



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 15, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0165

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	8.400 – Use of Force Reporting and Investigation 4. The Sgt will review the incident...	Not Sustained (Training Referral)

Named Employee #2

Allegation(s):		Director's Findings
# 1	6.220-POL-2 – Conducting a Terry Stop 1. Terry Stops are Seizures Based Upon Reasonable Suspicion	Not Sustained (Lawful and Proper)
# 2	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 3	5.001 – Standards and Duties 10. Employees Shall Strive to Be Professional	Sustained

Imposed Discipline

Written 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:

The Complainant alleged that Named Employee #2 used excessive force on her and the Subject, that Named Employee #2 improperly detained the Subject, and that Named Employee #2 was unprofessional towards them. OPA also alleged that Named Employee #1 may have failed to investigate a use of force.

SUMMARY OF INVESTIGATION:

Named Employee #2 (NE#2) and Witness Officer #1 (WO#1) were dispatched to a call of an assault at a store. It was reported that two juvenile males had assaulted store staff and that they had then stolen alcohol before leaving. One of the suspects was described as a light skinned Black male in his early twenties who was wearing a white jacket and tan pants. NE#2 and WO#1 began to conduct an area check in the vicinity of the store.

Approximately six minutes after the call was dispatched, NE#2 observed a male – referred to here as the Subject – who was walking around if not less than three and a half blocks away from the store. The Subject was Black and was wearing a white sweatshirt with the hood down and grey pants. The Subject was walking with two other individuals, both females. NE#2 and WO#1 turned around in their vehicle and when they next saw the Subject, his hood had been pulled up. NE#2 got out of the patrol vehicle and called out: "You in the white sweatshirt." The Subject pointed to



himself and NE#2 said “yes.” NE#2 told the Subject that he just needed to talk to him. The Subject asked for what. NE#2 said that the Subject needed to stop and that the Subject had been given an order to stop. As NE#2 approached the two females who were with the Subject, the Subject began to run. NE#2 extended his hands and pushed through the two females to get behind the Subject. He then began to chase the Subject.

As he chased the Subject, NE#2 yelled: “You’re going to get tased mother fucker” and “Seattle Police, stop mother fucker.” Approximately three minutes later, the Subject stopped running and faced NE#2. He asked NE#2 if he was going to “kill” him. NE#2 again yelled: “Get on the fucking ground.” The Subject then went down to the ground. The mechanism of how this occurred was not clear on Body Worn Video (BWV); however, NE#2 later contended that he pulled the Subject down using a soft takedown. While the Subject was on the ground, NE#2 directed: “Get your arm out, get your fucking arm out.” NE#2 took hold of one of the Subject’s arms. The Subject began to yell and move around. He was told to stop. NE#2 was then able to handcuff the Subject. WO#1 also assisted in handcuffing the Subject.

At this time, the two females who had been with the Subject started saying that he did not do anything. They were told to get back. NE#2 said: “Back the fuck up.” One of the females told NE#2 that he could not touch her. The Subject remained on the ground as the handcuffing was completed. At one point, he said that he could not breathe and that a knee was on his neck. NE#1 adjusted his knee placement as a result; however, the BWV did not depict NE#2’s knee actually being on the Subject’s neck at any time.

When the females began to approach where the officers and the Subject were situated, NE#2 stood up and faced them. He yelled at them to get back and asked if they wanted to be arrested. NE#2 then used an outstretched hand to push one of the females back. NE#2 returned to where the Subject was; however, both females again approached the officers and the Subject. NE#2 stood up and pushed one of the females back with an outstretched hand telling them to “get the fuck out of here.”

NE#2 asked the Subject why he ran. The Subject said that he did so because he thought he was going to be killed. He noted that he saw NE#2 reach for his gun and that NE#2 pulled his gun. Neither statement was consistent with the BWV. The Subject told the females to calm down. The officers talked to the Subject about running away and he acknowledged that he should not have run. The officers arranged for a show-up. The witness who came to the scene did not positively identify the Subject. The officers found out that the Subject had an open warrant. However, it was later determined that the Youth Justice Center would not accept him.

A supervisor – Named Employee #1 (NE#1) – came to the scene. Once it was determined that the Youth Justice Center would not accept the Subject, the Subject was released from custody. NE#1 asked the Subject whether he had any injuries. The Subject said that he had a scraped knee that was caused when he fell to the ground after being chased by NE#2. The Subject also said that NE#2 had his knee on the Subject’s neck. NE#1 clarified whether the Subject “fell down.” The Subject confirmed that this is what occurred and that he did not have any other injuries. NE#1 did not follow up on the Subject’s claim of NE#2’s knee on his neck. NE#1 did not examine the injury to the Subject’s knee and did not conduct any force investigation. He further did not order NE#2 to complete a use of force report. NE#1 gave the Subject a business card with the incident number and NE#2’s serial number. NE#1 also offered to talk to the two females.

NE#2 walked over to the females and tried to explain the reason for the stop to them. One of the females referred to NE#2 as “honey,” and NE#2 replied that his name was not honey and provided his last name. He continued to try to



explain what occurred, but the female spoke over him. She called him “baby” and moved closer to NE#2. He told her that she was about to cross a line. She told NE#2 to give her a business card and he did so. NE#2 told the female to have a great day. She responded: “Have a great day asshole.” NE#2 told the female that she was “so professional.” The contact then ended.

One of the females later made a complaint concerning this incident. The female – who is referred to here as the Complainant – asserted that NE#2 was overly aggressive and attacked the Subject for no reason. She further asserted that he pushed her without basis. This investigation ensued.

After conducting its intake investigation, OPA added allegations concerning NE#2’s decision to detain the Subject, the force he used on both the Subject, the Complainant, and the other female, and NE#2’s statements and use of profanity. OPA also added an allegation against NE#1 for his failure to conduct a force investigation.

OPA attempted to interview the Complainant, but she declined to provide a statement. OPA interviewed NE#1, NE#2, and WO#1. OPA also reviewed the BWV and the documentation generated concerning this incident.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.400 – Use of Force Reporting and Investigation 4. The Sgt will review the incident...

SPD Policy 8.400-POL-1(4) requires that a sergeant review a force incident and classify the force as either de minimis or as Type I, Type II, or Type III that must be investigated.

At his OPA interview, NE#1 said that he interpreted the Subject’s statements to mean that the Subject fell down on his own power. NE#1 did not view this as a reportable use of force. NE#1 said that this determination informed his decision to not further examine the injury. With regard to the knee on the neck, NE#1 recalled the Subject saying this and also remembered discussing this with NE#2. Based on NE#2’s description, NE#1 believed that the knee placement was incidental, and the knee was readjusted. He did not believe that it was necessary to ask the Subject further questions about the knee placement because he felt that the Subject was physically fine.

OPA finds that NE#1’s supervisory response to this incident was insufficiently thorough. First, OPA notes that he did not ask any probing questions concerning the mechanism of how the Subject went down to the ground of either the Subject or NE#2. While OPA agrees that the Subject’s recitation of the facts suggested that he fell rather than was pushed or pulled, NE#1 should have further explored this. Indeed, NE#2 later told OPA that he pulled the Subject down. If the knee injury occurred at that point, which appears likely, it should have been investigated as a Type II use of force. In addition, NE#1 also could have asked the females what they saw to assess the nature of the force used, but he did not do that either.

Second, NE#1 should have asked to see the injury and examined its severity, as well as asked the Subject if he needed medical attention. He did not take any of these steps.

Third, NE#1 should have asked further questions concerning the Subject’s contention that NE#2’s knee was on his neck. While OPA concurs that the BWV indicates that the knee was never actually impacting the Subject’s neck, NE#1



did not know that at the time. Failing to explore this issue, which could constitute an out of policy application of NE#2's knee if true, rendered the force investigation incomplete.

Ultimately, OPA finds that NE#1's investigation fell short of what was expected of him. That being said, OPA recognizes that NE#1 relied on the plain language of what the Subject reported and that there is no indication that NE#1 acted in bad faith. Moreover, NE#1 has never been disciplined previously for failing to conduct a thorough force investigation. For these reasons, OPA believes that retraining rather than discipline is the appropriate result. Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#1's chain of command should review this incident with him and discuss his force investigation. The chain of command should instruct NE#1 to be more thorough in the future, to ask probing questions, and to fully evaluate all allegations of force. Moreover, NE#1 should be informed that he should ask to see injuries in the future and to assess those injuries as part of his overall review of the force. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegation #1

6.220-POL-2 Conducting a Terry Stop 1. Terry Stops are Seizures Based Upon Reasonable Suspicion

SPD Policy 6.220-POL-2 governs Terry stops and stands for the proposition that Terry stops are seizures of an individual and, as such, must be based on reasonable suspicion in order to be lawful. SPD Policy defines a Terry stop as: "A brief, minimally invasive seizure of a suspect based upon articulable reasonable suspicion in order to investigate possible criminal activity." (SPD Policy 6.220-POL-1.) SPD Policy further defines reasonable suspicion as: "Specific, objective, articulable facts, which, taken together with rational inferences, would create a well-founded suspicion that there is a substantial possibility that a subject has engaged, is engaging or is about to engage in criminal conduct." (*Id.*) Whether a Terry stop is reasonable is determined by looking at "the totality of the circumstances, the officer's training and experience, and what the officer knew before the stop." (*Id.*) While "[i]nformation learned during the stop can lead to additional reasonable suspicion or probable cause that a crime has occurred, it "cannot provide the justification for the original stop." (*Id.*)

As described by NE#2 in both his report and at his OPA interview, he believed that the totality of the evidence established reasonable suspicion to detain the Subject. He pointed to the following: the Subject was first observed approximately six minutes after the crimes occurred; he was within three and a half blocks of the store; the Subject was wearing clothing – a white sweatshirt and grey pants – that were close to the clothing description – a white jacket and tan pants; the Subject put his hood up after first observing police; the Subject began walking faster and away from NE#2 when NE#2 verbally identified him via a clothing description; and the Subject then ran after being told that NE#2 wanted to speak with him. NE#2 confirmed that the clothing the Subject was wearing was not identical to the description that had been provided to officers.

OPA also questioned WO#1 about the stop. WO#1, like NE#2, believed that it was justified. He said that, had it been him, he would have made the same decision and cited the same facts referenced by NE#1.



In assessing whether a Terry stop is lawful and as explained above, the threshold for effectuating the detention is not overly high. It is a “well founded suspicion” that is less than probable cause and significantly less than the beyond a reasonable doubt standard required to convict.

When evaluating the totality of the circumstances available to NE#2 at the time, OPA concludes that he had a reasonable basis to effectuate the detention. OPA finds the Subject’s temporal and physical closeness to the store to be persuasive, as well as his conduct once he was identified by NE#2 and asked to stop. While the Subject did not exactly match the description provided, this does not, standing alone, vitiate the reasonable suspicion for the stop. In OPA’s experience, clothing descriptions are often imperfect. This is due to the rapidness in which most crimes are committed and the difficulty for witnesses to perfectly describe a suspect’s appearance and clothing given all of the other stimuli, fears, and stressors present. This is particularly the case where, as here, the crime and the stop both occurred after sundown and where visibility was compromised. Given all of this, OPA does not believe that it was unreasonable for NE#2 to believe that the Subject could not be excluded as the potential suspect simply because he was wearing a sweatshirt instead of a jacket and because his pants were the wrong shade. Moreover, reasonable suspicion is not vitiated simply because the Subject was not identified as the perpetrator after the fact. Lastly, OPA notes that WO#1, who observed the same factors, also felt that the stop was supported by reasonable suspicion. While not dispositive, this supports the conclusion that NE#2 acted consistent with the reasonable officer standard.

For all of these reasons, OPA concludes that NE#1 had sufficient reasonable suspicion to stop the Subject. Accordingly, OPA recommends 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 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.*)

Whether the force NE#2 used on the Subject was consistent with policy rises and falls on whether the stop of the Subject was lawful. As discussed above, OPA finds that the stop was supported by reasonable suspicion. As such, the Subject was not free to leave and was required to stop when ordered to do so by NE#2. When the Subject ran, NE#2 was permitted to use physical force to stop him from doing so and to effectuate the detention.

NE#2’s force consisted of pulling the Subject down to the ground and then holding the Subject in place while handcuffing him. NE#2 asserted that he pulled the Subject down using a soft takedown and this was consistent with the BWV. There was no evidence that the Subject was slammed to the ground or otherwise handled in a manner that would be likely to cause any significant injuries. Moreover, while the Subject said that NE#2’s knee was placed on his neck preventing his breathing, this was simply not reflected by the BWV. The video indicated that NE#2’s knee was



between the Subject's shoulder blades and there was no indication that it impaired the Subject from being able to breathe fully.

Based on OPA's review of the evidence and given OPA's finding that the stop was lawful, OPA concludes that NE#2's force was reasonable, necessary, and proportional.

OPA reaches a similar conclusion when evaluating the pushes of the females. Prior to both pushes, the females approached the officers and the Subject while the officers were trying to take the Subject into custody. They were told to move back and, when they did not immediately do so, they were pushed back by NE#2. He used an open hand to do so and did not push the females with undue force. Neither female complained in pain, fell to the ground, or appeared to suffer injury. NE#2 was ultimately permitted to ensure the safety of himself and WO#1 and to prevent the females from interfering with the arrest. The force he used to do so – two open hand pushes – was permissible under the circumstances and was consistent with policy.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #3

5.001 Standards and Duties 10. Employees Shall Strive to Be Professional

SPD Policy 5.001-POL-10 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-10.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person." (*Id.*) Lastly, the policy instructs Department employees to "avoid unnecessary escalation of events even if those events do not end in reportable uses of force." (*Id.*)

OPA finds that a number of NE#2's statements to the Subject, the Complainant, and the other female crossed the line into unprofessionalism. While OPA has found that some profanity used in high-stress situations that is purposed to cause compliance is permissible, NE#2's statements here were excessive and beyond that permitted by SPD policy. Specifically, calling the fleeing Subject a "motherfucker" twice while threatening force was not appropriate. Similarly, directing the Complainant and the other female to "get the fuck back" was simply not warranted under the circumstances. Even though NE#2 was permitted to direct them to move back, there was a better and less escalatory manner in which he could have done so at that time.

OPA recognizes that NE#2 acknowledged that his statements were problematic at his interview. He was regretful and said that he did not have his best day. Had this been NE#2's first case involving such statements, OPA would have considered a Training Referral. However, NE#2 has had one previous Sustained finding for similar conduct in the past (see 2019OPA-0232). Given this, OPA is required to issue a Sustained finding here. In doing so, OPA notes that NE#2 is a well-respected and extraordinarily competent officer. His one significant outstanding area of improvement is his use of profanity. OPA expects that NE#2's chain of command will continue to work with him to remedy this deficiency and to continue to help him grow as an officer.



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Recommended Finding: **Sustained**