



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 19, 2017

CASE NUMBER: 2017OPA-0315

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 | 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:

North Precinct Bike Officers made contact with the subject and a juvenile female in the area of N. 107 & Aurora AV N. after observing allegedly suspicious activity involving a possible car prowl. The subject was told he was not free to leave by officers. The subject then fled on foot across Aurora AV N. As the subject crossed into the southbound lane of travel, he was struck by a minivan travelling between 30-40 MPH, causing extensive damage to the vehicle. The subject was able to get up and continued to flee from officers into the parking lot of a business where he was seen throwing a container that was later recovered and found to contain heroin. A citizen in the parking lot observed the suspect fleeing and was able to take him down to the ground and held him until officers arrived. Once officers made contact with the subject, force, including multiple knee strikes by Named Employee #1 (NE#1), was used. The Seattle Fire Department responded and transported the subject to Harborview Medical Center for his injuries. TCIS responded and processed the traffic collision. FIT initiated a use of force investigation. OPA later initiated this complaint as the subject had made statements that NE#1 used excessive force while arresting him.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

The specific allegation in this case is that the knee strikes to the subject’s side by NE#1 were in violation of SPD’s use of force policy. NE#1 asserted, to the contrary, his belief that the force was within policy and was consistent with his training. (See NE#1 OPA Interview, at pp. 7-14, 19.) As explained below, I disagree.

Statement of Facts

The subject and a juvenile female were observed in an alley. (Officer Harrington General Offense Report.) Officers believed that they were engaged in suspicious behavior, based on the high drug activity and car prowls that occur in that vicinity. (*Id.*) After a period of time, and after observing the subject and the juvenile female walking up to and looking into cars, officers approached the subject. (*Id.*) Officers informed the subject that he was being detained and was not free to go. (*Id.*) The subject first asked “why” and said “we didn’t do nothing.” (*Id.*) Officer Harrington then



said “come here” and the subject ran away. (*Id.*) The subject ran out into and across Aurora Avenue. (*Id.*) Once the subject crossed into the southbound lane, he was struck by a taxicab. (*Id.*) Officer Harrington reported that he believed the subject to be injured. (*Id.*) The subject’s shoes had been knocked off and he was temporarily motionless. (*Id.*) However, the subject then got up and again started running away, apparently without injury. (*Id.*)

The subject ran through a parking lot and then jumped over a wall into a gravel pit in an adjacent lot. (*Id.*) Several employees who worked in a business located on the lot intercepted the subject and held him until police arrived. (Surveillance Video #6, at 00:40 – 00:50.) Surveillance video obtained from the business shows the subject being held by the employees. (*Id.*) He does not appear to be actively trying to get away from them. (*Id.*) Notably, at that point, one of the employees that is holding the subject appears to be speaking to the subject and the subject is lying still and not moving. (*See id.*) The video then captures NE#1 arriving on the scene on his bike. (*Id.* at 00:49 – 00:50.) He gets off the bike and immediately engages the subject with force. (*Id.* at 00:50-01:17.) NE#1 places his weight on what appears to be the subject’s front left shoulder area, apparently using that weight to hold him down. (*Id.*) At one point, NE#1’s forearm appears to contact the subject in or around his face area. (*Id.*) Other officers arrive when the subject is on his back and they are able to flip him over onto his stomach. (*Id.*) At that point, three officers are surrounding the subject. (*Id.*) Officer Sexton, who is to the subject’s right, appears to have a secure hold of the subject’s right arm. (*Id.*) Officer Tryker is behind the subject and appears to have secured the subject’s legs. (*Id.*) NE#1 has moved to the subject’s left side and appears to be trying to pull the subject’s left arm from underneath his body. (*Id.*) At this point, the subject is lying on his stomach. (*Id.*) His head is up and he is facing forward. (*Id.*) At times, the subject appears to move his head to look at NE#1, but he does not turn his body towards NE#1. (*Id.*) The subject further does not get up off of the ground. (*Id.*) While the video has no audio, the subject appears to be speaking. (*Id.*) NE#1 then applies two knee strikes to the subject’s left side. (*Id.*) NE#1 moves to the top left of the subject’s body and places his knee on the top of the subject’s head, forcing the subject’s face into the ground. (*Id.*) After a short period of time, the officers are able to place the subject into handcuffs. (*Id.*) At no point during the incident does the subject try to push, kick or strike the officers. (*Id.*) Further, based on my review of the video, the subject does not appear to represent an immediate threat of physical harm to any of the officers or to the bystanders in the near vicinity. (*See id.*)

At his OPA interview, the subject stated that he was grabbed by his collar and pushed into the ground, that an officer threatened to punch him in the face, and that he was repeatedly kneed in the ribs. (*See Subject OPA Interview.*) NE#1 denied grabbing the subject by his collar, and the video is inconclusive on this question. (*See Surveillance Video #6.*) However, the video clearly shows NE#1 forcefully interacting with the subject when he is on his back and then again using force to flip the subject over. (*See id.*) NE#1 admitted threatening to punch the subject in the face (which, I believe, would have been indisputably out of policy given the circumstances of this case), and said that he did so in the hope that it would cause the subject to listen to the officers’ commands. (NE#1 OPA Interview, at pp. 8-9.) NE#1 stated that the only force he used on the subject was the knee strikes. (*Id.* at p. 7.) NE#1 believed that he could have possibly kneed the subject up to five times, but did not recall the exact number. (*Id.* at pp. 12-13.) NE#1 denied that he kneed the subject in the ribs, and stated that he instead purposefully kneed the subject in the hip area. (*Id.* at p. 12.) NE#1 justified his force on the basis that he could not see the subject’s hand and his first attempt to pull the subject’s hand out from underneath his body was unsuccessful. (*Id.* at pp. 6-7, 12.) NE#1 further stated that this was a trained tactic and in applying the knee strikes he acted consistent with his training. (*Id.* at p. 19.)



The Use of Force Was Outside of Policy

Manual 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.” (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.*) These three factors and my conclusions as to each are outlined below.

Reasonableness Factor

First, with regard to reasonableness, virtually every single factor weighs in favor of a finding that the force was outside of policy.

- **Severity of the Offense:** At the time of the incident, NE#1 was aware that the subject was being pursued for a non-violent offense that was almost certainly a misdemeanor. (*See* NE#1 OPA Interview, at pp. 15-16.) I note that, based on my review of the records associated with this case, it is unclear what reasonable suspicion even existed to make the detention in the first place. (*See, e.g.,* General Offense Report; Officer Harrington OPA Interview; Officer Tryker OPA Interview.) At the time the subject ran, the officers had no evidence that the subject was involved in any narcotics activity, let alone felony possession or distribution. The officers only learned later that the subject threw drugs away while running from the officers when those drugs were recovered by a civilian. (*See* Officer Sexton Felony Statement.)
- **The Level of Threat or Resistance:** The threat posed to the officers was minimal. The subject was on his stomach, his legs and right arm was secured, and NE#1 (who weighs 250 pounds) had his bodyweight on the top half of the subject’s body. (*See* Surveillance Video #6, at 00:50 – 01:17.) While the subject refused to bring his left hand from under his body, he was not trying to strike or kick the officers and was not trying to get up. (*See id.*) Accordingly, while the subject was not passive, he was not displaying aggressive resistance that presented a serious danger to the officers.
- **Potential Threat to the Community:** While there were bystanders in the area, several of them had previously taken the subject down to the ground without incident. (*See id.*) They were in no further danger (if they ever were at all) from him once he was almost entirely subdued by the three officers.
- **Potential of Injury to Bystanders and Officers:** As explained above, the threat was minimal with regard to the officers and nonexistent with regard to the bystanders.
- **The Risk or Apparent Attempt by the Subject to Escape:** Given his position on the ground and given that one arm was held by Officer Sexton and his legs were held by Officer Tryker, there was no risk that the subject was going to escape. Moreover, the subject made no attempt to turn his body or get up, and took no actions that were consistent with an attempted escape. (*See id.*)



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- **The Conduct of the Subject:** As described herein, while the subject was refusing to allow his left hand to be pulled out from underneath his body, he was not aggressively resisting the officers or subjecting them to any physical harm.
 - **The Time Available to the Officer to Make a Decision:** NE#1 had significant time to make the decision on whether to use the knee strikes. Again, there were two other officers on the scene that had secured one of the subject's arms and the subject's legs. NE#1 attempted to pull the subject's left arm out only once prior to the knee strikes. (See NE#1 OPA Interview, at p. 12.) In using the knee strikes immediately thereafter, NE#1 acted with an exigency that did not exist. Notably, at his OPA interview, NE#1 stated that while his threat to punch the subject in the face was purposed to effectuate compliance, he would have punched the subject in the face for simply flailing his body around because flailing could harm an officer. (See *id.* at pp. 8-9.) This is a fundamental misunderstanding of Department policy and training.
 - **The Availability of Other Resources:** There were numerous other resources available to NE#1, including, as discussed below, the Cross Face hold that the Department trained for use in exactly this type of scenario. (See SPD Use of Force Skills Training, at pp. 10-13.)
 - **The Training and Experience of the Officer:** NE#1 has been with the Department since January 2009 and for the last two years he has worked in the Bikes Unit. (NE#1 OPA Interview, at pp. 1-2.) NE#1 stated that he is up to date with SPD's use of force policies. (*id.* at p. 2.) NE#1 further referred to his training throughout his OPA interview and indicated that he had been trained as to using force and, specifically, as to using knee strikes on resisting subjects. (See, e.g., *id.* at p. 19.)
 - **The Subject's Proximity to or Access to Weapons:** While NE#1 stated his belief that the subject could have access to a weapon (see *id.* at pp. 7, 10-11, 16), NE#1 had no factual basis for that assumption aside from his perception that the subject's hand was near his waist where weapons can be kept. (*id.* at p. 11.) It is true that any suspect could have a weapon, but if that logic was followed then it would always be appropriate for an officer to use intermediate or higher level force during an arrest. This is not what is contemplated by SPD's policy and training or, for that matter, the United States Constitution. There has to be more than supposition that a weapon exists. Here, however, such evidence did not exist: the subject was not suspected of committing violent crime; had not displayed a weapon; and had not caused physical harm to anyone in the moments prior to his arrest.
 - **Officer Versus Subject Factors:** As stated above, NE#1 is a self-described 250-pound officer that works out. (See *id.* at pp. 5, 12.) Based on a review of the video, the subject was significantly smaller. (See Surveillance Video #6, at 00:41 – 01:17.) The subject had further just been sprinting away from the officers and was presumably tired if not exhausted, while NE#1 had been following behind him on a bike and expending less energy. Lastly, the subject had just been hit by a taxicab, thrown approximately 100 feet, and, based on officer observations, potentially seriously injured. (See Officer Harrington Use of Force Report.) As such, it logically follows that NE#1 had a significant size, strength, and physical condition advantage over the subject.

While none of the above factors are by themselves determinative, that the factors virtually unanimously weigh against reasonableness supports a determination that the force was outside of policy.



Necessary Factor

With regard to whether the force was necessary, I find that, as indicted above, there were other reasonably effective alternatives to the knee strikes, including other trained tactics, and that the degree of force was thus not reasonable under the specific circumstances of this case.

Proportionality Factor

Lastly, with regard to the proportionality of the force, the force ultimately applied was not commensurate with the threat facing NE#1. Less significant force could have been used in this situation to achieve the goal of handcuffing the subject, including trained techniques that NE#1 failed to apply.

For these reasons, the knee strikes by NE#1 were outside of policy.

The Force Was Inconsistent with Training

NE#1 also contended that the force he used was consistent with his training. (NE#1 OPA Interview, at p. 19.) I believe this to be inaccurate. During its investigation, OPA obtained the training curriculum in this area. The training, which is entitled "Use of Force Skills Module 2: Threat Assessment and Prisoner Control," contemplates three types of resistance from arrestees. Obviously, these categories are not exclusive and there are varying degrees of each.

The first scenario, popularly referred to as "turtling," is when subjects display static resistance that prevents officers from securing the subjects' hands. (See SPD Use of Force Skills Training, at pp. 10-13.) Often this is exemplified by subjects keeping their hands under their bodies or by their sides. (See *id.*) Here, officers are trained to use control holds; specifically, a hold called the "Cross Face." (See *id.*)

The second scenario is exemplified when subjects try to turn and face the officer or actively attempt to get off the ground. (See *id.* at pp. 14-16.) The specific training provided by the Department involves a subject who has gotten off the ground, is on all fours, and is trying to grab an officer's leg. (See *id.* at p. 14.) In this scenario, the subjects are escalating their resistance to a point where their conduct becomes aggressive and officers are at increased risk of harm. (See *id.* at pp. 14-16.) Here, officers are trained to use intermediate force, including knee strikes. (See *id.*)

The third and most serious scenario involves where the resistance rises to the level of a potentially deadly assault (see *id.* at pp. 17-18); however, this last scenario is not germane to this case and is not discussed herein.

As analyzed more fully above, at the time NE#1 struck the subject with this knee, the subject's body was positioned with his chest to the ground and his head facing forward. (See Security Camera #6, at 00:50-01:17.) While both of the subject's arms were not in the classic "turtle" position and while the subject was certainly not complying with the officers' orders, the subject was not turning his body to face NE#1 at the time of the knee strikes. (See *id.*) Moreover, the subject was not trying to get off the ground and did not do so. (See *id.*) The subject never struck, kicked or otherwise physically assaulted the officers. (See *id.*) Notably, at the time of the knee strikes, NE#1 had his weight on the subject's left side, Officer Sexton was holding the subject's right arm, and Officer Trykar had control over the subject's legs. (See *id.*) As such, three officers largely had control over a non-violent misdemeanor arrestee that the officers knew had just been struck and potentially seriously injured by a taxicab.



As stressed by the Department in its training: “Absent clearly recognizable de-escalation factors in the totality of the circumstances, a suspect who makes attempts to get to their feet or to face the officer is being aggressive and has escalated beyond resisting arrest.” (SPD Use of Force Skills Training, at p. 14-15.) Phrased a different way, where a suspect is not trying to turn to face the officer or to get off the ground, the situation has not escalated beyond resisting arrest and intermediate force is neither consistent with training nor policy. The video clearly indicates that the subject did not do either. Moreover, there were other tactics available to NE#1 to de-escalate the situation and lower levels of force that could have been utilized. Given the above, using knee strikes on the subject was inconsistent with NE#1’s training.

As the force used by NE#1 was not consistent with either Department policy or training, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

ADDITIONAL INVESTIGATION:

OPA initially recommended that this allegation be Sustained. However, based on discussions at the *Loudermill* hearing, OPA agreed to conduct additional investigation to determine what training NE#1 received concerning when it was appropriate to use knee strikes on an individual in circumstances similar to the subject in this case. As part of that re-investigation, OPA interviewed three employees assigned to SPD’s Training Unit. All three employees were identified by NE#1 and his representatives as opining that the force was within policy.

The additional investigation conducting by OPA has not changed my conclusion that this allegation should be sustained as against NE#1. All three Training Unit employees reviewed only portions of the record – namely, NE#1’s force report and the video – that were presented to them by NE#1 and another officer. They did not review the Named Employee’s statement to OPA, any of the witness statements or interviews, or, for that matter, OPA’s analysis and findings.

Two of the officers indicated that they gave official opinions as members of the Training Unit. Their supervising Sergeant indicated that he was not asked whether he would authorize those officers to give official opinions and he did not, in fact, authorize them to do so. The Sergeant further stated that he, himself, did not give any opinion, official or otherwise, as to whether he believed the force to be within policy and consistent with training.

Given that the Sergeant was the supervisor of both officers and as they were not authorized to give official opinions, I do not place any weight on their conclusions. I instead evaluate the Sergeant’s assessment that was provided to OPA during his recent interview.

The Sergeant recalled viewing the video, but he did not recall being shown NE#1’s statement or OPA’s findings. The Sergeant described that, during his meeting with NE#1 and the other officer, he did not provide an opinion as to whether the force was within policy or consistent with training. He instead pointed them to training materials to review in advance of the *Loudermill*.



In response to OPA's questions, the Sergeant stated that, based on what he knew, the force could likely have been consistent with policy. The Sergeant indicated that the Department trained that where a subject was trying to get off the ground or turn his body, knee strikes were appropriate. OPA reviewed this training in reaching its initial findings.

The Sergeant stated that it was his understanding that at the time of the force, the subject was "trying to get back up." The Sergeant indicated that this information was learned from NE#1. However, that the subject was trying to get up is, in my opinion, inconsistent with the video. Moreover, during his OPA interview, NE#1 stated that he used the knee strikes because he could not pull the subject's left hand out from underneath his body and was concerned that he was reaching for a weapon. NE#1 stated that he used the knee strikes as pain compliance to ensure that the subject's hand came out from underneath his body and, once he was able to pull out and secure the hand, there was no need to use further force.

The Sergeant noted that the force reasonable for a solo officer could be different than that for a three officer team. The Sergeant further stated that there is less of an expectation that a solo officer, rather than an officer who is part of a three officer team, would use the trained cross-face technique. The Sergeant stated that the cross-face would be appropriate where the subject is resisting by muscular tension, rather than when the subject is actively attempting to escape. Based on my review of the video, as well as from my reading of NE#1's statement, I do not believe that the subject was trying to get off the ground, let alone escape, and I find that he was simply resisting NE#1's attempt to pull his left hand out from under his body. Here, NE#1 was part of a three-person team in effectuated the subject's arrest and he had other force options, including the trained cross-face, that were more reasonable, necessary and proportional under the circumstances.

As stated above, OPA read the entirety of the training referenced by the Sergeant in reaching its initial findings and has also, like the Sergeant, evaluated numerous uses of force and determined whether those cases were consistent with policy and law. While OPA appreciates the thoughtfulness of the Sergeant's answers, nothing he described at his interview changes my determination concerning this matter. I note that the Sergeant could not say that the force was definitively within policy and consistent with training as he did not review the entirety of the file. His answers were largely speculative and dependent on hypotheticals and incomplete information. Based on my review of the video, the documents generated as part of this incident, the statements of the involved officers, and the interviews conducted by OPA, I still conclude that this use of force was contrary to policy and I still recommend that this allegation be Sustained.

As a general matter, taking the statements from the Training Unit representatives interviewed by OPA to their logical extensions, the conclusion I draw is that the intermediate force used by NE#1 would have been deemed permissible in virtually any conceivable situation where a subject is on the ground and refusing to allow officers to grab his hand. Similarly, if here, the conclusion is that the subject was "aggressive," the definition of aggressive is so broad that it would encompass any behavior that is not passive compliance. Ultimately, if intermediate force was allowed in this case, it appears to me to be the opposite of what is expected from SPD officers under the Department's use of force policy or the relevant DOJ and Monitoring Team approved training in this area.

In making this determination, the fact that I may disagree with the Training Unit Sergeant and officers, and even Department management in this regard is not determinative. The OPA Director is a civilian authorized by statute to make independent determinations as to whether officers' conduct is within policy, and, in some cases, consistent with law. Here, my decision is based on the entirety of the file as well as the collective knowledge and expertise of



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OPA and its employees. For these reasons, I believe that NE#1's actions violated policy and, as such, I decline to alter my findings.