



## CLOSED CASE SUMMARY

ISSUED DATE: FEBRUARY 24, 2018

CASE NUMBER: 2017OPA-0895

### 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 (Lawful and Proper)
# 2	8.300-POL-5 Use of Force - IMPACT WEAPONS 4. A Hard Strike to the Head With Any Impact Weapon, Including a Baton, Is Prohibited Unless Deadly Force is Justified	Not Sustained (Unfounded)
# 3	8.300-POL-10 Use of Force - NECK AND CAROTID RESTRAINTS 1. Officers Are Prohibited From Using Neck and Carotid Restraints Except When Deadly Force is Justified	Not Sustained (Unfounded)

**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	8.300-POL-3 Use of Force - CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 4. Officers Shall Only Deploy CEW When Objectively Reasonable	Not Sustained (Lawful and Proper)
# 3	8.300-POL-3 Use of Force - CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 8. As With the Initial CEW Application, Each Subsequent Application of a CEW Must Be Individually Justified	Not Sustained (Lawful and Proper)

***This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.***

**EXECUTIVE SUMMARY:**

The Complainant alleged that the Named Employees used force against the subject that may have been out of policy, specifically the deployment of multiple Taser applications by Named Employee #2 and the use of baton strikes and a possible neck restraint by Named Employee #1.

**STATEMENT OF FACTS:**

On the date in question, the Named Employees were bicycle officers assigned to the West Precinct. They received a report of an individual, later identified as the subject, who was walking in the street, knocking over bicyclists and obstructing traffic. As such, at that time, the Named Employees had probable cause to believe that the subject had been committing ongoing assaults.

The Named Employees viewed the subject walking towards them down the street. He was walking southbound on Fourth Avenue in the vehicle roadway. The officers rode up to the subject and their subsequent encounter with him was captured on Body Worn Video (BWV). Named Employee #1 (NE#1) dismounted his bicycle directly in front of the



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subject and placed it in front of his body, as if to use it as a barrier between himself and the subject. The subject struck NE#1 with an open hand, pushing him back. The subject began to approach NE#1 again aggressively stating “who wants it.” At that time, he received a Taser warning from NE#2, who was to NE#1’s left and also facing the subject. In the midst of that Taser warning, the subject approached NE#1 again as if to assault him and NE#2 used his Taser. It was effective and the subject fell to the ground. He stayed on the ground for several seconds and the officers approached him in an apparent attempt to take him into custody. However, the subject began actively resisting the officers kicking them and flailing his arms from side to side.

The Named Employees used additional force, including two more Taser applications, a kick, knee strikes, and baton strikes, which are all addressed below. Even though this force, which appeared substantial, was used against the subject, he continued to resist and the officers were largely unable to control him and take him into custody. Ultimately, another officer arrived on the scene and helped subdue him. The Named Employees ceased using force at that point and the subject was handcuffed and secured.

Based on the level of force used and the fact that one of the Taser prongs had gotten lodged into the subject’s hand, the force used was classified as Type III and this incident was screened with the Department’s Force Investigation Team (FIT). FIT came to the scene and investigated this case. FIT collected video evidence, interviewed the involved and witness officers, interviewed the subject, and reviewed the subject’s medical treatment records. FIT also interviewed nine civilian witnesses (several more than once) who witnessed the force and four others who were determined not to have witnessed it. Virtually all stated that they perceived the subject as violent and aggressive both prior to and during his interaction with the Named Employees. Only two alleged that the force seemed potentially excessive; however, neither of these witnesses initiated an OPA complaint.

The Complainant in this matter was an employee at Buffalo Wild Wings who was working in the vicinity of and during the time of the incident. She was interviewed by FIT during its canvass of the scene. While she stated that she did not directly witness the force used and only saw the officers and the subject after the force application, she indicated that she wanted to make an excessive force complaint against the officers. The basis of that complaint was her belief that “the subject appeared to have his hands up the whole time and the officers used excessive force on the subject.” Her complaint was referred to OPA by the FIT Sergeant.

OPA’s investigation consisted of reviewing the comprehensive FIT file and the evidence and interviews therein, as well as conducting its own interviews. OPA interviewed the Named Employees (NE#1 twice), a witness officer, and the subject. OPA attempted to interview the Complainant, calling her several times and leaving her multiple voicemails. She did not respond to OPA and, thus, was not interviewed as part of this case. OPA also attempted to interview both of the other civilian witnesses who believed that the force was potentially excessive. One did not respond to OPA. The other was equivocal as to whether she believed the force to be excessive. She reported observing the subject initially attack the officer with his fists and push their bikes. She indicated that he was trying to fight them and did not appear to intend to flee at any point. She said that the officers were trying to restrain the subject but he was hitting them. The witness reported that an officer struck the subject with a baton in the arm area and that those strikes did not slow the subject down. She ultimately reported that she thought the force was “a little much” but that she was surprised how strong the subject was.

The Named Employees’ statements to OPA were largely consistent with their FIT interviews. The substance of both statements is discussed more fully below and in the Case Summary.



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The subject told OPA that he did not recall much of the incident and that he had used both marijuana and PCP on that date. He said, however, that when he watched the video of the incident after the fact he believed the force to have been excessive.

Lastly, OPA, like FIT, reviewed and analyzed the Department and private party video of this incident. This analysis is set forth more fully in the Case Summary.

**ADMINISTRATIVE NOTE:**

OPA is tasked with conducting investigations into allegations of police misconduct. Until the Inspector General is selected and put into place, the OPA Auditor continues to be responsible for reviewing those investigations once they are completed and evaluating whether they are thorough, objective and timely. Timeliness is generally a fairly clear standard, even if it changes from one Auditor to the next. Thoroughness and objectivity are much more subjective. In some cases, whether a case is thorough can be evident for anyone to see; for example, where OPA failed to engage in necessary efforts to locate and interview a complainant. In other cases, such as this one, the standard is more nebulous.

In this matter, while the Auditor found OPA's investigation to be timely and objective, he declined to certify it as thorough. Part of the Auditor's rationale appears to be that he has a different interpretation of the BWV, specifically, the application of NE#1's baton to the subject's face/neck area. The Auditor states that "OPA did not adequately evaluate the video evidence relating to the use of force"; however, what it appears that the Auditor is actually saying is that OPA did not evaluate the evidence in the same manner as he did and reach the same conclusions. Indeed, the Auditor explicitly writes with regard to his interpretation of the video evidence: "[NE#1's and the Training Unit's] descriptions do not match what I see on video." This is not, in my opinion, a proper basis for deeming an investigation to be not thorough. Perhaps there is simply a disagreement between OPA and the Auditor as to what the video shows. Another possibility is that the Auditor is right and what he interprets the video as showing is what occurred. However, the Auditor's interpretation could also be incorrect and, itself, unsupported by the video evidence. Either way, a disagreement concerning the evaluation of evidence should not impact the thoroughness of an investigation. It is an entirely subjective and, in a respect, an unfair standard to apply to OPA. Moreover, the OPA investigator, himself, does not make a definitive determination as to the evidence and what it proves or disproves. I do. To the extent the Auditor disagrees with my findings, that is a separate argument all together, not a referendum on the thoroughness of this investigation.

Further, while the Auditor asserts that the video evidence is inconsistent with NE#1 using a modified cross-face technique with his baton, I am unsure what evidence or expertise he is basing this conclusion on. Notably, OPA based its interpretation of the baton use both on its viewing of the video, the law enforcement experience of its staff, and on the report written by a Lieutenant who has long been a Department trainer on force and defensive tactics and was a supervisor in the Training Unit. The Lieutenant indicated that, while NE#1's use of his baton was not a trained technique, he believed it was "derived" from the cross-face. I credit the Lieutenant's interpretation and expertise in this area over that of the Auditor, particularly where the Auditor provides no concrete explanation for why he believes this interpretation to be incorrect.



In addition, I disagree with the Auditor that there was a discrepancy between the video evidence and NE#1's statement concerning when he was first struck by the subject. NE#1 stated at his OPA interview that he "felt like" the subject hit him in the shoulder with the subject's "right closed fist." He did not, however, state that this was definitively what occurred. This was consistent with the subject's FIT interview, during which he stated that when he was first struck by the subject it felt as if the subject had "punched him." However, he also did not state in his FIT interview that he was actually hit with a closed fist. Even if he had made this exact statement and there was a nominal discrepancy, whether the subject gave NE#1 a hard strike to the shoulder with an open hand or closed fist is absolutely irrelevant to whether NE#1 had a lawful basis to then use force and regarding whether the level of force was within policy. As such, it should not ultimately have any bearing on the thoroughness of OPA's investigation.

I also disagree that OPA did not fully explore the force used by the officers and ask sufficient questions to determine whether each application of force was reasonable, necessary and proportional. While the Auditor may feel otherwise, I believe that the assigned OPA investigator's comprehensive and targeted interviews, coupled with the extensive statements given by the Named Employees to FIT, were more than sufficiently thorough and clearly illuminated the facts necessary to determine whether the force was consistent with policy.

Lastly, the failure to de-escalate was not an allegation in this case. The Auditor approved the classification of this investigation and, thus, inherently agreed that there was no need to evaluate whether or not the officers properly de-escalated prior to using force. Thus, it seems unfair to then criticize OPA for not exploring whether or not the Taser application improperly escalated this incident or "whether it would have been possible [for the Named Employees] to instead back away from the subject and monitor/contain him while waiting for additional officers to arrive." I note that these are not elements of the allegations actually classified in this matter. I further note that had OPA asked these questions, as the Auditor apparently expected, it very well could have run afoul of the Collective Bargaining Agreement with the Seattle Police Officers' Guild, which requires advance notice of areas of questioning prior to an officer's interview. I also believe that such action on the part of the Named Employees would not have been feasible, safe, consistent with tactics or training, or in line with the Department's and public's expectations of officers' conduct.

Ultimately, while I disagree with the Auditor's conclusions and decision to deem this case not thorough, he is entitled to this belief based on the function of his role. That we publicly disagree is not a negative. It is instead proof that the system is functioning as it is supposed to and that all actors are taking their responsibilities seriously and critically approaching this work.

#### **ANALYSIS AND CONCLUSIONS:**

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

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

NE#1 used the following force on the subject: a kick, approximately 10 baton strikes, two jabs of the baton into the subject's ribs, and pressing the baton into the side of the subject's face/neck area to attempt to cause the subject to flip onto his stomach.

The subject failed to comply with NE#1's initial direction to him to stop. Indeed, he pushed through the bicycle that NE#1 was holding up as a barrier and pushed NE#1, himself, shoving him backwards. The subject then again aggressively advanced towards NE#1 and was apparently readying himself to assault NE#1 again. This is supported



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by the subject stating repeatedly “who wants it,” and then taking a step towards NE#1. At this point, and after receiving a warning from NE#2, he was Tased. The subject remained prone on the ground for several seconds, but as soon as NE#1 moved towards him in order to take him into custody, the subject instantly turned his body towards NE#1 and lashed out at him. NE#1 responded by striking the subject with his baton several times in left arm/shoulder area and, when the subject continued to grab at him and try to stand up, NE#1 kicked at him once. This had little effect and the subject continued to struggle with, grab and flail at, and kick the officers. NE#1 poked at the subject twice with his baton in the side. NE#1 explained that this was purposed to stop the subject from grabbing his baton. NE#1 then reported that he observed the subject continue to resist and kick NE#2 and he made the decision to apply additional strikes with his baton to the subject’s left arm/shoulder area. NE#1 then placed his baton at the junction of the subject’s neck and chin and used it as “pain compliance” and a modified cross-face technique in order to try to flip the subject onto his stomach. I note that, even after this force, the subject continued to struggle and it was not until a third officer arrived that he was subdued.

SPD 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***

With regard to this first element, I find that the force used was reasonable. At the time of the incident, the Named Employees were aware that the subject had been walking through traffic and assaulting or attempting to assault bicyclists. The officers were further aware that the subject was putting the entire public at risk with his behavior. The officers, like many of the civilian witnesses interviewed, opined that the subject was under the influence of narcotics. This was later proven to be true. The subject failed to comply with the officers’ orders to stop and, instead, aggressively tried to push through them and assaulted NE#1. The subject continued to actively resist, grabbing and flailing at the officers, trying to get off the ground, and kicking NE#2. While there were two officers involved in this incident, the subject was larger than either of them and appeared stronger and was indisputably aggressive. While the force used by NE#1 seems, *on its face, to have been substantial, it had little to no effect on the subject. Moreover, this was the case even though the subject was Tased multiple times.* He continued to resist until a third officer arrived on the scene. The force used by NE#1 was ultimately reasonable to stop the subject from resisting, to prevent him from harming the officers or others, and to prevent him from escaping.

#### **Necessary Factor**

With regard to whether the force was necessary, as stated above, I find that the force used was a reasonable degree of force. I further find that NE#1 did not believe that he had any other reasonable alternatives other than that force. Lastly, I find that the force was necessary to achieve the lawful goal of placing the subject into custody and preventing further harm to the officers or others.



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### Proportionality Factor

Lastly, with regard to the proportionality of the force, I find that the force applied was proportional to the subject's conduct and the threat of harm facing the officers. The subject had previously been assaultive to civilians and continued that behavior towards the officers. A high level of force was proportional to the harm posed by the subject. Moreover, I note that, aside from the Taser dart that lodged into his hand, the subject's injuries were largely superficial.

For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

### Named Employee #1 - Allegation #2

***8.300-POL-5 Use of Force - IMPACT WEAPONS 4. A Hard Strike to the Head With Any Impact Weapon, Including a Baton, Is Prohibited Unless Deadly Force is Justified***

SPD Policy 8.300-POL-5 prohibits a hard strike to the head with any impact weapon, including a baton, unless deadly force is justified. The policy has similar restrictions on baton strikes to the throat, neck, spine, groin or kidneys. The policy defines the preferred target areas as the arms, legs and torso. The policy recognizes that inadvertent strikes the head or other specified body areas may occur, but states that such mistaken blows "must be reported to ensure that all reasonable care was taken to avoid them."

In his statement to FIT, NE#1 estimated that he struck the subject approximately 10 times with his baton, but indicated that he did not believe that he hit the subject in the head, neck, throat, spine, groin or kidneys. He recalled that all of the strikes were to the subject's left forearm, upper arm and shoulder. NE#1 testified similarly during his OPA interview, wherein he stated that he believed that all of his strikes were to the subject's left arm and shoulder and that he did not intentionally target any other part of the subject's body. At his FIT interview, NE#1 also stated that he jabbed the subject twice in the ribs with his baton in order to stop the subject from grabbing the baton. He did not initially report this in his first OPA interview, but clarified in his second OPA interview that he also used this force.

The witness officer witnessed a number of the strikes, but not all. He stated that the strikes he observed were to the subject's arm and shoulder area. Moreover, from my review of the civilian witness interviews conducted by both OPA and FIT, I find no evidence that anyone identified that NE#1 struck the subject in the head or in another impermissible area with his baton.

The baton strikes were captured on video. The best view appears to be NE#1's BWV. From my review of that video, it does not appear that any of the baton strikes hit the subject in the head and that all were to his left arm and shoulder area. NE#2's ICV similarly does not reflect any baton strikes by NE#1 to the subject's head.

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

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



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**Named Employee #1 - Allegation #3**

***8.300-POL-10 Use of Force - NECK AND CAROTID RESTRAINTS 1. Officers Are Prohibited From Using Neck and Carotid Restraints Except When Deadly Force is Justified***

SPD Policy 8.300-POL-10 governs the use of neck or carotid holds by SPD officers. The policy indicates that these tactics are strongly disfavored by the Department and may not be used unless deadly force would be justified. (SPD Policy 8.300-POL-10.) The policy further requires that the use of such tactics will result in a FIT investigation. (*Id.*) While the policy does not clearly define neck or carotid holds, it logically follows that they are purposeful applications of force by an officer to a subject's neck. Accordingly, I find that inadvertent contact with the neck that is not purposed to restrict an individual's' airway or breathing does not constitute a neck or carotid hold.

At his OPA interview, NE#1 explained that he held his baton against the subject's face as a form of "pain compliance" in order to get the subject to roll over onto his stomach. NE#1 contended that his intention was to use a modification of the cross-face hold that he was taught in training to use to flip someone over. In a report submitted to FIT, Lieutenant Brooks contended that it also appeared to him from watching the video that NE#1 was attempting such a technique. While Lieutenant Brooks explained that officers were not trained to effectuate this technique with a baton, he believed that, under the circumstances, it was a reasonable modification of NE#1's defensive tactics training. NE#1 stated that he did not apply a neck or carotid hold.

From my review of the video, I conclude that NE#1 held his baton at the top of the subject's neck by his back left cheekbone. It appeared to me that the baton was more on the subject's face than on the subject's neck. It further appeared to me that NE#1 did not push the baton down on the subject's neck but, instead, seemed to be pushing it under and behind the bottom of the subject's lower left cheekbone. NE#1's actions seemed to me to be consistent with trying to utilize the baton to try to push the subject onto his stomach. I find no evidence that this technique impacted the subject's breathing or even caused the subject pain. Moreover, I do not see anything to suggest that it was an improper neck or carotid hold as contemplated by this policy.

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

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

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

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

NE#2 reported using the following force on the subject: two knee strikes and five applications of his Taser (two of which were faults and the Taser was not actually deployed). Only the knee strikes are discussed here as the Taser applications are evaluated in the context of Allegations #2 and #3, below.

I find that NE#2's use of knee strikes was reasonable, necessary and proportional. NE#2 reported that the first force he used was the Taser, which initially worked in that it got the subject to the ground. However, after the five second cycle, the subject tried to get up and was aggressively physically resisting and subsequent usages of the Taser were not successful in stopping him from doing so. Based on the subject's resistance, the facts that they suspected the subject of assault and that he had already assaulted both officers, and the fact that the Taser was not working as a force option, NE#2 decided to knee the subject twice in order to subdue him.



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NE#2 noted, however, that this force was also ineffective and the subject continued to physically struggle against and attempt to assault the officers. NE#2 then made the decision to go back to the use of his Taser, which he was still holding, and which he viewed as the better force option.

The knee strikes were reasonable to prevent the subject from continuing to resist and assault the officers, to prevent him from placing other civilians and officers in danger, to control his body and place him under arrest, and to ensure that he did not escape. While other significant force was being used by NE#1, this force was also not stopping the subject's actions. As such, the knee strikes were warranted under the totality of the circumstances. The knee strikes were also necessary given that the Taser applications and the force being used by NE#1 was not stopping the subject's resistance. I find that NE#2 believed the strikes were his only reasonable alternative at that point and were needed to prevent further injury and effectuate the arrest. Lastly, I find that the knee strikes were proportional to the threat presented and violence used by the subject.

As such, I find the knee strikes to have been consistent with policy and I recommend that this allegation be Not Sustained – Lawful and Proper.

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

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

***8.300-POL-3 Use of Force - CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 4. Officers Shall Only Deploy CEW When Objectively Reasonable***

SPD Policy 8.300-POL-3 concerns the use of Tasers. The policy mandates that Tasers may only be used when objectively reasonable, and refers to SPD Policy 8.000. (See SPD Policy 8.300-POL-3(4).) The policy specifically delineates two scenarios in which Taser use is appropriate: first, "when a subject causes an immediate threat of harm to the officer or others"; or second, "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." (*Id.*) Notably, the policy is silent on the use of Tasers on fleeing subjects. (See *id.*)

I find that the initial use of the Taser in this incident was justified under both prongs of the policy. First, I find that the evidence indicated that there was an immediate threat of harm to the officers and others. The subject was suspected of assaulted bicyclists, was aggressive towards the officers virtually immediately upon seeing them, and did, in fact, threaten and harm the officers. Second, I find that the subject needed to be taken into custody and, based on the level of resistance presented by the subject upon his first contact with the officers it was likely that injury would be caused to both the officers and the subject were hands on tactics used. Unfortunately, the officers were required to go hands on with the subject anyway based on his level of resistance. However, the initial use of the Taser in this situation was absolutely warranted and proper under SPD's policy.

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

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





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**Named Employee #2 - Allegation #3**

***8.300-POL-3 Use of Force - CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 8. As With the Initial CEW Application, Each Subsequent Application of a CEW Must Be Individually Justified***

SPD Policy 8.300-POL-3 states that, “as with the initial CEW [Taser] application, each subsequent application of a CEW [Taser] must be individually justified.”

Here, NE#2 used his Taser five times during the incident; however, two of those usages were faults that did not result in a Taser application.

NE#2 first used his Taser at the inception of the incident (at 17:23:43). As indicated above, I find this first application to have been consistent with SPD policy. NE#2 then pulled the trigger of his Taser four more times. However, two of those usages were faults that did not result in a Taser application. The second and third times that NE#2 used his Taser were the faults (at 17:23:52 and 17:24:06). NE#2's fourth and fifth applications were separated by approximately 30 seconds from the first application and 10 seconds from each other (at 17:24:10 and 17:24:20). Both were successful and each lasted for approximately five seconds.

Given that the second and third applications of the Taser were not successful, no force was actually applied and those applications do not, in my mind, need to be justified. Were such a need to exist, however, I would find them consistent with policy.

The fourth and fifth applications, which were successful, occurred during the active struggle with the subject. On both occasions, the subject was actively resisting the officers, flailing his arms at them and grabbing at them, kicking NE#2, and refusing to roll onto his stomach. He had further been aggressively fighting the officers without letting up, even in the face of fairly substantial force. I find that, during these latter two applications, there remained an immediate threat of harm to the officers (that was, in fact, substantiated by the kicks to NE#2's person). Moreover, the subject still needed to be taken into custody and there was the significant likelihood, given the events that had already transpired, that the officers and even the subject could be seriously injured were the officers to continue to go hands on with him.

For these reasons, I find that the fourth and fifth Taser applications were consistent with policy and were reasonable, necessary and proportional. As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

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