



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 30, 2018

CASE NUMBER: 2018OPA-0231

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	8.400 - Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force	Not Sustained (Training Referral)
# 2	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Not Sustained (Training Referral)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Not Sustained (Training Referral)
# 2	8.400 - Use of Force Reporting and Investigation 3. The Sergeant Will Review the Incident and Do One of the Following:	Not Sustained (Lawful and Proper)

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 Named Employee #1 may have made prohibited contact with the Complainant’s neck and failed to report or document this force. It was further alleged that neither Named Employee #2 or Named Employee #3 properly identified or documented this potential force and the Complainant’s allegation. Lastly, it was alleged that Named Employee #3 may have failed to properly classify and investigate the force.



STATEMENT OF FACTS:

Officers, including Named Employee #1 (NE#1), responded to a large fight. The officers were also aware that a firearm was possibly involved. As the crowd began to disperse, the officers noticed a vehicle parked in the middle of the road that appeared potentially involved. The officers observed individuals both inside and outside of the car arguing and pushing others. The officers shined their spotlights on the car and several of the individuals drove the car from the scene. The officers followed the vehicle for a short distance and effectuated a high-risk vehicle stop. As a result of the stop, the driver of the subject vehicle was arrested for DUI. One of the passengers, who was later identified as the Complainant, was uncooperative with the officers and began to argue with them.

NE#1 approached the Complainant when he was standing with two officers. The Complainant spat at NE#1 twice. NE#1 instructed the Complainant to not do so again and used his arm to push the Complainant against the patrol vehicle and to turn his face away to prevent further spitting. When NE#1 believed that the Complainant was going to spit again and when the Complainant continued to be resistive, he asked the officers standing next to the Complainant to take the Complainant down to the ground. NE#1 assisted the other officers in performing a controlled takedown. Once the Complainant was on the ground, NE#1 used his body weight to hold him down. NE#1 reported that the Complainant did not make any complaints of pain at that time. This assertion was consistent with the Department video. The Complainant was then handcuffed.

The officers then made the decision to pick the Complainant off of the ground and to walk him to a patrol vehicle. NE#1 pulled the hood of the Complainant's sweatshirt over his head, so as to act as a barrier to prevent further spitting. Notably, the officers were unable to procure a spit sock at that time. NE#1 reported that he then used his hand to hold the Complainant's face away and the Complainant was quickly walked to the patrol vehicle and secured inside. While NE#1 was holding the Complainant's face/head area, the Complainant stated: "why are you holding my neck." NE#1 responded: "you just assaulted me twice." NE#2 did not document Complainant's statement that NE#1 was holding his neck or disclose that it was said to a supervisor.

This incident was screened with NE#1's Sergeant, Named Employee #3 (NE#3). NE#3 ordered NE#1 to generate a Type II use of force report. NE#1 did so. NE#3 later conducted a review of the force. During that review, NE#3 described much of the force that had been used with significant detail, clearly pulling this information from his review of Department video. However, he did not fully flesh out the officers walking the Complainant from where he was being held to the patrol vehicle. He further did not discuss NE#1 holding the Complainant's face/head, the placement of NE#1's hands, and any statements or complaints that the Complainant might have made at that time. NE#3 expressly did not note that the Complainant had mentioned that NE#1's hands were on his neck. NE#3 reported that he screened the other force used with the Department's Force Investigation Team (FIT) and that FIT recommended that he investigate this force as a Type II, which he did. As NE#3 did not know about the Complainant's statement at the time and did not notice it during his review of video, he never screened this issue with FIT.



The precinct Administrative Lieutenant, Named Employee #2 (NE#2), conducted the next level of the force review. She evaluated NE#1's and NE#3's paperwork, as well as the Department video for all of the involved officers. As part of her responsibilities, she bookmarked video that captured the force, any complaints of pain or misconduct, and any other issues necessary for later supervisory review. While she bookmarked the spitting on NE#1, as well as the force used to hold the Complainant against the car, take the Complainant down to the ground, and hold him on the ground until he was handcuffed, NE#2 did not bookmark the Complainant's statement concerning NE#1's hands on his neck. She further did not mention this anywhere in her review. NE#2, like NE#3, did not screen this matter with FIT.

Another Lieutenant and the precinct Captain also reviewed the force. Even though video from both before and after the Complainant's statements was bookmarked, the statement itself was not bookmarked. The Lieutenant and Captain were only expected to review bookmarked video and neither caught nor documented the Complainant's statement concerning his neck.

This matter proceeded to the Department's Force Review Board (FRB), where it was administratively reviewed. During that review, the members of the FRB heard the Complainant's statement concerning his neck. In consultation with OPA, the decision was made to refer the potential contact with the Complainant's neck, the failure to report that contact, and the fact that all of the supervisors in NE#1's chain of command did not catch or report the statement to OPA. This investigation ensued.

As part of its investigation, OPA reviewed the documentation generated as a result of this incident, as well as the Department video. OPA interviewed all of the Named Employees, as well as the lieutenant and the captain (who were initially included as named employees but later removed after further investigation, which specifically included NE#2's statements during her OPA interview).

OPA also interviewed four other witness officers. The first witness officer stated that she did not observe the Complainant spit on NE#1. She further stated that she had no recollection of hearing the Complainant state anything about his neck and did not see any officer holding the Complainant's neck. She noted that the scene was loud and chaotic.

The second witness officer told OPA that he did observe the Complainant spit on NE#1. He did not, however, hear the Complainant make any complaint concerning his neck or see NE#1 make contact with the Complainant's neck. Notably, at the time this statement was made, this witness officer was in the Complainant's vicinity, walking the Complainant to the patrol vehicle with NE#1. This witness officer recalled that the Complainant mentioned something about his hood being over his face and stated that the Complainant was yelling and belligerent throughout the incident.

The third witness officer reported seeing the Complainant spit on NE#1 twice. He did not see any officer, including NE#1, grip the Complainant's neck and stated that he was not positioned in a manner where he could have seen that even had it occurred. He further reported that he did not hear the Complainant make any statement concerning his neck. He told OPA that the Complainant was very aggressive during the incident, including repeatedly using profanities towards the officer. He stated that, at some point, officers simply tuned the Complainant out.



The fourth witness officer did not see NE#1 get spit on, but heard NE#1 tell the Complainant to not spit. He did not see an officer grip the Complainant's neck or hear the Complainant say anything about his neck. He stated that there was a lot going on at the time of the incident.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

SPD Policy 8.400-POL-1 requires that officers report all uses of force except de minimis force. The Complainant's claim that NE#1 was holding his neck constituted, at the very least, an allegation of Type II (if not Type III) force that was required to be reported.

It is undisputed that NE#1 failed to report the Complainant's complaint. At his OPA interview, NE#1 stated that, while he recalled the Complainant asking him why he was holding the Complainant's head, he had no recollection of the Complainant mentioning his neck. NE#1 stated that he was, in fact, holding the Complainant's head and not his neck and, as such, he did not see any need to report what he heard.

Notably, from OPA's review of the video, it appeared that NE#1's hands were by the Complainant's jawline, not his hairline around his ear, as NE#1 contended. NE#1 continued to assert that this was where his hand was placed, even after being shown the video at his OPA interview.

NE#1 stated that, prior to writing his use of force report, he reviewed his Department video. However, even though he did so, he told OPA that he still did not hear the Complainant's statement concerning his neck. NE#1 explained to OPA that he reviewed his video at the end of his shift when he was tired.

From my review of the Department video and the involved officers' OPA interviews, the scene was clearly chaotic and the Complainant was verbally aggressive and physically resistive. That being said, the Complainant's comment concerning NE#1 gripping his neck was clear and NE#1 appeared to have heard it given his immediate response. Moreover, NE#1 acknowledged that he reviewed his Department video prior to documenting his force and, at the very least, he should have caught, reported, and documented the comment then. Given the heightened reporting requirements when contact is made with a subject's neck or even alleged to have occurred, NE#1 should have reported this. He did not do so here.

That being said, and under the specific circumstances of this case, I do not feel that a Sustained finding is warranted. Instead, I recommend that NE#1 receive a Training Referral.

- **Training Referral:** NE#1 should receive counseling and retraining concerning this incident and his failure to identify, report, and document the Complainant's allegation that NE#1 made contact with his neck. Given the heightened scrutiny concerning such allegations, the Department expects that NE#1 will so report, even if no contact actually occurred. NE#1 should be counseled to ensure that he tries to comply with these expectations going forward. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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



Named Employee #1 - Allegation #2

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

SPD Policy 8.200-POL-2 governs when force is prohibited. If, as the subject contended, NE#1 gripped the subject's neck, this force would not have been reasonable, necessary, and proportional under the circumstances. As such, it would have constituted force that was prohibited under this policy.

NE#1 denied gripping or even touching the Complainant's neck. From my review of the video, I agree. I find that NE#1's hand was placed on the jawline of the Complainant's face and was controlling his head to prevent further spitting. I find it confusing that, even after watching the video of this incident, NE#1 still believed that his hands were above the Complainant's ears by his hairline. However, this inconsistency does not yield the force out of policy or make it any more likely that prohibited force occurred.

Ultimately, I see no evidence supporting the Complainant's assertion that his neck was gripped by NE#1. As such, I recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #1

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

SPD Policy 5.002-POL-5 requires that supervisors investigate or refer allegations of policy violations depending on the severity of the violation. Where it is an allegation of minor misconduct it can be investigated by a supervisor; however, were it is an allegation of serious misconduct – such as a neck hold – it must be reported to OPA.

At her OPA interview, NE#2 acknowledged that she failed to catch the Complainant's statement concerning his neck. She accepted responsibility for this error. She further acknowledged that she failed to bookmark this portion of the video and explained that, for this reason, it was likely that neither the Lieutenant nor the Captain would have watched it during their review. She thus also accepted responsibility for the Lieutenant's and Captain's failure to identify the Complainant's complaint. Her doing so resulted in these individuals being removed as named employees.

The job of Department Administrative Lieutenants, and particularly the Administrative Lieutenant for the North Precinct, is difficult. They are required to review numerous uses of force – some straightforward but others complex, as well as read all of the documentation and watch all of the video, which can amount to hundreds if not thousands of hours. It is understandable, if not expected, that this will result in some allegations of misconduct or force being missed.

OPA does not expect perfection. Instead, we expect that officers will work diligently and thoughtfully. We further expect that when officers make mistakes they will, as NE#2 did in this case, accept responsibility for their actions and learn from the experience. OPA believes that NE#2 will do so and, as such, I do not believe that a Sustained finding is merited. Instead, I recommend that NE#2 receive a Training Referral.



- **Training Referral:** Based on her OPA interview, I believe that NE#2 already understands her error in this case and will do her best to ensure that this does not happen again. NE#2's chain of command should discuss this issue with her and if it determines, as I believe, that this issue is resolved and that there are no outstanding concerns, no counseling or retraining is necessary.

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

Named Employee #3 - Allegation #1

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

As discussed above, NE#3 reviewed Department video concerning this incident. After doing so, he included a very specific and thorough recounting of the force in his review. However, when it came to the force used when NE#1 walked the Complainant over to the patrol vehicle, he was less specific. He did not provide any detail as to where NE#1's hands were located at the time or concerning any statements that the Complainant made. Indeed, he completely missed or overlooked the Complainant's statement concerning his neck.

Had he heard this statement, NE#3 would have been required to report it to OPA. He did not do so. Moreover, at his OPA interview, NE#3 asserted that he did not believe that, even if NE#1 was aware of the statement, he would have been required to report it to NE#3. NE#3 contended that this was the case "because it didn't correspond with any – any force that was used by [NE#1] or any other officer at the scene." NE#3 similarly contended that, without further context, he did not necessarily believe that this allegation would have needed to be reported to OPA.

I disagree with NE#3. First, had he heard the statement, NE#1 would have absolutely been required to immediately notify a supervisor pursuant to SPD Policy 8.400-POL-2. Second, if true, the Complainant's complaint of NE#1 holding his neck would have constituted serious misconduct. Moreover, at the very least, it would have warranted an exploratory screening with FIT. These actions are consistent with the explicit language of SPD policy.

However, under the circumstances of this case, I do not believe a Sustained finding is warranted as against NE#2. I reach this conclusion for several reasons. First, he was never told of the Complainant's statement by NE#1 or any other officer. Second, this was a complex incident with multiple involved officers and significant documentary and video evidence. Third, NE#3 was not required to watch all of the Department video relating to this incident. It appears from his predominantly thorough review that he did watch a significant amount of video, including that concerning the walking of the Complainant to the car. It seems unfair, however, to penalize NE#3 for this, even though he missed the Complainant's statement concerning his neck.

Instead, and primarily due to NE#3's incorrect belief that he was not required to report the Complainant's statement and that the statement did not rise to the level of potential misconduct that would warrant an OPA referral, I recommend that NE#3 receive a Training Referral.



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- **Training Referral:** NE#3's chain of command should discuss this incident with him, as well as retrain him concerning SPD Policies 8.400-POL-2, 8.400-POL-3, and 5.002-POL-5. He should be informed that alleged contact with a subject's neck should be screened with FIT and, depending on the preliminary investigation, classified and investigated as Type III force. Moreover, such an allegation may also need to be reported to OPA. NE#3 should be counseled to more closely comply with the elements of these policies moving forward. This re-training and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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

Named Employee #3 - Allegation #2

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

SPD Policy 8.400-POL-3 sets forth the requirements for sergeants to properly classify each use of force and to ensure that the appropriate investigation is conducted.

As discussed above, at the time that he screened the force in this case, NE#3 was unaware that the Complainant had asserted that NE#1 had gripped his neck. Had NE#1 known about this he would have been obligated to screen this matter with FIT and, possibly, to classify and investigate the force as a Type III. Instead, based on what he knew from his conversations with the involved officers, NE#3 classified and investigated the force as Type II. Without being told of the Complainant's comment by NE#1 or another officer, NE#3 could not have possibly known about it at the time. As such, based on what he did know at the scene, NE#3 took appropriate action and acted consistent with this policy. For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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