



CLOSED CASE SUMMARY

ISSUED DATE: APRIL 4TH, 2018

CASE NUMBER: 2017OPA-0550

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force	Not Sustained (Inconclusive)
# 2	8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, [...]	Sustained
# 3	8.400-TSK-4 Use of Force - RESPONSIBILITIES OF WITNESS OFFICERS DURING A TYPE II OR TYPE III INVESTIGATION (NOT A FIREARMS DISCHARGE)	Not Sustained (Training Referral)
Discipline Imposed: Oral Reprimand		

Named Employee #2

Allegation(s):		Director's Findings
# 1	8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force	Not Sustained (Training Referral)
# 2	8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, [...]	Not Sustained (Training Referral)
# 3	8.400-TSK-4 Use of Force - RESPONSIBILITIES OF WITNESS OFFICERS DURING A TYPE II OR TYPE III INVESTIGATION (NOT A FIREARMS DISCHARGE)	Not Sustained (Training Referral)

Named Employee #3

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Inconclusive)
# 2	8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force	Not Sustained (Training Referral)
# 3	8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, [...]	Sustained
# 4	8.200 - Using Force 1. Use of Force: When Authorized	Sustained
# 5	8.200 - Using Force 2. Use of Force: When Prohibited	Sustained
# 6	11.010 - Detainee Management in Department Facilities 11.010-PRO-2 Application of the Spit Sock Hood	Not Sustained (Lawful and Proper)
# 7	5.001 - Standards and Duties 13. Retaliation is prohibited	Allegation Removed



# 8	5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times	Sustained
Discipline Imposed: Suspension without Pay – 8 days		

Named Employee #4

Allegation(s):		Director's Findings
# 1	8.400-TSK-6 Use of Force - RESPONSIBILITIES OF THE SERGEANT DURING A TYPE II INVESTIGATION	Not Sustained (Training Referral)
# 2	8.400 - Use of Force Reporting and Investigation 3. The Sergeant Will Review the Incident and Do One of the Following:	Not Sustained (Lawful and Proper)
# 3	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Sustained
Discipline Imposed: No Discipline		

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:

This case was referred to OPA by several Department employees. In summary, these employee complainants alleged that Named Employee #3 may have violated SPD policies and potentially the law when he struck a handcuffed subject in the back of the head with his elbow after she spat in his face. It was also alleged that all of the Named Employees failed to report and may have not properly documented the force used. Lastly, it was alleged that Named Employee #4, a patrol supervisor, may have failed to comply with SPD policy by not conducting a complete and thorough investigation and by failing to refer the force to OPA.

STATEMENT OF FACTS:

A. Incident and Use of Force

On May 25, 2017, officers, including Named Employees #1, #2 and #3 (NE#1; NE#2; NE#3), responded to a report of an assault. (NE#2 General Offense Report.) Dispatch indicated that an unknown female subject had punched a female victim in the face and that the alleged perpetrator was running eastbound on Jefferson Street. (*Id.*) When the officers arrived at the scene, the victim told the police that she had been assaulted and provided a description of the subject. (*Id.*) Officers located the subject, who matched the description provided by the victim, approximately four blocks away. (*Id.*) The officers contacted the subject and asked whether she had been involved in a physical altercation. (*Id.*) While the subject admitted that she had engaged in a verbal dispute with a woman, she claimed that she had not assaulted anyone. (*Id.*) The officers conducted a show-up with the victim, who was able to positively identify the subject as the perpetrator. (*Id.*) When the officers approached the subject to place her under arrest, she opened a soda bottle that she was holding and squeezed it, causing liquid to get on herself and the officers. (*Id.*) The subject started yelling at the officers and using profanities towards them. (*Id.*)



At this point, NE#1, NE#2 and NE#3 were in the subject's immediate vicinity. (*Id.*) The subject resisted their attempts to place her into handcuffs and attempted to kick at the officers, who were holding her hands. (*Id.*) NE#1 and NE#2 made the decision to take the subject to the ground in order to better control her body and to handcuff her. (*Id.*) They reported performing a "soft takedown," meaning that they guided her to the ground using control holds. (*Id.*) The officers' account in this regard is confirmed by In-Car Video (ICV) of this portion of the incident. Once the subject was on the ground, the officers were able to handcuff her. (*Id.*)

ICV also captured the next stage of the officers' interaction with the subject. The subject was taken to the front of NE#3's and NE#2's patrol vehicle in order to search her incident to arrest. (NE#2 and NE#3 Front ICV.) During this time, the subject yelled and continued to twist her body. (*Id.*) NE#3 appeared to see an object attached to the subject's hair. (*Id.*) In his OPA interview, NE#3 identified the object as a handcuff key. (NE#3 OPA Interview, at p. 6.) NE#3 reached forward in an apparent attempt to retrieve the object. (NE#2 and NE#3 Front ICV.) At that point, the subject pulled her body backwards and was facing NE#3. (*Id.*) The subject yelled at NE#3 and then moved her head towards NE#3 and spat in his face. (*Id.*) NE#3 reacted by closing his eyes and moving back slightly. (*Id.*)

Once the subject spat at NE#3, NE#1 positioned her head so that it was facing in the opposite direction. NE#1 had his right hand on the subject's handcuffed wrists and his left hand was placed on her back. NE#2 was directly behind the subject. His right hand appeared to also be gripping one of the subject's arms. The subject's head was facing to the right and was pressed down on the hood of the patrol vehicle.

At the time of the strike, NE#1's right hand was still holding the subject's wrists and his left hand was securing her head by the base of her neck around her shirt collar. NE#2 was also still holding the subject with his right hand and his left hand was reaching towards the left side of the subject's head. The subject's head and body were not moving at the moment of the strike.

In stills of the video that were generated during OPA's investigation, NE#3 is observed focused on the subject's head and advancing with his arms at chest level. (Frame-by-Frame ICV Analysis.) He began to prepare to strike the subject after her head was turned, after it was flush against the hood of the patrol vehicle, and at a moment when her body and head were not moving. He then struck her on the back of the head with his right elbow (his fist was clenched) with significant enough force to make an audible sound when her head is impacted against the hood. (*Id.*)

After striking the subject, NE#3 continued to secure her head to the hood of the vehicle using his body weight and pushing down with his forearm. (NE#2 and NE#3 Front ICV.) Immediately after the strike, he appeared to grab onto the hair at the top of her head. (*Id.*) From my review, it is unclear whether NE#3 pulled the subject's hair during this time. (*See id.*) A spit sock was placed on the subject's face in order to prevent further spitting. She was then placed in NE#3's patrol vehicle. (*Id.*)

B. Use of Force Reporting and Investigation

NE#3 did not immediately notify a supervisor of his use of force. (NE#4 Use of Force Review.) He instead made the decision to transport the subject to the precinct and there screened the force with a supervisor. (*Id.*) Named Employee #4 (NE#4) performed the supervisory screening of the arrest and the force at the precinct. (*Id.*) He spoke to NE#3 who described the force that he used. (*Id.*) NE#4 classified the force as follows: "Officer Good used a hard strike to the



lower back of head, upper neck, to keep the suspect's head down to avoid being spat on again." (*Id.*) NE#4 ordered NE#3 to complete a Type II use of force report, and ordered NE#1 and NE#2 to complete witness reports. (*Id.*)

NE#4 attempted to speak with the subject; however, she only yelled and would not speak with him. (*Id.*) NE#4 later again attempted to speak with her. (*Id.*) On this second occasion, she was either asleep or non-responsive. (*Id.*) NE#4 noted that the subject did not complain of injury – presumably because she never spoke to NE#4 – and had no visible injuries. (*Id.*) NE#4 further indicated that no photographs were taken of the subject “due to the issues with the suspect kicking, spitting and acting irrationally.” (*Id.*) NE#4 did not remove the subject's spit sock to examine and photograph her head and facial area. (*Id.*) In his review, NE#4 stated that NE#3's failure to immediately notify a supervisor of the use of force prevented a potential witness who interacted with NE#3 at the scene from being identified and interviewed. (*Id.*) NE#4 initiated a Frontline Investigation into NE#3's failure to immediately notify a supervisor, and forwarded his conclusions to Lieutenant Leung. (*Id.*)

Consistent with NE#4's order, NE#3 completed a Type II use of force report. In that report, NE#3 asserted the following:

When I felt the spit land on my face I immediately as a reactionary movement raised my right arm and with my forearm went to push Harris's head to the hood of the patrol vehicle. As I was reacting Officer Melvin had already started pushing Harris to the hood, my forearm that was already in motion continued down and by the time Officer Melvin had already pushed Harris to the hood of the patrol car is when I attempted with my forearm to push Harris's head down to prevent Harris from spitting on Officers again. Harris's head had already landed hood when my forearm made contact with the back of Harris's lower head. I continued to hold down Harris's head and instructed Officer Simbeck to get a spit mask.

(NE#3 Use of Force Report.) NE#3 also described an interaction he had with a civilian witness after the force was used. That witness, who NE#3 identified as a male, was critical of the way the officers interacted with the subject and the force that was used on her. (*Id.*) NE#3 described the male witness as confrontational. (*Id.*) NE#3 stated that, at one point, the male witness said: “if you did not have a gun, we would see what happens.” (*Id.*) NE#3 reported that he tried to explain to the male witness that he could see how the situation appeared, but that this was how he was trained to act. (*Id.*) From NE#3's report and later OPA interview, he characterized the interaction with this witness as threatening. This is the case even though there were at least three other officers in the immediate vicinity and apparently no other civilian witnesses or bystanders. NE#3 further indicated that at the end of the conversation, he and the male witness shook hands. (*Id.*)

NE#1 and NE#2 also completed use of force witness reports. NE#1 indicated that while he observed NE#3 apply force to the subject's head, it did not appear to be a strike from his vantage point. (NE#1 Use of Force Witness Report.) NE#1 also reported that after the subject spat at NE#3, NE#1 moved her head towards the hood of the vehicle to stop her from spitting again. (*Id.*) NE#2 reported that the force used by NE#3 was a strike to the subject's head that was purposed to prevent further spitting, but provided little additional detail. (NE#2 Use of Force Witness Report.)

Administrative Lieutenant Sweeney conducted the next level of the use of force review. Lieutenant Sweeney observed that after the subject spat at NE#3, NE#1 and NE#2 “pushed her down to the hood of the car” and NE#3 “struck her



in the back of her head with his forearm. (Lieutenant Sweeney Use of Force Review.) Lieutenant Sweeney believed the force to have been a strike based both on what he saw and heard on the ICV. (Lieutenant Sweeney OPA Interview, at p. 3.) Lieutenant Sweeney further believed that the force was unnecessary and was not consistent with Department training. (*Id.* at pp. 3-4.) Lieutenant Sweeney conferred with and watched the ICV with Captain McDonagh. (Lieutenant Sweeney Use of Force Review.) As a result of that conversation, he wrote up an OPA complaint concerning this incident and provided the complaint to Captain McDonagh who forwarded it to OPA. (*Id.*)

Captain McDonagh performed the final level of the chain of command review of the incident. Captain McDonagh evaluated whether the force used by NE#1 and NE#2 was consistent with policy, but reserved on NE#3's force given the referral to OPA. (Captain McDonagh Use of Force Review.) Captain McDonagh addressed the Frontline Investigation into the NE#3's failure to immediately notify a supervisor of the force and noted that: "While the suspect was obviously not cooperative and presented physical threat issues, spitting and kicking, it is not prohibitive to still notify the Sergeant prior to transport." (*Id.*)

The use of force was further reviewed by the Force Review Board (FRB). Given that an OPA complaint had already been filed, the FRB, per its practice, did not opine as to whether the force used by NE#3 was consistent with policy. However, the FRB did make observations, including, but not limited to, the following:

- NE#3's use of force report lacked sufficient detail concerning his decision to use force;
- NE#3's chain of command did not specifically identify and discuss the fact that NE#3 used force against a handcuffed individual, nor did they indicate what steps were taken, if any, to ensure that this did not happen again; and
- No photographs were taken of the scene or of the subject as part of the use of force investigation.

C. Criminal Investigation

After receiving and reviewing the referral from the chain of command, OPA, identified possible criminality on the part of NE#3 and referred the case back to SPD for criminal investigation on June 7, 2017. The case was investigated by Sergeant Nelson, who was assigned to SPD's Homicide Unit. In his initial investigation, Sergeant Nelson conducted no interviews, but reviewed OPA's file, the General Offense Report and statements. He then watched various ICV of the incident. Sergeant Nelson recounted that, during his investigation, he played the ICV for Kelly Harris, Chief of the Criminal Division at the Seattle City Attorney's Office. Nelson and Harris together agreed that there was no criminality. Sergeant Nelson's completed investigation, which contained his interpretation of what occurred on the video (without the aid of any forensic analysis), was returned to OPA on June 27, 2017. On June 28, 2017, SPD requested that the case be returned for further investigation and OPA returned the case to the Homicide Unit on June 29, 2017. Sergeant Nelson conducted a supplemental interview of a potential witness and the case was returned to OPA on July 24, 2017, again indicating that no criminal behavior was identified.

In the return memorandum, Lieutenant Kebba, a supervisor in the Homicide Unit, stated: "The officer's actions appear reasonable and measured to adequately address the threat." Lieutenant Kebba further noted that the subject had been charged with Assault 4 for spitting on NE#3 and Assault 3 for hitting the female victim.

D. OPA's Investigation



After receiving the case back from the Department, OPA initiated its investigation. OPA interviewed all of the Named Employees. OPA additionally interviewed Officers Simbeck and Leitizia, who were witnesses to the incident. However, neither Officer Simbeck nor Officer Leitizia observed NE#3's use of force. Also interviewed by OPA were Lieutenants Sweeney and Leung, who reviewed the use of force.

As described above, OPA obtained the criminal investigation into this matter, and interviewed Sergeant Nelson and Lieutenant Kebba concerning the investigation and their articulated conclusions.

OPA obtained the Named Employees' training records, and, specifically, the materials concerning training provided to the Named Employees regarding use of force reporting and force techniques to use on spitting subjects. OPA interviewed Sergeant Kim from the Training Unit concerning the Department's training in this area.

OPA additionally retained a forensic video professional, William Neale, to analyze the ICV and to create a frame-by-frame analysis. Mr. Neale also forensically enhanced the ICV. Both the frame-by-frame analysis and the forensically enhanced ICV are included in the case file.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force

SPD policy sets forth four levels of force – de minimis, Type I, Type II and Type III. (SPD Policy 8.400-POL-1.) De minimis is the lowest level of force and Type III is the highest. (*Id.*) No investigation or reporting is required for de minimis force, but all other levels need to be reported, documented and investigated to varying degrees. (*Id.*) The policy defines Type I force as including a “strike with sufficient force to cause pain or complaint of pain.” (*Id.*) Among the force that rises to the level of Type II, is any force “reasonably expected to cause physical injury.” (*Id.*) Both levels of force must be reported to and screened in-person at the scene by a sergeant. (*Id.*) With regard to Type I force, in-person screening is not required if not practical under the circumstances). (*Id.*)

SPD Policy 8.400-POL-1(2), which is discussed below in the context of Allegation #2, requires that “officers, including witness officers, will verbally notify a supervisor immediately, unless not practical, following any use of reportable force.” Moreover, pursuant to SPD Policy 8.400-POL-1(1), officers are required “thoroughly document all reportable uses of force to the best of their ability, including a description of each force application.”

As explained more fully below, NE#1 failed to immediately report the force he observed. Once the force was belatedly reported, however, NE#1 did complete a witness officer report. In his report, NE#1 indicated that when the subject spat at NE#3 he “pushed [the subject] from the right shoulder area toward the hood of the patrol car to prevent [the subject] from spitting again.” (NE#1 Use of Force Witness Report.) NE#1 further stated that, when he did this, NE#3 “was bringing his right elbow toward the direction of [the subject] in order to deflect her from spitting again, which I believe if given the chance she would have.” (*Id.*) NE#1 recounted that NE#3's “elbow landed on the back side of her head.” (*Id.*) Lastly, NE#1 indicated that, from his vantage point, NE#3's force did not appear to be a strike. (*Id.*)

This report was generated without the aid of ICV and was based on NE#1's recollection of the incident at that time. I find the description of the force therein to be inconsistent with the ICV. Specifically, I disagree that while NE#1 was



positioning the subject's head away from NE#3, NE#3 was simultaneously bringing his forearm over and down to pin her heard. The frame-by-frame analysis of the video clearly indicates that NE#3 did not begin moving his forearm to strike the subject until after her head was already turned away from him, she was secured by NE#1, and she was no longer moving.

That being said, the policy explicitly recognizes "the inherent limitations on perception and recall following tense and rapidly evolving circumstances." (SPD Policy 8.400-POL-1(1).) As such, even though I believe that NE#1's report was ultimately inconsistent with the video, I cannot determine that he did anything other than report what he believed he perceived at that time while under fast-evolving circumstances. Accordingly, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #1 - Allegation #2

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, [...]

Even though I do not recommend sustaining Allegation #1, I conclude that NE#1 failed to immediately notify a supervisor that force had been used.

NE#1 did not immediately report to a supervisor either the force he used to take the subject down to the ground to handcuff her or the force he witnessed NE#3 use. With regard to the force that NE#1, himself, used, I find it to have been de minimis and, as such, no reporting or documentation of that force was required. However, with regard to the strike applied by NE#3, I conclude that it was Type II force or, at the very minimum, Type I force that should have been immediately reported.

As indicated above, NE#1 asserted that, at the time of the incident, he did not believe that Type II force had been used by NE#3. He believed the force to have been de minimis or "maybe a Type I." (NE#1 OPA Interview, at p. 11.) NE#1 explained that this belief was based both on his vantage point and on the fact that he did not review ICV until after the incident. (*Id.*) While I recognize that NE#1 did not review video until prior to and during his OPA interview, it is simply not plausible that from his vantage point he believed the force was de minimis. From a review of the video, NE#1 was looking directly at the subject's head when the strike was applied. Even if argued that the force did not rise to the level of Type II force, which NE#1 appeared to intimate at his OPA interview and which I strongly disagree with, it was certainly Type I force, as it was a strike with sufficient force to cause pain or complaint of pain. Indeed, after watching the video, NE#1 stated that the force used was a strike and later in his interview asserted that it seemed to be "more of a strike to cause pain." (*Id.* at pp. 13, 19.) Moreover, at the time of the strike, the subject was in handcuffs, which further supports the importance of immediately notifying a supervisor as such force is required to be "critically reviewed." (See SPD Policy 8.200(2).)

Based on a preponderance of the evidence standard, I find that a reasonable officer would have viewed the force used by NE#3 as at least Type I force, if not Type II force. As such, NE#1, even though he was a witness officer, had the affirmative obligation to immediately notify a supervisor so as to ensure that the force could be screened in-person and at the scene. NE#1's failure to do was in violation of SPD Policy 8.400-POL-1(2).

Accordingly, I recommend that this allegation be Sustained.



Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

8.400-TSK-4 Use of Force - RESPONSIBILITIES OF WITNESS OFFICERS DURING A TYPE II OR TYPE III INVESTIGATION (NOT A FIREARMS DISCHARGE)

SPD Policy 8.400-TSK-4 sets forth the responsibilities of witness officers during Type II and Type III force investigations. The policy requires that a witness officer: protect the scene and related evidence; stand by the scene until released by the sergeant; upload and flag ICV before going off shift; and provide a use of force report as directed by a supervisor. (SPD Policy 8.400-TSK-4.) With regard to the reporting requirement, the policy states that “if a witness officer is aware that reportable force was used but not reported, the witness officer shall provide the witness statement to his or her supervisor.” (SPD Policy 8.400-TSK-4.)

As a result of the failure to immediately report the use of force by NE#1, as well as by NE#2 and NE#3, the Type II investigation envisioned by this policy was not performed and NE#1 thus did not comply with the elements of this policy. However, as I recommend sustaining the failure to immediately report the force, I find it unnecessary to also sustain this allegation. However, I believe NE#1 would benefit from additional training.

- **Training Referral:** NE#1 should receive additional training concerning the Department’s expectations as to force reporting and, specifically, what force needs to be immediately reported to a supervisor. I recommend that NE#1 also receive additional training concerning the elements of SPD Policy 8.400-TSK-4. This training and the related counseling from his chain of command should be memorialized in a PAS entry.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #2 - Allegation #1

8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force

NE#2 completed a witness officer report after being directed to do so by NE#4. In that report, NE#2 recounted that after the subject spat on NE#3, NE#3 “used his forearm to pin [the subject’s] head, in order to prevent further exposure, resulting in a strike to the back of her head.” (NE#2 Use of Force Witness Report.) NE#2 did not opine as to whether the strike was a reaction to the spitting, but rather stated that the strike was purposed to prevent further spitting. (*Id.*)

As with NE#1’s report, I find that NE#2’s report was also inconsistent with the ICV. I further find that NE#2’s report was not sufficiently thorough. NE#2 did not provide any description as to where the subject’s head was situated at the time of the strike. NE#2 also provided no detail concerning where he and NE#1 were standing at the time of the incident and what actions they were engaged in.

NE#2 also presumably did not watch the ICV prior to reporting. As such, I find that he, like NE#1, reported what he believed he perceived at that time while under fast-evolving circumstances.



Given NE#2's status as a student officer, I do not believe it to be warranted to sustain this allegation. However, I find that NE#2 should be provided with additional training and counseling.

- **Training Referral:** NE#2 should receive additional training concerning the Department's expectations as to force reporting. Specifically, NE#2 should receive instruction on identifying what force needs to be reported, how to document that force, and what detail and information is required in his report. This training and the related counseling by NE#2's chain of command should be documented in a PAS entry.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #2 - Allegation #2

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, [...]

As explained above in the context of NE#1, Allegation #2, I find that the strike by NE#3 was at clearly at least Type I force, if not Type II force. As such, NE#2 was required to immediately report that force to a supervisor.

On the date in question, NE#2 was a student officer in his first rotation. This means that, at the time he viewed the force in this case, he had only completed 21 shifts of police work. (NE#2 Daily Observation Report.) Moreover, his Field Training Officer on this date was NE#3, who not only used the force in question but who made the ultimate decision to not report the force until the officers returned to the precinct.

For these reasons, while I find that NE#2 was obligated to report the force and the failure to do was outside of policy, his status as a very inexperienced officer who was relying on his FTO for guidance influences my conclusion that this allegation should not be sustained. Instead, I recommend that NE#2 receive additional training on this policy.

- **Training Referral:** NE#2 should receive additional training concerning the requirement that, even where he is a witness officer, he is required to immediately report Type I and Type II uses of force to a supervisor. NE#2 should also receive counseling from his chain of command concerning their expectations of his conduct in this regard. This additional training and counseling should be memorialized in a PAS entry.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #2 - Allegation #3

8.400-TSK-4 Use of Force - RESPONSIBILITIES OF WITNESS OFFICERS DURING A TYPE II OR TYPE III INVESTIGATION (NOT A FIREARMS DISCHARGE)

The reason NE#2 was unable to comply with the elements of this policy was because he, as well as NE#1 and NE#3, failed to report the force to a supervisor. However, given NE#2's status as a student officer at that time, I feel that a training referral, rather than a sustained finding, is more appropriate.



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- **Training Referral:** I refer to the above Training Referral. I also recommend that NE#2 receive additional training concerning the requirements of SPD Policy 8.400-TSK-4. This training and the related counseling from his chain of command should be memorialized in a PAS entry.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #3 - Allegation #1

5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy

SPD Policy 5.001-POL-2 generally states that Department employees must adhere to laws, City policy and Department policy. It specifically sets forth the expectation that officers will comply with City, State and federal law. (SPD Policy 5.001-POL-2.)

As set forth more fully below, I find that NE#3's conduct in this incident violated a number of SPD policies and was inconsistent with Department training. I deem the strike to the subject's head to have been excessive and outside of the Department's policies, training and expectations. I do not, however, reach a conclusion as to whether the force used by NE#3 violated local, state or federal criminal laws. Here, the Criminal Chief of the Seattle City Attorney's Office purportedly watched the ICV and determined that the conduct in question was not criminal in nature and declined to prosecute NE#3. Even though I have significant concerns about the force and its propriety and legality, I will not substitute my judgment for that of the prosecutor. With regard to the violations of policy and training, as I have sustained a number of allegations below, I find it unnecessary and duplicative to also sustain this allegation.

As such, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #3 - Allegation #2

8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force

Pursuant to SPD Policy 8.400-POL-1(1), officers are required "thoroughly document all reportable uses of force to the best of their ability, including a description of each force application." I recommend herein that the allegation that NE#3 failed to immediately report the force in question be sustained. As such, in order to also sustain this allegation, I must separately find that NE#1 failed to thoroughly document the force he used.

As indicated above, in its review of this case, the FRB noted that NE#3's report lacked sufficient detail concerning his decision to use force. I agree. However, I do not find that this, in and of itself, warrants a sustained finding.

Moreover, as explained more fully below, I find that significant portions of NE#3's report were inconsistent with the video evidence in this case and were simply not plausible. Most notably, I believe that NE#3 mischaracterized the strike he used when he called it a push and errantly stated that he was already in the process of reacting and using force when the subject's head was being moved towards the hood of the patrol vehicle. I conclude, as explained below, that NE#3, contrary to his recounting in his report, purposefully used force to punish and retaliate against the subject. I believe that a reasonable officer would not have believed that the force used was a push, that the force was initiated prior to the threat posed by the subject dissipating, and that the force was not used to retaliate or



punish. However, I cannot find by a preponderance of the evidence that NE#3 did not genuinely believe this and did not attempt to accurately report what he did, even if I conclude that his account is imminently unreasonable and unsupported by the evidence.

For these reasons, I recommend that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#3 should receive additional training concerning the requirements of SPD Policy 8.400-POL-1(1), as well as on the Department’s expectation that he will record the force he uses thoroughly and accurately. This training and counseling by NE#3’s chain of command should be memorialized in a PAS entry.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #3 - Allegation #3

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, [...]

After using force against the subject, NE#3 did not immediately notify a supervisor. NE#3 asserted that his primary focus was on placing the subject in a spit sock so that she could not spit on any other officers. (NE#3 OPA Interview, at p. 8.) After he did so, he recounted that he spoke with a male witness who had previously been criticizing the officers’ actions. (*Id.*) NE#3 indicated that, for officer safety reasons, he then wanted to leave the scene and return to the precinct and that he intended to notify a sergeant once he arrived at the precinct. (*Id.*)

However, in his use of force report, NE#3 stated that after he interacted with the male witness, he and the male witness shook hands. (NE#3 Use of Force Report.) As such, it does not appear that there was any threat to the officers from the male witness at that time (if ever during their interaction). There is also no indication that there were any other civilians in the near vicinity that presented any threat. It is unclear why NE#3 did not notify a supervisor after his interaction with the male witness and once the subject was secured in the back of a patrol vehicle. When asked this question at his OPA interview, NE#3 stated that while there was no threat or an unstable scene at that time, he had already made up his mind to return to the precinct and he did so. (NE#3 OPA Interview, at p. 14.)

SPD policy requires immediate notification of a supervisor after reportable force is used. Here, based on NE#3’s own paperwork and interview, there was no justifiable reason for not summoning a supervisor to the scene to investigate his force. By not doing so, the only known civilian witness to the incident was not identified and was not interviewed in connection with the eventual Type II investigation. NE#3’s failure to immediately notify a supervisor of his force was in violation of policy.

Accordingly, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #3 - Allegations #4

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



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.*)

The Force Was Outside of Policy

Reasonableness Factor

With regard to the first factor, I find that the force was not reasonable. It is undisputed that, prior to the force being used, the subject spat at NE#3. However, at the time the force was used, she did not present an immediate threat to NE#3 or to any other officer. Her head was flush against the hood of the patrol vehicle and was pointing away from NE#3. NE#1 was holding the subject down and NE#2 was behind her, also holding on the subject and reaching towards her head. The subject, while continuing to yell, was not moving. She did not present any active danger and there was no risk that she was going to escape. Notably, at the time that NE#3 applied the strike to the subject, NE#2, who was standing directly behind the subject, appeared, based on his behavior and actions, to be completely unconcerned with any threat presented by her.

At the time the force was used, NE#3 was looking at the subject’s head, its positioning, and at the officers who were surrounding her. It would have been evident to a reasonable officer that an elbow strike to the back of the head of a handcuffed subject who no longer posed a threat was unreasonable.

NE#3 asserted in both his Type II use of force report and during his OPA interview that the force he used was a push instead of a strike. I find this characterization to be completely unsupported by the clear video evidence and, as a result, I place little weight on the overall credibility of his account.

NE#3 further argued at his OPA interview that his force was reactionary. With regard to this assertion, his theory in this regard appears to be that even if the subject did not present an imminent threat at the time of the strike, he had already perceived a threat, begun to react, and was unable to stop. First, even if this were the case, the force he chose to use, a strike, was excessive, and less intrusive force options were available to him. Second, even were the strike not excessive in and of itself, NE#3 had time, even if only two seconds, to recognize that the subject did not present a threat and to decide not to strike her head. I base this conclusion on my review of the ICV and the frame-by-frame video analysis. Indeed, SPD officers are trained to make quick decisions in fact-paced and stressful situations and are expected on those occasions to use appropriate levels of force. Here, NE#3 failed to do so.

I expect that NE#3 and others will contend that research by the Force Science Institute (FSI) supports NE#3’s argument. This bears little if no impact on my analysis and decision. While FSI has conducted much research in the area of mental chronometry, virtually all of that research concerns reaction time in the context of an officer-involved shooting. Such a situation is not analogous to this case for a host of reasons. Moreover, FSI’s research has been criticized as “invalid and unreliable” by at least one other researcher, “pseudoscience” by an editor from the American Journal of Psychology,” and “lacking in both foundation and reliability” by the United States Department



of Justice. (See Matt Apuzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, NY Times, dated August 1, 2015.) As such, even if there was FSI research on point, it would not change my conclusion.

Lastly, I accord little to no weight to Sergeant Nelson's and Lieutenant Kebba's articulated opinions that the force was reasonable, necessary, and proportional, and thus within policy. First, such opinions were well outside of the scope of their investigation. They were tasked with evaluating whether or not NE#3 committed an assault or other criminal conduct, not whether he acted consistent with policy. Their failure to stay within the four corners of their criminal investigation raises unnecessary questions of their objectivity and the how critically their unit's review of this incident truly was. Second, neither Sergeant Nelson nor Lieutenant Kebba has undergone advance training in use of force or, as far as I am aware, possesses any expertise in this area. To the extent the Criminal Chief of the Seattle City Attorney's Office also opined that the strike was within policy, which was asserted by Sergeant Nelson during his OPA interview but is surprisingly not memorialized in his investigation report, I accord a similar lack of weight to that conclusion.

Accordingly, this factor weighs in favor of finding that the force was out of policy.

Necessary Factor

With regard to whether the force was necessary, I find that there were other reasonably effective alternatives to the elbow strikes. NE#3 could have simply taken a step backwards and let the two officers surrounding the subject control her body and head. NE#3 could also have used an underhook or an open-handed check or push, which are force tactics that the Department, itself, has identified as reasonable and necessary force in analogous situations. Instead, however, NE#3 used an untrained tactic when he forcefully struck the subject in the back of the head with his elbow. It cannot be said that there was no other reasonably effective alternative to that strike. As such, this factor also weighs in favor of finding the force outside of policy.

Proportionality Factor

Lastly, with regard to the proportionality of the force, the force ultimately applied was not commensurate with the threat facing NE#3. Not only was the threat minimal at the instant the force was used, but the force was more significant than what was warranted under the circumstances. A lower level of force could have been used in this situation to achieve the goal of preventing the subject from further spitting, including alternative techniques that the Department has identified as appropriate in past training.

For these reasons, the strike by NE#3 was excessive and inconsistent with SPD policy.

The Force Was Inconsistent with Department Training

NE#3 claimed that he had never received training from the Department concerning how deal with a suspect who is actively spitting or attempting to spit on officers. (NE#3 OPA Interview, at p. 14.)

OPA interviewed Sergeant Kim, a defensive tactics instructor assigned to the Training Unit. Sergeant Kim indicated that SPD officers are trained to make rapid critical decisions regarding the use of force. (Sergeant Kim OPA Interview, at p. 3.) Sergeant Kim stated that he did not know whether there was any instruction relating to spitting subjects in



the most recent training. (*Id.* at p. 4.) After watching the ICV, Sergeant Kim characterized the force as NE#3 “deliver[ing] an elbow to the back of the subject’s head,” and, in response to OPA’s questions, indicated that he would have notified FIT based on the fact that the subject was restrained when the force was used. (*Id.* at p. 5.) Ultimately, Sergeant Kim did not conclusively indicate whether he believed NE#3’s force was consistent with training. (*See generally id.*)

OPA was able to locate a training module concerning a spitting subject. (Spitting Subject Role Play Training.) This training instructed officers to use “ICC techniques for controlling the suspect and affixing a ‘spit sock.’” (*Id.*) Specifically, officers were trained to take the following steps: “ICC Under hook, bend suspect at the waist, open hand check face away from officer, cup hand at rear base.” (*Id.*) Notably, officers were not trained to elbow or strike spitting subjects. (*Id.*) In one role playing scenario, an officer applies handcuffs to a subject who then prepares to spit on the officer. (*Id.*) The officer “uses [an] open hand ‘check/push’ to stop the suspect from spitting and an “under-hook to table top,” which are identified as the “reasonable/necessary force options.” (*Id.*)

OPA was informed by Sergeant Kim that this module was part of the 2013 Street Skills training. (Email from Kim to OPA, dated September 25, 2017.) Sergeant Kim further told OPA that the 2014 Prisoner Control ISDM also referred “to the use of an underhook/head control technique for taking suspects, including those likely to spit, down to the ground.” (*Id.*)

Whether or not NE#3 received specific training concerning dealing with spitting subjects, it is clear that NE#3 was not trained to strike the subject in the manner that he did. The Department’s expectations of officers’ conduct in such scenarios, as exemplified by the 2013 training, do not include an elbow strike to a handcuffed subject’s head. Moreover, if it is the case that officers are not being presently trained on how to deal with spitting subjects, I would strongly advise the Department to consider reinstating this instruction.

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**

Named Employee #3 - Allegation #5

8.200 - Using Force 2. Use of Force: When Prohibited

While SPD Policy 8.200(1) provides for when force is authorized, SPD Policy 8.200(2) sets forth those scenarios in which force is prohibited. Among those scenarios are: when force is used to retaliate against or punish a subject; and when force is used against a restrained subject, “except in exceptional circumstances when the subject’s actions must be immediately stopped to prevent injury, [] escape, [or] destruction of property.” (SPD Policy 8.200(2).)

Based on my review of the video, and specifically the frame-by-frame analysis, I conclude that the strike used by NE#3 was purposed to punish or retaliate against the subject for spitting on him. The frame-by-frame analysis indicates that at the time NE#3 begins to move towards the subject to strike her, her head is turned away from him and is flush against the hood of the patrol vehicle. She was being held securely by NE#1 and NE#2 was reaching towards her hair. Notably, even though she had just spit at NE#3, neither NE#1 or NE#2 used force on her nor did they appear to perceive her to be a physical threat. NE#3 is looking directly at her head at that time. There is no



possibility that she could spit on him at that point. Moreover, even if she wanted to spit on another officer, it would have been ineffective.

When NE#3 begins to move his hands up in the air, he is looking intently at the subject. He bites down on his lower lip as he raises his arms and hands up to approximately shoulder level. From my review of the video, NE#3 appears to be angry. He strikes down on her with his elbow and forearm on the back of her head. NE#3's anger continues to be apparent in his aggressive interaction with the male witness after the fact and his grabbing of the subject's hair.

His choice to use an elbow strike as opposed to a push with his hand or other less extreme force is determinative. This force was purposed to hurt the subject. From my analysis, it was used to cause her pain to recompense her for spitting in NE#3's face.

Furthermore, when the force was used against the subject, she was in handcuffs. I do not find that exceptional circumstances existed here to use a strike against a handcuffed subject. This is especially the case given that, at the time of the force, there was one officer holding her arms and securing her body and another officer in her immediate vicinity also apparently holding her arm. Moreover, at the time the strike was used, the subject did not present an immediate threat of injury to any of the officers.

Unlike virtually any other civilian or government employee, police officers have the right to use force in furtherance of their duties and when legally appropriate. Stated differently, this means that, in certain circumstances, officers are permitted to harm, and in some cases, to kill other human beings. Such a right should only be exercised when necessary and, when it is exercised, scrutinized critically. Where an officer uses force that is excessive and unwarranted, it not only violates the expectations of the Department, as set forth through its policies and training, but also those of our collective community. In these cases, it is OPA's duty and obligation to conduct a thorough and objective analysis of the force and, where appropriate, recommend that the Department hold the officer accountable.

I conclude that NE#3 used a strike to retaliate against and punish a handcuffed woman who had just spat in his face and who, at the time of the force, did not present an imminent threat of harm. While I cannot imagine how horrible it was for NE#3 to experience being spat on and the immediate concerns he must have had for his health, the force used in this case was simply inappropriate. Moreover, the force fell below the standards of conduct expected by both the Department and community.

I do not reach this conclusion lightly. When considering this and other allegations, I am bound by a preponderance of the evidence standard. This means that in order to sustain an allegation, I must find that the greater weight of the evidence (i.e. 51%) supports a determination that NE#3 violated policy. Here, I believe that this standard has been met. For these reasons, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #3 - Allegation #6

11.010 - Detainee Management in Department Facilities 11.010-PRO-2 Application of the Spit Sock Hood



SPD Policy 11.010-PRO-2 governs the usage of a spit sock hood by Department personnel. A spit sock is purposed to prevent a subject from spitting on officers or others. It may be permissibly used “if the detainee is actively spitting on officers, or the officers have a reasonable belief that the detainee will spit on them.” (SPD Policy 11.010-POL-20.)

When applying spit socks, officers are required to do the following: (1) apply it when the subject is under control; (2) affix it with the built-in elastic band; (3) notify a sergeant of the application; (4) observe the subject continuously and remove the spit sock if there are any signs of respiratory distress; and (5) assesses the continuing need for it. (SPD Policy 11.010-PRO-2.)

Here, I find that the use of a spit sock was warranted, as it is undisputed that the subject spat at NE#3. Based on my review of the record, NE#3, as well as the other officers involved in this incident, complied with the elements of this policy.

As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #7

5.001 - Standards and Duties 13. Retaliation is prohibited

SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-13.) SPD employees are specifically prohibited from retaliating against a person who engages in activities including, but not limited to, “oppos[ing] any practice that is reasonably believed to be unlawful or in violation of Department policy” or “who otherwise engages in lawful behavior.” (*Id.*) Retaliatory acts are defined broadly under SPD’s policy and include “discouragement, intimidation, coercion, or adverse action against any person. (*Id.*)

While, as indicated above, I conclude that the force used by NE#3 was purposed to retaliate against and punish the subject, that violation of policy is captured under SPD Policy 8.400(2) (*see* Named Employee #3, Allegation #5). SPD Policy 5.001-POL-13 is concerned with different conduct than is at issue here and is, thus, inapplicable to this case.

As such, I recommend that this allegation be removed.

Recommended Finding: **Allegation Removed**

Named Employee #3 - Allegation #8

5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times

SPD Policy 5.001-POL-9 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-9.)

As indicated above, I believe that, by striking the subject, NE#3’s conduct undermined the public’s trust in the Department, himself, and other officers. Notably, during the use of force, NE#3 was confronted by a male witness who took issue with the way he and other officers interacted with the subject. This male witness watched officers



take a female subject down to the ground, handcuff her and ultimately saw NE#3 strike her. NE#3 became engaged in an escalated back and forth with this individual. At various points during this interaction, NE#3 told the witness that he did not care to hear from him. NE#3 defended his use of force, at one point asking the witness whether he would “just take it” if someone spat in the witness’s face. NE#3 then told the male witness to leave the scene. However, this individual had a constitutional right to watch the officers, monitor their conduct, and to openly and verbally criticize them. Like NE#3’s conduct, I also find this interaction to have been unprofessional.

I find that NE#3’s conduct in this case violated the Department’s expectations of professionalism. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #4 - Allegation #1

8.400-TSK-6 Use of Force - RESPONSIBILITIES OF THE SERGEANT DURING A TYPE II INVESTIGATION

SPD Policy 8.400-TSK-6 sets forth the responsibilities of a sergeant during a Type II investigation. In his review of the force, Lieutenant Sweeney noted a number of deficiencies with NE#4’s use of force investigation.

I agree that this investigation was not particularly thorough. As explained by Lieutenant Sweeney, NE#4 should have ordered NE#1 and NE#2 to draft Type II use of force statements, not just witness statements, given the blood that was in the subject’s mouth and the potential that she suffered an injury when NE#1 and NE#2 took her to the ground. NE#4 further should have gone to the scene to take photographs and canvas for witnesses, even if the force was reported to him after the fact.

While the generating of these reports was certainly within NE#4’s power to require, most of other portions of the investigation that were less than satisfactory resulted from factors outside of his control. The force was not reported to him until the officers had returned to the precinct. Thus, he did not have an opportunity to conduct an investigation at the scene shortly after the force had been used with the officers, subject and any witnesses present. The officers’ failure to immediately report the force also resulted in NE#4 being unable to identify and interview the male witness. He attempted to speak with the subject twice, but she was uncooperative. NE#4 further did not take any pictures of her potential injuries, based both on her ongoing conduct and on the fact that she was continuously wearing a spit sock. While the documentation of injuries to the subject’s face and head would have been desirable, under the circumstances, I do not find NE#4’s failure to do so to have been unreasonable.

As such, while NE#4’s investigation could have been more thorough and complete, I do not find that it was so deficient so as to violate policy. As such, I recommend that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#4 should receive additional training concerning his responsibilities when conducting a Type II investigation. Specifically, NE#4 should be instructed that the Department expects that these investigations will be thorough, complete, and will critically examine uses of force. NE#4 should also receive counseling from his chain of command regarding how his investigation in this case failed to meet those expectations. This training and counseling should be memorialized in a PAS entry.

Recommended Finding: **Not Sustained (Training Referral)**



Named Employee #4 - Allegation #2

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

SPD Policy 8.400-POL-3 requires that, when notified of a use of force, a sergeant must review and classify the force for investigation.

Here, after hearing NE#3's account of the force, NE#4 classified the incident as a Type II use of force. NE#4 instructed NE#3 to complete a Type II report, and ordered NE#1 and NE#2 to complete witness reports. While, as stated above, I find that his use of force investigation could have been more thorough and complete, I believe he complied with this section of the policy.

As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #4 - Allegation #3

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation

SPD Policy 5.002-POL-5 requires that supervisors investigate or refer allegations of policy violations. For minor misconduct, supervisors are permitted to investigate the allegation. For serious misconduct, the supervisor must make a referral to OPA.

Here, NE#4 made the decision to conduct a Frontline Investigation into NE#3's failure to immediately report the force he used. While, given the specific circumstances of this case and the nature of the force used, I believe that this matter should have been referred to OPA at the outset, I do not fault NE#4 for proceeding with his own Frontline Investigation.

That being said, once he watched the ICV of this incident and once he viewed that NE#3 had used an elbow strike against a handcuffed subject, he should have referred the matter directly to OPA. He did not do so. This failure to identify this potential policy violation and to refer it to OPA was inconsistent with NE#4's obligations under SPD policy.

As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**