prong of 8.300-POL-3(4) to include more explicit explanations of what constitutes “public safety interests” and what conduct meets the requisite “level of resistance” from the subject.
- Amplify Taser training to address standards for Taser deployment on fleeing subjects near stairs or concrete and define what constitutes an imminent risk of harm, justifying use of a Taser.
- Taser training recommendations have additionally been issued in the MARs for cases 2017OPA-0318 and 2018OPA-0061.

Thank you for your consideration of this matter. I look forward to your response.

Sincerely,

Andrew Myerberg  
Director, Office of Police Accountability