



## **CLOSED CASE SUMMARY**

ISSUED DATE:      JANUARY 27, 2019

CASE NUMBER:     2018OPA-0872

### **Allegations of Misconduct & Director’s Findings**

**Named Employee #1**

<b>Allegation(s):</b>		<b>Director’s Findings</b>
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Unfounded)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Allegation Removed
# 3	8.300-POL-3 Use of Force – CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 4. Officers Shall Only Deploy CEW When Objectively Reasonable. See Section 8.000	Not Sustained (Management Action)
# 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 (Training Referral)
# 5	8.300-POL-3 Use of Force – CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 6. Officers Shall Issue a Verbal Warning to the Subject and Fellow Officers Prior to Deploying the CEW	Not Sustained (Training Referral)

***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 Employee may have violated the use of force and de-escalation policies when he used his Taser on a fleeing non-violent Subject.

**SUMMARY OF INVESTIGATION:**

On July 31, 2018, Named Employee #1 (NE#1) and other officers responded to a potential stolen vehicle. The officers had tracked the vehicle using GPS technology. NE#1 pulled up to the car in his patrol vehicle. At that time, the occupants began to exit. NE#1 attempted to effectuate a traffic stop by turning on his patrol vehicle’s emergency lights and siren. The driver of the car, who was later identified as the Subject, ran away and up a stairwell.

NE#1 reported observing an object in the Subject’s right hand, which he believed could be a weapon. He also stated that he saw the Subject reaching down to his waist. NE#1 stated the following:

I decided to intercept [the Subject] at the stairwell and deploy a Taser. At the time, I was alone at the scene; I had three outstanding subjects, one running E/B, one still in the vehicle, and another running W/B from the scene. Due to observing [the Subject] reaching for the back of his pants right as he got out of the vehicle and seeing an object in his right



---

hand, my suspicion of weapons involved in the call, having possibly two suspects to my back, and a great injury to myself in the attempt to take down an actively running suspect. I decided to use the Taser as the only less-lethal tool available to me at the time.

Once the Subject cleared the stairway and began moving forward, NE#1 fired his Taser. He missed. The Subject then fled from the scene.

NE#1's force application was reviewed his chain of command. NE#1's Sergeant noted initial concern with NE#1's decision to deploy his Taser at a fleeing Subject. However, he contended that NE#1's explanation resolved his concern. The Sergeant counseled him regarding his decision to engage, including regarding contact and cover and concerning other safer tactical options that could have been used. NE#1's Lieutenant noted that, when she watched the Body Worn Video (BWV), she could not see anything in the Subject's right hand or that the Subject ever reached for his waistband, as NE#1 reported. She noted that NE#1 did not give a Taser warning before he deployed. The Lieutenant also counseled him concerning de-escalation. However, the Lieutenant approved the force as consistent with policy.

The force was then reviewed by an Administrative Lieutenant. The Administrative Lieutenant determined that the force was outside of policy. The Administrative Lieutenant noted that the Subject did not have anything in his right hand at the time of the Taser application. With regard to the first prong of the Taser policy, he noted that there was no evidence of imminent harm when the force was used, as the Subject was unarmed and was running away at the time. With regard to the second prong, he stated that there was a low public safety interest given that the crime at issue was a non-violent auto theft. Further, the Administrative Lieutenant found NE#1's rationale for the force – the concern that NE#1 did not want to physically engage with the fleeing Subject when there were also other suspects at large – to be unconvincing. He believed this because, even had the Taser application been successful, NE#1 would have been in the same situation, placing the Subject under arrest with no backup and with the other suspects still outstanding. The Administrative Lieutenant found that, to achieve his stated goal, it would have made more sense for NE#1 to chase the Subject while maintaining visual contact and waiting for additional resources. Ultimately, the Administrative Lieutenant found the force to be outside of policy.

The Precinct Captain agreed with the Administrative Lieutenant's determination and found that the force was outside of policy. The Precinct Captain stated that he spoke with the Lieutenant about this case and she stated that she had attended the most recent Taser training and that "the trainers seem to indicate that a Taser application in situations like the one faced by [NE#1] in this incident is reasonable." The Captain further wrote the following: "If so, I am concerned that the training being provided is contradictory to written policy." The Captain concluded by stating: "if [NE#1] was acting in accordance with such training, that would seem to be a mitigating factor for the alleged policy violation." This matter was referred to OPA and this investigation ensued.

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

##### **Named Employee #1 - Allegations #1**

##### ***5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy***

This allegation was classified based on the possibility that if the force was unreasonable, it also technically violated the law. Based on my initial review of this case, I did not believe that NE#1's acts were criminal in nature. That belief did not change based on the results of the completed investigation. While, like NE#1's chain of command, I have



---

concerns regarding the Taser application and the policy and training in this area, I do not find that NE#1 violated this policy. As such, I recommend that this allegation be Not Sustained – Unfounded.

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

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

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

NE#1 used no force aside from the unsuccessful Taser application. That force is discussed in the context of Allegation #3. As such, this allegation is duplicative and I recommend that it be removed.

Recommended Finding: **Allegation Removed**

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

***8.300-POL-3 Use of Force – CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 4. Officers Shall Only Deploy CEW When Objectively Reasonable. See Section 8.000***

At the outset, it is important to state that OPA shares the same concerns as the Administrative Lieutenant and the Precinct Captain regarding NE#1's Taser application. OPA similarly believes that, under a plain reading of the policy, this force was not reasonable, necessary, or proportional.

OPA also shares similar concerns as to those expressed by the Captain concerning the training being provided on Taser applications generally and, specifically, concerning tasing fleeing suspects. OPA has verified that such applications are being trained as appropriate and that, when NE#1 acted as he did in this case, his conduct was consistent with his training.

This is the third such case that OPA has seen. In one of the other cases, 2017OPA-0318, OPA initially found that an officer violated this policy when he tased a subject in the back while the subject was running away on concrete. At the discipline meeting, the officer's chain of command raised that the officer acted consistent with his training during the incident. OPA agreed to conduct further investigation to determine whether this was the case. That further investigation included interviewing the lead Taser trainer, as well as a Lieutenant and Captain in the Training Unit. All opined that the officer acted consistent with his training. OPA accordingly reversed its decision and instead issued a Management Action Recommendation. OPA wrote the following:

As the Training Unit is clear that it believes that [the officer] acted consistent with his training in this case, a reversal of my prior Sustained finding is warranted. It would be unfair to sustain an allegation against an officer whose conduct, whether right or wrong in my opinion, was consistent with the Department's training and expectations.

That being said, that this Taser application was deemed to be in compliance with training does not change my belief that it was inconsistent with policy. I still conclude that there was no imminent threat of harm to [the officer] that warranted the use of the Taser. I further believe that there was a significant risk of injury in applying the Taser to the subject when he was running away from [the officer] on a concrete surface. In my opinion,



---

this risk of harm was not outweighed by the need to take the subject into custody or by the speculative belief that [the officer] would have suffered harm had he gone hands on. Moreover, while the law is admittedly unsettled in this area, I view the case law as trending towards finding such an application to be inconsistent with the Fourth Amendment.

Ultimately, however, the Department needs to make a judgment call here. Weighing all of the risks of Taser applications to fleeing subjects that have not been involved in a crime of violence and who have not assaulted or otherwise harmed an officer, is this the behavior that it expects its officers to engage in? If so, while I believe it to be inadvisable and a possible risk management concern (particularly given the cautionary instructions provided in Taser's own training materials), I defer to the Department's prerogative in this regard.

OPA recommended that the Department amplify its training regarding tasing fleeing subjects.

In a fourth case, which OPA believe is related yet factually distinguishable (*see* 2018OPA-0061), OPA further recommended that the Department reconsider the necessity of SPD Policy 8.300-POL-3 and evaluate whether the second prong of that policy, which is the same one at issue in this case, is too permissive. In that regard, OPA wrote the following:

I further recommend that the Department consider the interplay between SPD Policies 8.200 and 8.300-POL-3 and the possible confusion that having both of these policies may cause. I suggest that the Department consider why it needs SPD Policy 8.300-POL-3, as opposed to simply requiring that all Taser applications be reasonable, necessary and proportional, like any other use of force. It is unclear what the purpose of the "objectively reasonable" standard set forth in this policy is. It also somewhat unclear, at least for OPA, whether a Taser application is deemed consistent with SPD Policy 8.200 if it satisfies SPD Policy 8.300-POL-3, or whether both tests must be met for the force to be consistent with policy.

Lastly, to the extent the Department believes that both policies are necessary, I ask the Department to evaluate whether the second prong of SPD Policy 8.300-POL-3 is too permissive. As explained above, it is OPA's belief that it is and OPA is concerned that it could serve to justify Taser applications in inappropriate situations.

It is OPA's understanding that SPD is presently providing more detailed training concerning the application of Tasers to fleeing individuals; however, OPA has not seen or sat through that training and lacks specific knowledge of its contents. The Department has not, however, taken any steps to rework SPD Policy 8.300-POL-3 and, specifically, the second prong of the policy concerning the objective reasonableness of Taser applications. Given that OPA has seen the same questionable Taser applications multiple times, OPA is further convinced that a modification of this policy is needed.



As with the officer in 2017OPA-0318, OPA finds that it would be unfair to recommend a Sustained finding against NE#1 when he acted consistent with his training. This is the case even though OPA agrees with NE#1's chain of command that his Taser application was problematic.

Instead, OPA issues the below Management Action Recommendation.

- **Management Action Recommendation:** OPA reiterates its requests that the Department rethink SPD Policy 8.300-POL-3 and, specifically, the two prongs of SPD Policy 8.300-POL-3(4). OPA also requests that the Department reevaluate its training on tasing fleeing suspects as that training has resulted in multiple incidents in which both OPA and the chain of command believe that sanctioned conduct resulted in violations of policy.

Recommended Finding: **Not Sustained (Management Action)**

#### **Named Employee #1 - Allegations #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.

OPA agrees with NE#1’s chain of command that NE#1 could have better utilized time, distance, cover, and concealment, as well as that he could have attempted to avoid physical confrontation and the likelihood that he would go hands on until he could summon other units to back him. OPA recognizes, however, that this was a fluid situation that NE#1 believed was exigent, even if the source of the exigency – the Subject being armed with a weapon – was not supported by the video evidence.

As such, and for several reasons, OPA believes that a Training Referral is appropriate here. First, OPA believes that NE#1 tried to handle this situation as well as he could and acted in good faith. Second, OPA recognizes and appreciates that NE#1’s chain of command already identified NE#1’s shortcomings in this regard and counseled him.

- **Training Referral:** NE#1 should be counseled concerning how he could have better applied de-escalation to this incident. To the extent NE#1’s chain of command feels that it has already fully addressed this matter, that no further counseling or retraining is needed, and that NE#1 understands how he could have handled this situation better and will apply those lessons in the future, no further action is needed. Any counseling and retraining that is provided should be documented and this documentation should be maintained in an appropriate database.

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

**Named Employee #1 - Allegation #5**

***8.300-POL-3 Use of Force – CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 6. Officers Shall Issue a Verbal Warning to the Subject and Fellow Officers Prior to Deploying the CEW***

It is undisputed that NE#1 failed to issue a warning before firing his Taser. At his OPA interview and in his reports, NE#1 stated that he did not do so because he did not have time.

As discussed above, the video indicated that the situation was less exigent than NE#1 likely believed at the time. Notably, the Subject was not armed, was not physically aggressive, and was not suspected to have committed a violent crime. As such, NE#1 appeared to have had time to issue a Taser warning.

That being said, and given that this issue was already identified and addressed by NE#1’s chain of command, I recommend that he receive a Training Referral rather than a Sustained finding.

- **Training Referral:** NE#1 should be counseled concerning his failure to provide a Taser warning during this incident. To the extent NE#1’s chain of command feels that it has already fully addressed this matter, that no further counseling or retraining is needed, and that NE#1 understands how he could have handled this



---

situation better and will apply those lessons in the future, no further action is needed. Any counseling and retraining that is provided should be documented and this documentation should be maintained in an appropriate database.

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