



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 15, 2018

CASE NUMBER: 2018OPA-0319

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	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)
# 4	8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Not Sustained (Lawful and Proper)

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	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)
# 4	8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director's Findings
# 1	8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Not Sustained (Lawful and Proper)

Named Employee #4

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)
# 4	8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers	Not Sustained (Lawful and Proper)



	Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	
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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:

It was alleged that the Named Employees used excessive force on the Complainant while he was handcuffed. It was further alleged that Named Employee #1, Named Employee #2, and Named Employee #4 engaged in unprofessional conduct. Lastly, it was alleged that all of the Named Employees may have failed to de-escalate this incident.

ADMINISTRATIVE NOTE:

Both the Named Employees’ chain of command and the Force Review Board made OPA referrals relating to this case. The chain of command referral, which involves allegations of excessive force, professionalism, and the failure to de-escalate, is reviewed in this case. The referral by the Force Review Board, which, like this case, also concerns de-escalation, is reviewed in 2018OPA-0428. While the cases are reviewed separately, the analysis concerning de-escalation is identical.

STATEMENT OF FACTS:

The Complainant was arrested by officers assigned to the Southwest Precinct Anti-Crime Team (ACT). The Complainant was arrested because he had an active felony warrant. He was observed by Named Employees #4 (NE#4) and another officer. The officers told the Complainant to stop and that he was under arrest, but he attempted to flee from them. While chasing the Complainant, NE#4 told him to “get on the fucking ground.” After a short foot pursuit, the Complainant went down to the ground on his own power and the officers caught up to him.

The officers attempted to handcuff him. Named Employee #2 (NE#2), who had arrived at the scene, applied the handcuffs. The Complainant pulled his arm away and further resisted, even after being given orders to stop. NE#2 then finished applying the handcuffs. Even after he was handcuffed, the Complainant repeatedly tried to turn on his side and address the officers. NE#4 asked the Complainant whether he would give the officers problems if they stood him up. The Complainant responded “shut up.” The officers stood him up and the Complainant said “what the fuck are you doing that for” and “what the fuck is your problem.” The officers moved him towards the patrol vehicle and NE#4 stated “shut up.” After they walked a few steps, the Complainant went limp and down to the ground.

Approximately five seconds after he went down to the ground, the officers lifted him up by his legs and arms and carried him to the patrol vehicle. The Complainant complained of pain multiple times. He then stated that the officers broke his wrist. He was placed in the patrol vehicle, face-forward, with his chest against the seat. His feet remained outside of the vehicle. The officers tried to force his body inside, with NE#2 holding his feet. Complainant kicked at the officers at that time. NE#2 told him to stop kicking. NE#2 then stepped back and stated to the Complainant: “If you kick me again, I’m going to put my foot up your ass.”



The officers called for a supervisor and for medical attention given the Complainant's allegation that he broke his wrist. The officers then again pulled the Complainant up and walked him to the patrol vehicle. They read him his Miranda warnings and he continued to pull away from the officers. They tried to walk him to the curb to sit him down and he again pulled away from the officers. Medics arrived at the scene and, at that point, the Complainant was calmer. After the medical examination, no structural injuries were found to the Complainant's wrists or arms. His handcuffs were switched to make them more comfortable and he was transported to the jail in an ambulance.

During a later force review, an Administrative Lieutenant identified the Complainant to be making a possible allegation of excessive force and noted that NE#2 and NE#4 may have engaged in unprofessional conduct. She also noted in her force review that further de-escalation could have been used before the officers used force to carry the subject to the patrol vehicle. She referred these matters to OPA. The Force Review Board (FRB) also reviewed this case and agreed with the Administrative Lieutenant that there was a possible failure to de-escalate. FRB also made a referral to OPA. This referral is being investigation under a separate case – 2018OPA-0428.

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.*)

The Named Employees used force to handcuff the Complainant, to initially pick him up from a prone position, and then to pick him up again and carry him by his legs and his arms to the patrol vehicle. Whether the officers failed to de-escalate prior to using this force is discussed below; however, with regard to the force itself, I find that it was consistent with policy.

First, at the time the force was used, the Complainant was under arrest for an open felony warrant. He ran from the officers and he resisted being taken into custody. At that time, it was reasonable to use force to control the Complainant's body and to place him into handcuffs. Moreover, when the Complainant purposefully went down to the ground and again resisted the officers, they were permitted to use force to move him from the ground to the patrol vehicle. In order to do so, the officers carried the Complainant using his legs and arms. While not a trained tactic, I find that this force was reasonable to take the Complainant into custody. I further find that the force used was necessary to effectuate the lawful purpose of taking the Complainant into custody. I also find that no reasonably effective alternative appeared to exist at the time to the officers. Lastly, I find that the force was proportional to the Complainant's resistance, his aggressive behavior, and the potential threat of harm to the officers, the Complainant, and potentially others were he allowed to continue to resist.



For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper as against all of the Named Employees.

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

Named Employee #1 - Allegation #2

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

This allegation was classified for investigation based on the fact that force was used on the Complainant while he was in handcuffs. SPD Policy 8.200-POL-2 states that force is prohibited: “On restrained subjects (e.g. including handcuffed or contained in a police vehicle) except in exceptional circumstances when the subject’s actions must be immediately stopped to prevent injury, or escape, destruction of property. All such force shall be closely and critically reviewed.”

Under a technical reading of this policy, the carrying of the Complainant to the patrol vehicle was not necessary to immediately stop the Complainant from preventing injury, from escaping, or from destroying property. The Complainant was not trying to strike or harm the officers at the time of the force, there was no risk of him escaping, and he was not destroying any property. That being said, it was a low level of force. Moreover, the Complainant had physically resisted the officers, including pulling his body away, and had previously tried to flee the scene. It is likely that, had he been left to his own devices, the Complainant would have continued to physically resist until he was able to escape. Further, as discussed above, I find that the force was reasonable, necessary, and proportional. For these reasons, and under the totality of the circumstances of this case, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

From my review of the Department video, I found no evidence of any unprofessional statements made by Named Employee #1. I find that his behavior and demeanor was consistent with policy. As such, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #4

8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

“De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.” (SPD Policy 8.100-POL-1.)



The policy further instructs that: “When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.” (*Id.*) Officers are also required, “when time and circumstances permit,” to “consider whether a subject’s lack of compliance is a deliberate attempt to resist or an inability to comply based on factors” such as “mental impairment...drug interaction...[and/or] behavioral crisis.” (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident “when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.” (*Id.*)

The policy gives several examples of de-escalation, which include: mitigating the immediacy of the threat to give officers time to use extra resources and to call more officers or specialty units; and increasing the number of officers on scene to thus increase the ability to use less force. (*Id.*) Other examples of de-escalation include, but are not limited to:

- Placing barriers between an uncooperative subject and officers;
- Containing the threat;
- Decreasing exposure to the potential threat by using distance, cover and concealment;
- Avoidance of physical confrontation unless immediately necessary to protect someone or stop dangerous behavior;
- Using verbal techniques, such as “Listen and Explain with Equity and Dignity” (LEED) to calm an agitated subject and promote rational decision making;
- Calling extra resources, including CIT officers and officers equipped with less-lethal tools; and
- Using “any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject.

(*Id.*) De-escalation is inarguably a crucial component of the Department’s obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department’s policy and expectations.

In her review of the Named Employees’ force, an Administrative Lieutenant wrote the following:

Officers located [the Complainant] and waited for additional officers to arrive before contacting [the Complainant]. [The Complainant] is known to officers and has a reputation for running from police. Throughout the first portion of the arrest, officers used verbal de-escalation telling [the Complainant] to relax, calm down and stop resisting. When [the Complainant] decided to sit down while walking to the patrol vehicle, de-escalation was still feasible prior to the four officers carrying [the Complainant] and attempting to place him in the patrol vehicle but little attempt was made during this portion of the arrest.

The FRB agreed with the Administrative Lieutenant and further noted that this issue was not addressed by the officers’ chain of command.



While all of the Named Employees generally discussed de-escalation in their use of force reports, none of them provided any explanation for how they de-escalated prior to using force to lift the Complainant off of the ground and carry him to patrol vehicle. This was a factor informing the referral to OPA – notably, that it was unclear from the officers’ reports what efforts they used to de-escalate prior to this force being used and whether and why they believed that further de-escalation was no longer safe and/or feasible.

At their OPA interviews, the officers universally stated that further de-escalation prior to using force to carry the Complainant to the patrol vehicle was not safe or feasible. They contended that they tried to reason with the Complainant throughout the interaction, including trying to convince him to comply with their directions to stop resisting and to allow himself to be arrested. They noted that the Complainant was aggressive and resistive regardless. They stated that he had previously fled from the officers and that they believed that, had they not used force to restrain him, he would have tried to do so again, putting both the officers, himself, and nearby community members at risk of harm.

I disagree with the Named Employees that further de-escalation was not safe. I do not believe that there was any risk of harm to the officers had they continued to reason with the Complainant, called for additional resources, or summoned an ambulance to transport him to the jail instead of trying to force him into the patrol vehicle. This was particularly the case given that there were multiple officers surrounding the Complainant and he was handcuffed prone on the ground

I find the officers’ claim that de-escalation was not feasible at that point to be the more convincing argument, even if not overly compelling. The officers asserted that this was the case given the Complainant’s lack of responsiveness and cooperation, as well as based on his ongoing physical resistance. They asserted that further discussion would have been useless given the Complainant’s demonstrated refusal to comply with their orders. While this may be the case, I note that the Complainant and the scene was static at the time he was carried to the patrol vehicle. Even though the officers wanted to get the Complainant into the patrol vehicle and away from the scene, there was no immediate need to do so. The Complainant did not pose a true physical threat to the officers or anyone else at that time. There was no reason that they could not have waited longer and employed other tools set forth in the de-escalation policy prior to using force to carry the Complainant to the car. Indeed, this is the confusing nature of feasibility in the context of the de-escalation policy. This term is not defined and, viewed broadly, there is virtually no scenario, other than that in which there is a fast-evolving situation, where further de-escalation is not feasible.

While ultimately a close call, in OPA’s opinion, the officers did not violate the de-escalation policy in this case. This decision is reached based on the following factors. First, I credit the officers’ contention that, at the time of the incident, they did not reasonably believe that further de-escalation was feasible. Second, I note that only five seconds elapsed from when the Complainant purposefully went limp until when the officers carried him to the patrol vehicle, which suggests that they did not even view this as a separate application of force for which they were required to first attempt de-escalation. Third, while an untrained tactic and while it resulted in a complaint of pain (that was ultimately unfounded), the force used to carry the Complainant to the patrol vehicle was not significantly greater than that used to initially secure his person and to handcuff him. As such, there was no true escalation of force here. Fourth, all of the officers were CIT trained and a number officers were already at the scene dealing with one subject. As such, I do not think it would have made any difference had the Named Employees waited for more CIT certified officers to arrive. Fifth, the Complainant was unresponsive to the officers’ attempts to reason with him and it seems likely that LEED or other verbal skills would have been similarly ineffective. Sixth, and last, even if



performed quickly, the officers appeared to put together a tactical plan for how they were going to get the Complainant into the patrol vehicle and then worked cohesively together to carry out that plan.

In many respects, this is one of the more unique de-escalation cases that I have seen, particularly given the relatively low level of force used. That being said, it was properly identified and referred as a possible failure to de-escalate given a preliminary review of the Department video and the lack of any explanation from the officers for why de-escalation was no longer safe and/or feasible. While ultimately a close call, given my review of the totality of the evidence and based on the substance of the Named Employees' OPA interviews, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #1

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

For the same reasons as stated above (see 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

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

For the same reasons as stated above (see Named Employee #1, Allegation #2), I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #3

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

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.)

NE#2 was alleged to have been unprofessional when he told the Complainant “If you kick me again, I’m going to put my foot up your ass.” NE#2 contended that this statement was not unprofessional. In his use of force report he explained that this statement was: “made in a way to startle and impact [the Complainant’s] actions and judgment in a manner to deescalate his combative behavior. The tactic was successful in that [the Complainant] ceased any further physical aggressions against officers on the scene.” NE#1 provided a similar explanation for this statement at his OPA interview. He further asserted to OPA that he did not use profanity as an insult to the Complainant and that he did not use derogatory, contemptuous, or disrespectful language.



From my review of the video, I disagree. I find that telling a subject that you are going to stick your foot up their ass is both contemptuous and disrespectful. I further find that, at the time the statement was made, NE#2 was not actively being kicked and was standing away from the Complainant. As such, unlike when NE#4 used profanity, it was not in the heat of the moment. Moreover, while NE#2 stated that his statement was purposed to gain compliance from the Complainant, it seems more likely that it was based on NE#2's anger. Indeed, after the incident, NE#2's supervisor spoke with him and asked him how he was doing. He stated that he had been grazed by a kick from the Complainant and was "pissed." This strongly suggests that anger, not strategy, was the reason for NE#2's statement.

That being said, I find that a Training Referral, rather than a Sustained finding, is the appropriate result here. I make that determination for two main reasons. First, the Complainant was inordinately difficult during this incident, both through his physical resistance and his repeated unproductive verbal comments. Second, NE#2 had been kicked by the Complainant only seconds prior. For these reasons, I issue the below Training Referral.

- **Training Referral:** NE#2 should receive additional training concerning the elements of the Department's professionalism policy. His chain of command should further discuss this incident with him and the statement he made to the Complainant. His chain of command should remind him that telling a subject that he is going to stick his foot up the subject's ass is unacceptable and is not in line with the expectations of the Department and the community. This is the case even where the subject is difficult and uncooperative, such as the Complainant was here. This retraining and counseling should be documented and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegation #4

8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

For the same reasons as stated above (see Named Employee #1, Allegation #4), I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #1

8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

For the same reasons as stated above (see Named Employee #1, Allegation #4), I recommend that this allegation be Not Sustained – Lawful and Proper.

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



Named Employee #4 - Allegation #1

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

For the same reasons as stated above (see 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 #4 - Allegation #2

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

For the same reasons as stated above (see Named Employee #1, Allegation #2), I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #4 - Allegation #3

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

This allegation was classified against NE#4 based on his statement to the Complainant to “get on the fucking ground” and when he told the Complainant to “shut up.”

Profanity directed as an insult is prohibited by the Department’s professionalism policy. Here, while NE#4 did use profanity, it was not directed as an insult towards the Complainant. Instead, it was a statement made in the heat of the moment while NE#4 was engaged in a foot pursuit with the Complainant. OPA has consistently deemed these types of conduct to be a product of the high-stress nature of police work, not indicative of a lack of professionalism.

With regard to NE#4 telling the Complainant to “shut up,” I think that it was inadvisable as it seemed to serve to escalate the situation. That being said, I do not believe that it constitutes unprofessional behavior. Moreover, I note that, for the remainder of his response to the call, NE#4 behaved appropriately and respectfully towards the Complainant.

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

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

Named Employee #4 - Allegation #4

8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

For the same reasons as stated above (see Named Employee #1, Allegation #4), I recommend that this allegation be Not Sustained – Lawful and Proper.

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