



CLOSED CASE SUMMARY

ISSUED DATE: APRIL 24, 2018

CASE NUMBER: 2017OPA-1230

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	8.400 - 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, Unless Not Practical, Following any Use of Reportable Force	Sustained

Imposed Discipline

Oral Reprimand

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	8.400 - 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, Unless Not Practical, Following any Use of Reportable Force	Not Sustained (Training Referral)
# 4	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations	Not Sustained (Inconclusive)

Named Employee #3

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations	Not Sustained (Inconclusive)
# 2	8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, Unless Not Practical, Following any Use of Reportable Force	Not Sustained (Inconclusive)

Named Employee #4

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations	Not Sustained (Inconclusive)
# 2	8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor	Not Sustained (Inconclusive)



	Immediately, Unless Not Practical, Following any Use of Reportable Force	
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Named Employee #5

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 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, Unless Not Practical, Following any Use of Reportable Force	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:

During its investigation into another case, OPA determined that the subject complained of pain and may have alleged misconduct. These statements were made in the presence of multiple officers but were not reported. The Named Employees' collective failures to report may have constituted policy violations.

STATEMENT OF FACTS:

During an investigation into other allegations made by the subject (see 2017OPA-1165), OPA determined that the subject made two complaints of pain. Both complaints of pain were captured by multiple officers' In-Car Video (ICV) and Body Worn Video (BWV). At the time the complaints were made, Named Employee #1 (NE#1), Named Employee #2 (NE#2), and Named Employee #5 (NE#5) were all in the subject's immediate vicinity.

After the complaints of pain were made, and when the subject was standing in front of a patrol vehicle, he turned to face NE#5, who was a Field Training Officer (FTO) on that date and was wearing a tan shirt, and alleged that he was punched by the "male in the white shirt." NE#2, Named Employee #3 (NE#3), and Named Employee #4 (NE#4) were standing in the near vicinity of the subject when this statement was made. There was no use of force reports generated as a result of this incident, nor was there an OPA referral.

Based on these facts, OPA self-initiated an investigation into this matter. As part of that investigation, OPA interviewed all of the Named Employees. OPA also attempted to interview the subject, but the subject did not respond to OPA's requests.

NE#1 reported that she responded to a call that the subject was sleeping in a coffee shop and the coffee shop wanted him removed. She reported to OPA that she moved the subject's head in order to wake him up. The subject left the coffee shop and engaged in a conversation with NE#1. She stated that, in order to de-escalate this matter, she disengaged with him. When she viewed the subject again, he was standing in the middle of the street and blocking



traffic. NE#1, NE#2, and NE#5 were able to corral the subject and placed him under arrest. NE#1 explained that she used force to handcuff the subject. NE#1 did not report using any other force.

NE#1 told OPA that she did not hear the subject's complaints of pain. However, she stated that, even had she heard them, she would not have reported the complaints because they were made at a time when she was not using any force on the subject. NE#1 further told OPA that she did not hear the subject state that he had been struck by a person wearing a white shirt and, as such, she did not report this allegation.

NE#2, who was a student officer on the date in question and in the final checkout phase of the FTO program, reported assisting NE#1 and NE#5 handcuff the subject. He did not report using any other force. NE#2 told OPA that he did not hear the complaints of pain made by the subject for the following reasons:

I mean, I, I believe just trying to, trying to bring him over to—he wasn't resisting, but having to walk him over to, to the front of the car and being focused on the other officer safety aspects. You know, I was trying to do my, do my part of the job of at that moment, of getting him to the car and to begin a search.

NE#2 stated that he heard the subject say that an individual in a white shirt punched him; however, he did not believe that the subject was referring to an officer who had punched him and NE#2 stated that he did not see NE#5 ever strike the subject. As such, he admittedly did not report this allegation.

NE#5 also participated in the handcuffing but used no other force. NE#5 stated that he did not recall hearing the complaints of pain. However, after reviewing the video, he told OPA that, because the complaints were not associated with any use of force, he did not believe that he was required to report them.

NE#3 and NE#4 responded to the incident after the subject had already been handcuffed. Both recounted hearing the subject state that someone with a white shirt had hit him. NE#3 explained that he perceived NE#5 as wearing a tan shirt and did not think that he was the individual that the subject was referring to. NE#3 opined that the subject could have been referring to employees of nearby businesses. NE#3 further stated that he did not view NE#5 use force towards the subject. As such, NE#3 did not believe that he was required to report this allegation. NE#4 similarly reported that he did not believe that the subject was referring to NE#5 when he mentioned being hit by someone wearing a white shirt. This was the case even though he agreed that the subject referred to NE#5 as a person wearing a white shirt at one point during their conversation. NE#4, like NE#3, recounted that he did not see NE#5 ever strike the subject.

Both NE#3 and NE#4 denied any recollection of hearing the subject complain of pain. This was the case even though they agreed that two complaints were made after watching the video. NE#4 explained that he and NE#3 were likely approximately 20 to 25 feet away from the subject when he made the complaints of pain. Notably, while the audio of the complaints was captured on their video systems, based on the video, NE#3 and NE#4 did not appear to be in the subject's immediate vicinity when the complaints were made.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

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.” (SPD Policy 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.*)

Here, NE#1 made physical contact with the subject on two occasions. First, she moved his head in order to wake him. Second, she, with the assistance of NE#2 and NE#5, applied handcuffs to him.

With regard to the moving of the subject’s head, I conclude that this was not force as contemplated by SPD policy. As such, I do not evaluate it herein.

With regard to the handcuffing, I find the force used by NE#1, NE#2, and NE#5 to have been consistent with policy. As a starting point, the force was reasonable in order to effectuate the arrest and to secure the person of the subject, who was just viewed committing a crime. Moreover, it was necessary to further the lawful goal of placing the subject into custody and there was no effective alternative to placing the subject into handcuffs. Lastly, the minor force used to handcuff the subject was proportional given the circumstances facing the officers. While the subject complained that he was struck by someone wearing a white shirt, I find no evidence supporting that this occurred, let alone that this force was used by a Department employee.

As such, I recommend that this allegation be Not Sustained – Lawful and Proper as against NE#1, NE#2, and NE#5.

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

Named Employee #1 - Allegation #2

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

SPD Policy 8.400-POL-1 requires that officers report all uses of force except for de minimis force. The policy further requires that: “Officers shall further document all reportable uses of force to the best of their ability, including a description of each force application.” (SPD Policy 8.400-POL-1.)

As discussed more fully below, I find, applying a preponderance of the evidence, that NE#1, NE#2, and NE#5 all heard or should have heard the complaints of pain made by the subject. However, this does not mean that they were necessarily required to generate use of force reports. This was particularly the case given that all three only used de minimis force. While they should have completed some documentation concerning the complaints of pain, I recommend that, under the circumstances of this case, NE#1, NE#2, and NE#5 receive Training Referrals rather than Sustained findings.



- **Training Referrals:** NE#1, NE#2, and NE#5 should receive additional training concerning the requirement that they document all non-de minimis uses of force. This includes complaints of pain, which are classified as Type I force. The failure to do so constitutes a violation of policy. NE#1, NE#2, and NE#5 should be counseled by their chain of command to ensure that they document complaints of pain moving forward in an appropriate report. This training and associated counseling should be memorialized in a PAS entry.

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

Named Employee #1 - Allegation #3

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, Unless Not Practical, Following any Use of Reportable Force

SPD Policy 8.400-POL-2 requires that an officer who uses reportable force or hears a complaint of pain while on duty is required to immediately notify a supervisor of this matter unless it would be impractical to do so. The policy further instructs the officer to make this notification by calling the supervisor via radio. (SPD Policy 8.400-POL-2.)

Based on my review of the evidence, the subject's two complaints of pain were made while NE#1 was in his immediate vicinity. NE#1 contended that she did not remember hearing the complaints of pain. However, applying a preponderance of the evidence standard and given her proximity to the subject at the time the complaints were made, I find that she either did hear or should have heard them.

I further find that she did not immediately report the complaints to a supervisor. Notably, during her OPA interview, NE#1 stated that, even had she heard these complaints, she would not have reported them because they were made at a time when she was not using any force on the subject. This is directly contrary to the express requirements of the policy and the expectations of the Department concerning the reporting of complaints of pain, which constitute Type I uses of force.

For the above reasons, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #2 - Allegation #1

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

For the same reasons as explained in the context of Named Employee #1, Allegation #1, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #2

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

For the same reasons as discussed in the context of Named Employee #1, Allegation #2, I recommend that this allegation be Not Sustained – Training Referral.



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

Named Employee #2 - Allegation #3

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, Unless Not Practical, Following any Use of Reportable Force

NE#2, like NE#1 and NE#5, also stated that he did not recall hearing the complaints of pain at the time. Again, applying a preponderance of the evidence standard and given his proximity to the subject when the complaints were made, I find that he either did hear or should have heard them. I further find that he did not immediately report the complaints to a supervisor.

I note that NE#2 was a student officer on the date in question. Given his relative inexperience, I give some weight to his explanation that he was distracted by the circumstances presented to him during this incident, which, in his recounting, caused him not to hear the complaint of pain. As such, while I find that NE#1 technically violated policy, for the reasons set forth above, I believe that a Training Referral, rather than a Sustained finding, is the appropriate disposition.

- **Training Referral:** NE#2 should receive additional training concerning his obligation to report complaints of pain when he hears them. NE#2 should be counseled that such complaints constitute Type I uses of force. NE#2 should be informed that, were he not a student officer on the date of the incident, OPA would have recommended that this allegation be Sustained. Lastly, NE#2 should be instructed to comply with this policy in the future. This training and associated counseling should be memorialized in a PAS entry.

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

Named Employee #2 - Allegation #4

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations

SPD Policy 5.002-POL-6 requires that SPD employees who learn of possible misconduct report that misconduct. Minor misconduct must be reported to a supervisor, while serious misconduct must be referred to both a supervisor and OPA. SPD Policy 5.002-POL-5 defines minor and serious misconduct. An allegation of excessive force is serious misconduct that must be reported to a supervisor and OPA (I note that SPD currently trains officers that they only need to report to a supervisor *or* OPA, not both).

As discussed above, while NE#2, NE#3, and NE#4 all heard the subject's allegation that he was hit by someone with a white shirt, they argued that they did not perceive the subject as specifically referring to NE#5. This was due to the fact that NE#5 was wearing a tan shirt not a white shirt, their belief that the subject was likely referring to an employee of a business that he had previously been in, and because none saw NE#5 strike or use any force towards the subject.

Given my review of the video, it appeared to me that, at least at one point, these officers construed the subject to be identifying NE#5 as the person with the white shirt. I base this primarily on their verbal interaction with the subject and responses to his statements. However, I do not find it unreasonable that NE#2, NE#3, and NE#4 did not



believe that the subject was referring to NE#5. As such, I cannot conclusively determine that the subject was making an allegation of potential misconduct against a Department employee that they were required to report, even though I find that it would have been advisable for them to have done so.

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

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

Named Employee #3 - Allegation #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations

For the same reasons as set forth in the context of Named Employee #2, Allegation #4, 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 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, Unless Not Practical, Following any Use of Reportable Force

As discussed above, both NE#3 and NE#4 denied hearing the subject make the two complaints of pain. NE#4 explained that they were likely 20 to 25 feet away from the subject at the time. While the complaints of pain could be heard on NE#3's and NE#4's ICV, they were not recorded as being in the subject's immediate vicinity at the time. As such, there is no evidence that conclusively establishes, even when applying a preponderance of the evidence standard, that they heard the complaints. Logically, NE#3 and NE#4 would not have had an obligation to report what they did not hear.

For these reasons, I recommend that this allegation be Not Sustained – Inconclusive as against NE#3 and NE#4.

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

Named Employee #4 - Allegation #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations

For the same reasons as set forth in the context of Named Employee #2, Allegation #4, I recommend that this allegation be Not Sustained – Inconclusive.

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



Named Employee #4 - Allegation #2

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, Unless Not Practical, Following any Use of Reportable Force

For the same reasons as explained in the context of Named Employee #3, Allegation #2, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #5 – Allegation #1

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

For the same reasons as explained in the context of Named Employee #1, Allegation #1, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #5 – Allegation #2

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

For the same reasons as discussed in the context of Named Employee #1, Allegation #2, I recommend that this allegation be Not Sustained – Training Referral.

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

Named Employee #5 – Allegation #3

8.400 - Use of Force Reporting and Investigation 2. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Immediately, Unless Not Practical, Following any Use of Reportable Force

Based on my review of the evidence, the subject's two complaints of pain were made while NE#5 was in his immediate vicinity. Similarly to NE#1 and NE#2, NE#5 contended that he did not remember hearing the complaints of pain. However, applying a preponderance of the evidence standard and given his proximity to the subject at the time the complaints were made, I find that he either did hear or should have heard them.

I further find that he did not immediately report the complaints to a supervisor. NE#5, like NE#2, told OPA that, even had he heard these complaints, because they were not associated with any use of force, he did not believe that he was required to report them. This is directly contrary to the express requirements of the policy and the expectations of the Department concerning the reporting of complaints of pain, which constitute Type I uses of force.

For the above reasons, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**