



## CLOSED CASE SUMMARY

ISSUED DATE: JULY 15, 2018

CASE NUMBER: 2018OPA-0061

### Allegations of Misconduct & Director's Findings

#### Named Employee #1

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)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Training Referral)
# 3	8.300-POL-3 Use of Force - CEW/CONDUCTED ELECTRICAL WEAPONS (TASER) 4. Officers Shall Only Deploy CEW When Objectively Reasonable	Not Sustained (Management Action)

#### Named Employee #2

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)

***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 failed to de-escalate prior to using force and that the force he used, specifically, a Taser application, may have been inconsistent with policy. It was further alleged that Named Employee #2, who was the senior officer on the scene, may have improperly escalated the situation.

### STATEMENT OF FACTS:

On the date in question, officers, including the Named Employees, were dispatched to a call concerning an individual who was possibly in crisis and had threatened to kill himself. The individual – who was later identified as the subject – was reported to be inside of an apartment. This entire incident was recorded on the involved officers' Body Worn Video (BWV).

The officers arrived at the apartment, knocked, and were allowed entry. When they came inside they viewed the resident, as well as the subject, who was a houseguest. The subject moved towards a bathroom in the rear of the apartment. The officers observed that he was holding a razor blade (a small blade from a face razor) and that his



arm was bleeding. The subject then closed the door of the bathroom and held it shut. The officers removed the resident from the apartment and, for a period of time, tried to convince the subject to open the door. He would not do so.

The officers then began discussing team tactics and their approach to this situation. It was decided that one officer would be the contact officer and go hands-on. Named Employee #1 (NE#1) was designated as the less-lethal officer, as he was equipped with a Taser. A third officer was assigned to be lethal cover. Named Employee #2 (NE#2), who was the most senior officer on the scene, stood on top of a bed so that he could view a better perspective of the incident as it unfolded. Notably, at the time of the incident, the contact officer, NE#1, and the lethal cover officer were all student officers. None of the officers notified a supervisor to come to the scene, even though the subject was technically barricaded and suicidal and, as such, a supervisor was required to be called under SPD policy.

The contact officer was able to open the door. NE#2 stated to the other officers that the subject was cutting himself and directed NE#1 to enter the bathroom with his Taser. NE#1 did so with his Taser drawn, and the subject retreated to the shower and stood inside. The officers directed the subject to drop the razor blade and he did so. The officers noticed that the subject had some blood and open wounds on his arm and he was scratching at the wounds causing them to continue to bleed. The injuries were not bleeding profusely and, from OPA's review of the BWV, there was not an appreciable amount of blood either on his arm or on the ground.

NE#1 told the subject that he wanted to help him and asked him to exit the bathroom. During this time, NE#1 had his Taser pointed at the subject. The subject looked directly at the officers but was not responsive. NE#1 told the subject that he did not want to tase him. He continued to speak with the subject and told the subject that he wanted to help; however, the subject did not respond and did not leave the bathroom. NE#1 asked the subject whether he would let NE#1 help him. NE#1 told the subject that if he would not, NE#1 would have to tase him. The subject was not responsive and did not move from his stationary position in the shower. After around one minute of discussion with the subject and between the officers ("are you gloved up?"), NE#1 told the subject: "I'm going to have to tase you ok...If I tase you it's going to look like this." NE#1 then performed an arc test. In response, the subject clenched his body inwards as if to receive the electrical shock. The officers told the subject to get on the ground or else they were going to tase him. During this interaction, NE#2 stated to the student officers: "he's gotta be controlled or he's gonna have to be tased."

NE#1 asked the subject once more whether he was going to let NE#1 help him. When the subject did not respond, NE#1 stated: "alright guys..." The subject then pulled the shower curtain around him to block himself from the Taser. An officer and NE#1 pulled the curtain away from the subject. He pulled his body back and moved his clenched fists up to his midsection. The subject, who was still several feet away from the officers, did not make any move towards them that was captured by the video or engage in any apparent threatening behavior towards them. NE#1 then announced "Taser," and tased the subject. The subject exclaimed in pain and fell to the ground. He was then taken into custody without further incident.

NE#1's Taser application was reviewed by his chain of command. The chain determined that the force was consistent with policy. The force was also reviewed by the Department's Force Review Board (FRB). The FRB identified that the officers failed to call a supervisor to the scene and that this was contrary to policy. However, the FRB found that the officers sufficiently de-escalated and that the Taser application was consistent with policy. OPA self-initiated this investigation after viewing the video at FRB.



As part of its review of this case, OPA reviewed the documentation generated, including: The General Offense Report; the use of force statements and reviews; the BWV; and the FRB's findings. OPA interviewed both Named Employees (NE#2 twice), the contact officer, the lethal cover officer, and one other witness officer.

### **ANALYSIS AND CONCLUSIONS:**

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

"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.



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The officers in this case dealt with a complex and potentially dangerous situation. Of the five officers at the scene, three were student officers and two were field training officers. Moreover, the three officers that were in the bathroom were the student officers. None of the officers recognized that since they were dealing with a barricaded suicidal subject, they were required to notify a sergeant to come to the scene. This is specifically mandated by SPD Policy 16.110-POL-5(2)(a). This error on the part of the involved officers was also noted by the FRB. The FRB indicated that the issue was caught and addressed by the officers' chain of command and that training was provided. Therefore, OPA did not deem it necessary to investigate this issue, even though all of the officers engaged in a technical violation of policy in this regard.

That they did not notify a sergeant does not, in and of itself, cause the officers to have failed to de-escalate. Indeed, under the circumstances of this case, I find that the officers did sufficiently de-escalate and used force only when further de-escalation was no longer safe or feasible. I reach this finding for several reasons.

First, the officers largely acted consistent with Department training and tactics. In these types of scenarios, officers are trained to establish a less-lethal contact team. (Advanced Tactics Training: 2017 Small Team Tactics, at pp. 82-85.) Training recommends at least three officers be part of the team (less-lethal operator, lethal cover officer, and arrest/contact officer). The Department also provides training on the roles and responsibilities of each member of the team. Included in these roles and responsibilities are that the officers will: "form a deployment plan in relation to exigency"; "establish a contingency plan"; and "position team members [and] communicate in place." (*Id.* at pp. 82-83.) Essential to this tactic is communication and effective teamwork between officers. (*Id.* at p. 82.)

Department training on de-escalation further emphasizes a "team-tactics approach to CIT incidents." (*Id.* at p. 77.) It directs officers to "emphasize contact/cover concepts...", to "cover teammates from threats," and discusses "how team tactics enhance[] changes of de-escalation." (*Id.*) Again, like the training concerning the utilization of a less-lethal contact team, the de-escalation training accentuates the use of teamwork by instructing officers to: "exercise command"; "communicate"; and "coordinate." (*Id.* at p. 78.)

As discussed above, the involved officers engaged in tactical discussions prior to entering the bathroom. They assigned roles consistent with their team-tactic training and utilized a less-lethal contact team. They engaged in team work by communicating and coordinating their actions. This is different than other cases that OPA has evaluated where officers have failed to engage in any tactics or have made unilateral decisions without consulting fellow officers that elevated the potential force.

Second, all of the officers, but predominantly NE#1, engaged in substantial verbal de-escalation efforts. Notably, the contact officer repeatedly tried to communicate with the subject through the bathroom door while it was still closed. When it was opened, NE#1 engaged with the subject for several minutes before using force – telling the subject that he wanted to help him, asking the subject to leave the bathroom, and trying to convince the subject to cooperate. These attempts were unsuccessful and the subject was unresponsive and largely non-verbal. All of the officers used verbal techniques consistent with LEED and did not, as OPA has experienced in other cases, simply issue repeated commands with a raised voice and heightened tone.

Third, prior to using force, NE#1 warned the subject several times that he was going to tase him if he did not cooperate and let the officers help him. He conducted an arc test, which NE#1 (and the other officers) viewed as de-escalation. I note that I do not necessarily agree with the Department that an arc test constitutes de-escalation.



Instead, it appears to be an attempt to frighten a subject into compliance. While this may ultimately lessen the need to use force, it seems counter-productive to the whole purpose of the de-escalation policy. Indeed, while NE#1 acted with good intentions when he conducted the arc test and I believe that he was trying to de-escalate by doing so, it served to do the opposite and agitated the subject.

Through all of this, the subject did not cooperate and did not leave the bathroom. He remained in the shower, injured, with the razor at his feet. As all of the officers explained, while time, distance, and shielding was their goal, it would have been problematic to exit the bathroom and leave a known suicidal subject alone with a weapon. As such, while NE#1 certainly could have made more distance between himself and the subject (as was recognized by the FRB), I do not think it was safe or feasible to leave the bathroom given the totality of the circumstances.

At that time, I believe that it was appropriate to use force to take the subject into custody. As discussed below, I do not necessarily agree that the optimal force was the Taser. I instead believe, as NE#2 opined, that it would have been most desirable to quickly go hands-on and remove the subject from the bathroom. However, this does not alter my belief that the officers properly de-escalated prior to using force and, when force was used, further de-escalation was no longer safe or feasible.

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

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

#### **Named Employee #1 - 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.” (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.*)

At his OPA interview, NE#1 stated that, at the time he tased the subject, he perceived that the subject was “starting to get more and more agitated.” NE#1 described that, immediately prior to using the Taser, the subject “started to get that stance to where he looked like he was getting ready to come out of the bathroom. I mean, come out of that shower, and he was getting ready to come at us.” NE#1 recounted that the subject began to “lean” out of the shower, had his fists “balled,” and appeared ready to come out of the shower, and it appeared to NE#1 that an “attack was imminent.”

NE#1 stated that the force application was purposed to “save” the subject’s life and to get him some “help.” He believed the force to be reasonable as “it prevented further harm to [the subject]” and “also prevented additional officers from being harmed.” NE#1 stated that the force was necessary because had the officers “went hands on with him in that small, small area, the officers in there, and probably [the subject], would end up getting hurt, getting seriously injured, just trying to get him, trying to take him into custody.” NE#1 further told OPA that he did not believe that he had any reasonable alternatives to using the Taser. Lastly, NE#1 opined that the force was



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proportional because they could not use OC spray in that small area and “the only other option would be to go hands-on with him and risk getting hurt, or just use the Taser.” This, however, goes to reasonableness and necessity and does not address how the level of force used was proportional to the threat that the subject was alleged to have presented to NE#1 and the other officers.

Indeed, this is where my concern lies. In my opinion, NE#1 failed to provide a compelling explanation for proportionality, either at his OPA interview or in his force paperwork. He contended that he thought the subject appeared aggressive and that a physical altercation could be imminent, but that is simply not borne out by the BWV. From OPA’s review of the video, there is no indication that the subject ever leaned or took a step towards the officers in the moments before the Taser was used. Moreover, while his fists were balled, they became so after the arc test and apparently because the subject was tensing himself to be tased and feel physical pain. Further, while the subject had, at one time, possessed a small razor blade, he dropped it well before he was tased.

The Ninth Circuit has recognized that, based on “[t]he physiological effects, the high levels of pain, and foreseeable risks of physical injury” attendant with Taser usage, Tasers represent “a greater intrusion than other non-lethal methods of force.” *Bryan v. McPherson*, 630 F.3d 805, 825 (9th Cir. 2010). As such, it follows that NE#1 be required to sufficiently articulate proportionality to justify this greater intrusion. In the absence of a clearer and more robust description by NE#1, I do not see the imminent threat of harm either to the officers or to the subject, himself, at the time of the force. As such, I do not see proportionality and, thus, I tend to believe that the force was inconsistent with policy.

That being said, and while I have serious reservations about the force used in this case, I do not recommend that this allegation be Sustained for several reasons.

First, I recognize that the entirety of NE#1’s chain of command and the FRB believed that this force was consistent with policy. While I am not bound by this determination and predominantly disagree, it remains persuasive.

Second, given what I perceive to be the permissiveness of the Taser policy – particularly the second prong, I conclude that the Taser application fell within the bounds of what the policy deems “objectively reasonable.” It seems logically inconsistent to find the Taser application Not Sustained - Lawful and Proper under SPD Policy 8.300-POL-3, while issuing a Sustained finding under SPD Policy 8.400(1). This is a larger problem that I perceive with the Taser policy and one that is addressed more fully below.

Third, I genuinely believe that NE#1 acted in good faith in this case and thought that the force he used was reasonable, necessary, and proportional under the circumstances. I note that this was a heightened situation where NE#1 was required to make a quick decision as to what force he was going to use and where no supervisor was present. Further, even if I deemed his reporting and recounting of the incident to be incomplete in certain regards, I found him thoughtful. Indeed, his incident appeared to have strongly affected him. For example, he told OPA that, after this incident, he almost turned in his Taser and that he viewed this as a learning experience.

That NE#1 learned from this situation is, in my mind, more important than a Sustained finding and more impactful than any discipline that could be meted out. For this reason, and even though I believe the force to have likely been out of policy, I issue NE#1 the following Training Referral.





- **Training Referral:** NE#1's chain of command should discuss this incident with him. The chain should specifically counsel NE#1 to more clearly and articulately set forth why the force he uses is proportional, particularly where the force is a Taser application. He should also review and receive additional training concerning the Department's force policies (SPD Policies 8.000 and 8.200) and force reporting policies (SPD Policy 8.400). Lastly, he should receive additional training concerning the elements of the Taser policy and when the application of a Taser is appropriate from the Training Unit. 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 #3**

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

SPD Policy 8.300-POL-3 concerns the use of Tasers. The policy mandates that Tasers may only be used when objectively reasonable, and refers to SPD Policy 8.000. (*See* SPD Policy 8.300-POL-3(4).) The policy specifically delineates two scenarios in which Taser use is appropriate: first, "when a subject causes an immediate threat of harm to the officer or others"; or second, "when public safety interests dictate that a subject needs to be taken into custody and the level of resistance by the subject is likely to cause injury to the officer or to the subject if hands on control tactics are used." (*Id.*) Notably, the policy is silent on the use of Tasers on fleeing subjects. (*See id.*)

As discussed above, NE#1 contended that his Taser application was justified under both prongs of the policy. First, he believed that the subject's actions – specifically, the subject's movements right before the Taser application – represented an immediate threat of harm to the officers. NE#1 further asserted the subject's scratching of his open wounds on his wrists presented an imminent threat of harm to the subject's health. Second, he also contended that his Taser application was appropriate because the subject had not complied with their orders, was largely unresponsive, and NE#1 was concerned that were he to go hands-on with the subject, it could cause officers and the subject to suffer injury.

With regard to the first prong of the Taser policy, I do not agree that the subject presented an imminent threat to the officers or, at the time he was tased, to himself. That being said, due to the breadth of the second prong of the Taser policy, my concerns are immaterial. NE#1 was certainly able to articulate that harm could have occurred were he to go hands-on with the subject. Indeed, based on my experience with this policy, this standard can be satisfied in virtually every case. This is worrisome, as by allowing under the second prong of the policy such a wide expanse of situations in which Tasers can be used, it permits a relatively high level of force to be applied in potentially inappropriate situations.

In a prior case, 2017OPA-0318, I issued a Management Action in which I recommended that the Department amplify its Taser training in multiple areas. Most relevant to this case, I asked that the Department provide: clearer guidance as to what constitutes an imminent risk of harm justifying use of a Taser; and more explicit explanations of what constitutes the "public safety interests" that are referenced in the second prong of the Taser policy and what conduct is sufficient to meet the requisite "level of resistance" from the subject. It is unclear whether the



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Department has accepted OPA's recommendations and instituted these modifications. If not, I herein renew that recommendation.

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 is 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.

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

**Named Employee #2 - Allegations #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***

During his OPA interview, the contact officer stated that NE#2's statement that "he's gotta be controlled or he's gonna have to be tased" caused the contact officer to speed up his decision-making and made him perceive the situation as more urgent. As such, it was alleged that NE#2, through his statements, may have violated the Department's de-escalation policy.

NE#2 told OPA that, at the time he made the statement, the subject had just dropped the razor blade. NE#2 believed that more veteran officers would have then immediately moved in and taken the subject into custody. However, the younger officers did not act and NE#2 believed that they were freezing up ("condition black"). NE#2 indicated that he was trying to communicate to the officers that they needed to handle the situation before it went any farther. NE#2 did not believe that his statement had any impact on NE#1's decision on when to tase the subject. NE#2 did not even perceive that NE#1 reacted to what he said. NE#1 confirmed with OPA that he did not hear the statement. As such, it follows that the statement did not affect NE#1's decision-making and cause him to escalate the situation.

NE#2 stated that the officers, and most notably NE#1, spent a significant amount of time trying to de-escalate the subject and to gain the subject's compliance. NE#2 stated that these attempts were unsuccessful. NE#2 acknowledged that the officers could have backed out of the bathroom and, thus, used time, distance, and shielding. He further acknowledged that there was no risk that the subject was going to escape from the bathroom. However, NE#2 stated that this was complicated by the fact that the razor was still at the subject's feet and that he had shown a willingness to use it to harm himself. He stated that there was also a risk in going hands-on in the bathroom given the presence of the razor, the confined quarters, and the possibility that the bathroom floor could be slippery. For these reasons, NE#2 did not believe that any further de-escalation was safe or feasible.





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As discussed above in the context of NE#1, I agree. I believe that the Named Employees properly de-escalated this matter and that, at the time the force was used, further de-escalation was no longer safe or feasible. For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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