



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 18, 2017

CASE NUMBER: 2017OPA-0631

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 (Inconclusive)
# 2	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
Discipline Imposed: N/A		

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)
Discipline Imposed: N/A		

Named Employee #3

Allegation(s):		Director’s Findings
# 1	16.090 - In Car Video System 6. Employees Will Record Police Activity	Not Sustained (Lawful and Proper)
Discipline Imposed: N/A		

Named Employee #4

Allegation(s):		Director’s Findings
# 1	16.090 - In Car Video System 6. Employees Will Record Police Activity	Not Sustained (Lawful and Proper)
Discipline Imposed: N/A		

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:

Based on a civilian witness complaint, the Employee Complainant, a Department Sergeant, alleged that Named Employee #1 used excessive force when he struck the subject while placing him into custody. OPA added allegations against Named Employee #2 as he also documented using force on the subject. Moreover, one of the civilian witnesses indicated that the strikes occurred while the subject was handcuffed, which was a possible out of policy use of force. Lastly, it was alleged that Named Employee #3 and Named Employee #4 may have failed to timely activate their In-Car Video systems.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

Named Employee #1 (NE#1) and Named Employee #2 (NE#2) responded to the Downtown Emergency Services Center (DESC) to take a missing persons report. The officers approached the front desk where one of the witnesses was working. The subject, who was seeking the assistance of DESC, was interacting with a Nurse Supervisor and was seeking to be admitted to a hospital. The subject walked over to the officers and asked them to take him to jail. Initially neither NE#1 nor NE#2 responded; however, according to the witness and Nurse Supervisor, the subject stated: "do I need to assault you to get to jail" and "if I assault you, are you going to take me to jail." The Nurse Supervisor tried to distract the subject but was unsuccessful. The witness reported observing the subject raise an arm as if to "swing" at one of the officers. Regarding the subject's conduct, the Nurse Supervisor indicated: "My understanding was that he was going to do whatever it took to get the officer to respond to him...so I assume [the subject] was going to put his hands on the officer."

NE#1 recounted that when the subject asserted that he was going to assault the officers, NE#2 responded "you're not going to assault me." One of the officers also stated to the subject: "why don't you walk away from me."

NE#2 reported that the subject began advancing towards him and repeated that he was going to assault NE#2. NE#2 stated that he put his arm out towards the subject to keep him back and twice told the subject to get back. Simultaneously, NE#1 went over the radio to request additional units to respond. NE#2 recounted that the subject then lunged at him, grabbing at his head or upper body area. Notably, the Nurse Supervisor confirmed that the subject "charged after the officers."

NE#1 stated that this caused NE#2 to fall forward with the subject onto the ground. NE#2 reported that he punched the subject twice in the chin and pushed forward into the subject and was able, with NE#1's assistance, to take the subject down to the ground. This presents a slight inconsistency between the two officers' accounts. Once on the ground, NE#2 stated that he tried to control the subject's right arm, but that the subject continued to actively resist. He stated that he used several knee strikes to get the subject to stop resisting, but that these strikes were ineffectual and the subject continued to attempt to try to punch the officers. NE#1 reported trying to control the subject's left hand. NE#1 stated that, at one point while on the ground, the subject grabbed NE#1's gun belt with his left hand. NE#1 tried to wrest the subject's hand free and then, according to NE#1, the subject kicked him several times in the back of his head. These kicks were described by NE#1 as "hard impacts." When the subject began preparing to kick him again, NE#1 reported punching the subject two or three times in the face with his left fist. The subject then ceased his resistance and the officers were able to handcuff him and place him under arrest. NE#2 did not see the subject grab NE#1's gun belt or kick NE#1, but he heard NE#1 state: "Stop! Stop kicking us!"

Based on paperwork generated as a result of this incident, it was reported that the subject did not suffer any injuries from the force used. Photographs taken of him and included as part of the use of force investigation did not, based on my review, reveal any obvious injuries to his person. Both Named Employees reported suffering injuries from the altercation. NE#2 stated that he received: scrapes to the inside of his right arm; an abrasion/cut to his ear; a sore neck; and a sore right hand. NE#1 reported: pain to the back of his head; pain to his neck; and swelling to both of his hands. Both received treatment at a hospital and were released.



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.*)

It is undisputed that the Named Employees were presented with an emergent threat. The subject, who was clearly suffering from mental illness, approached them with the apparent aim of causing them physical harm. As such, force was permitted under policy. The question here is how much.

NE#1 used force when he punched the subject two or three times in the face. NE#1 asserted that his force was within policy based on the threat presented to both him and NE#2 by the subject. Specifically, NE#1 justified his force on the basis that the subject was grabbing his gun belt, kicked him in the back of the head multiple times, and was preparing to kick him again. At the time of the force, NE#1, NE#2 and the subject were on the ground and both Named Employees were actively struggling with the subject.

To the contrary, the civilian witnesses alleged that NE#1 used excessive force when he punched the subject multiple times in the face. Notably, one of the witnesses stated that NE#1 punched the subject four to five times when he would not flip over on his stomach and contended that, at the time of that force, the subject did not present a high-level threat. The civilian witnesses further alleged that NE#1 threw a chair towards the front desk while saying something to the extent of “move the fuck away.” None of the witnesses stated that the chair hit anyone; however, they indicated their belief that he acted unsafely. In the Acting Lieutenant’s use of force review, he noted that NE#1 could be heard saying “move, fuck” on his ICV. Given the timing of this statement, the Acting Lieutenant deemed it likely that it occurred during the altercation with the subject. However, this timing was difficult to discern because, as identified by the Acting Lieutenant, NE#1 failed to mention the movement of the chair in his report. The Acting Lieutenant noted that several of the witnesses indicated that there was another “client” in close proximity to NE#1, and he opined that this may have given NE#1 concern.

With regard to this allegation, NE#1 stated that he cleared some chairs that were in his immediate vicinity during the incident by pushing them away. NE#1 denied that he ever threw a chair, as described by the civilian complainants. NE#2 corroborated NE#1’s account. He stated that there were chairs in their immediate vicinity during the incident. At one point, there was an individual who was sitting in one of the chairs that had his legs basically in NE#1’s face. NE#1 yelled at that person to move and then shoved the chair out of the way so that he could maneuver his arms. NE#2 stated that that NE#1 did not throw a chair at the front desk.

It may be that what NE#1 and NE#2 viewed as NE#1 pushing chairs out of the way appeared to the civilian witnesses as NE#1 throwing a chair towards the desk. It could also be the case that NE#1 did throw the chair. As this incident was not captured on video, I cannot conclusively determine this fact. I note, however, that while his chain of command did not initiate an OPA referral for this behavior, the Acting Lieutenant instructed a Sergeant to counsel NE#1 on the potential danger to civilians that was posed by his actions in this regard.



As indicated above, the physical altercation with the subject was not captured on video. The officers' ICV did, however, capture some of the audio of the incident. Germane to this analysis, the audio recording during the time frame of the altercation included the following statements: "let go of that"; "he tried to punch you"; orders to the subject concerning the placement of his arms; a request by NE#1 for "fast back up"; NE#1 stating "move, fuck"; and "he kicked me." While this generally supports the officers' account of the incident, it does not conclusively reveal the extent of the subject's resistance. Certainly, if the subject was repeatedly trying to punch and kick the officers, force was permitted to stop him from doing so. However, the justification of the force used by NE#1 in this case – two to three punches to the suspect's face – depends on the level of the threat faced by the officers.

Without being able to conclusively determine the level of resistance and the actual threat of physical harm presented by the subject at the time NE#1 used force, I cannot, especially in light of the statements of the civilian witnesses, determine whether or not that force was consistent with policy. As such, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #1 - Allegation #2

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

SPD Policy 8.200-POL-2 delineates those situations in which force is expressly prohibited. This includes where force is used "to punish or retaliate" or, unless exceptional circumstances exist, when the subject is restrained in handcuffs. (SPD Policy 8.200-POL-2.)

It appears that this allegation was classified primarily based on the Nurse Supervisor's claim that the subject was handcuffed when NE#1 struck him. Both NE#1 and NE#2 denied that the subject was handcuffed when that force was used. Moreover, one of the civilian witnesses, who was also a direct witness to the force used by NE#1, stated that the subject was not handcuffed at that time. The other civilian witness did not see this portion of the force. This evidence weighs in favor of a determination that the subject was not handcuffed when NE#1 struck him.

Moreover, while the civilian witnesses certainly believed that the force was excessive, there was no indication from their statements that they thought the force was used to punish or retaliate. I see no evidence that this was the case.

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

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

Named Employee #2 - Allegation #1

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

NE#2 reported punching the subject twice in the chin and then later kneeling the subject several times. From my review of the civilian witnesses' statements, it appears that their concern was with the force used by NE#1, rather than NE#2. Regardless, I independently find that the force used by NE#2 was consistent with policy.



It is undisputed that the subject advanced on NE#2 with the intention of physical harm. The subject grabbed NE#2's head and/or upper body and, at that time, committed an assault. This behavior, coupled with the subject's earlier threats, warranted the use of force by NE#2. At that point, and under the circumstances, I find that it was reasonable for NE#2 to punch the subject to prevent imminent physical harm. I further find that this force was necessary under the circumstances, as well as proportional to the threat facing NE#2.

When NE#2, NE#1 and the subject were on the ground and the subject was providing active resistance, including attempted punches, it was reasonable to use force in an attempt to stop that resistance. SPD trains its officers to use intermediate force, including knee strikes, when officers are attempting to arrest a subject and that subject engages in active physical resistance that could result in injury to the officers, the subject, and/or other bystanders. That was the case here. As such, the knee strikes were also reasonable, necessary and proportional, and NE#2 acted consistent with policy and training in this regard.

For these reasons, 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

It was not alleged that NE#2 used force on the subject when he was in handcuffs. As such, I recommend that this allegation be Not Sustained – Unfounded as against him.

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

Named Employee #3 - Allegation #1

16.090 - In Car Video System 6. Employees Will Record Police Activity

Named Employee #3 (NE#3) and Named Employee #4 (NE#4) were working together in a prisoner transport vehicle. The vehicle was equipped with an ICV system. NE#4 was operating the vehicle and NE#3 was sitting in the back seat. Due to his role as the driver, NE#4 was responsible for activating the ICV system when necessary.

When the incident in question occurred, a request for "fast back up" came over the radio. Upon hearing that request, NE#4 activated his ICV and began to drive to the location. A subsequent call indicated that the incident was under control. NE#4 and NE#3 decided that they no longer needed to respond and NE#4 accordingly turned off the ICV.

At that time, NE#3 and NE#4 were in traffic, but were close to the incident location. Given that fact, NE#3 suggested that they actually go to the scene to provide support. NE#4 agreed and re-activated the ICV. The ICV remained on through the duration of NE#3 and NE#4's involvement in this incident.

SPD Policy 16.090-POL-1(6) requires that Department personnel record delineated activity, including responses to dispatched calls. Once ICV is activated, officers must record until an event has concluded. (See SPD Policy 16.090-POL-1(8).) An event has concluded when: (1) "the employee has completed his or her part of the active



investigation”; (2) “there is little possibility that the employee will have further conduct with any person involved in the event”; and (3) “the employee is leaving the area of the event.”

Here, when NE#3 and NE#4 received information that they were no longer needed to respond and when they decided not to do so, they were permitted to de-activate their ICV. When they again decided to take law enforcement activity, they re-activated their ICV consistent with policy. Once re-activated, they maintained recoding until it was appropriate for the ICV to be de-activated. Accordingly, I find that NE#3 and NE#4 acted consistent with policy.

For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #4 - Allegation #1

16.090 - In Car Video System 6. Employees Will Record Police Activity

For the same reasons as stated above (see Named Employee #3, Allegation #1), I recommend that this allegation be Not Sustained – Lawful and Proper.

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