



## CLOSED CASE SUMMARY

ISSUED DATE: AUGUST 13, 2020

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2018OPA-1120

### **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 (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:**

The Complainants alleged that Named Employee #1 subjected the Subject to excessive force by choking him.

### **ADMINISTRATIVE NOTE:**

Along with the allegation against Named Employee #1 (NE#1), this case initially included allegations against another officer – referred to here as Subject Officer #1 (SO#1). Specifically, it was alleged that SO#1 also used excessive force against the Subject, as well as failed to de-escalate prior to using force and made unprofessional statements.

As an unfortunate result of this incident, NE#1 was injured and was out on medical leave for a significant amount of time. Given this and because OPA deemed it to be unfair to SO#1 and the Complainants to continue to seek extensions to the investigation timeline during NE#1's leave, OPA bifurcated the cases. OPA concluded the investigation against SO#1 on October 8, 2019. OPA found SO#1's force to be consistent with policy but concluded that he violated the Department's de-escalation and professionalism policies. These findings were upheld by the Chief of Police and discipline was imposed on SO#1. OPA left this case against NE#1 open until he returned to duty and the contractual deadlines were tolled. As NE#1 is now back from leave, OPA issues this DCM.

### **SUMMARY OF INVESTIGATION:**

Officers, including NE#1 and SO#1, responded to a potential domestic violence incident. The Subject's brother (who, along with another brother, are the Complainants in this case) called and stated that the Subject was drunk and would not leave their residence. The officers' arrival on the scene and the law enforcement action they took were captured on Body Worn Video (BWV).

The BWV indicated that SO#1 approached the residence and that the Subject was at the front door. SO#1 tried to make verbal contact with the Subject ("hey, hey...what's going on") and the Subject stepped back from the front door of the residence, raised both his arms and hands in the air while facing SO#1, and began walking down the street. The Subject stated "no, bro." SO#1 again tried to make verbal contact with the Subject ("come here, I want to



talk to you”) but the Subject continued to walk away. SO#1 approached the Subject and shined his flashlight to illuminate the Subject’s face and body. The Subject said: “take that flashlight off of me.” SO#1 approached the Subject and stated: “Dude, do you want to really do that right now? Do you think you’re that tough? Do you?” The Subject turned around and again started walking away. SO#1 said: “You better calm down right now, don’t you take that attitude with us.” At that point, NE#1 also arrived at the scene and was standing in the vicinity of SO#1 and the Subject. As the Subject walked away, SO#1 pointed at him and said: “You will lose, you will lose.” The Subject turned around and retorted: “I bet I won’t.” When the Subject did so, he made his hand in the form of a gun and pointed it towards the officers.

SO#1 began to run after the Subject, stating: “Come here then, come here then. Come here then. Come here, you want to find out if you’re going to lose?” NE#1 also told the Subject that he could not make a threat like that and walk away. NE#1 and SO#1 followed the Subject around the side of a house. The Subject turned to face the officers with his hands up. SO#1 pushed him back against a wall and stated: “Huh? Huh? You said...Who’s going to lose? Who’s going to lose?” The Subject, who was clearly inebriated at the time from the slurring of his voice, stated: “I’m gonna lose. I’m gonna lose. Bro, please.” The officers took hold of the Subject’s arms and SO#1 started to say: “Grab me one more time you will...” The officers told the Subject that he was detained for making a threatening gesture towards them and he was informed that he was being brought to SO#1’s patrol vehicle. NE#1 told the Subject to put his hands behind his back and both officers instructed the Subject to “stop.” A third officer arrived on scene and the officers told the Subject, who was leaned over and was moving his body away, to “relax.” The Subject repeatedly asked what he did, said “no,” and pulled towards the ground. Other community members, including the Subject’s brothers and a woman who was videotaping the incident, began to gather in the near vicinity. One of the brothers approached the Subject and tried to calm him down. The officers asked that brother to stand back.

SO#1 and NE#1 moved the Subject away from the other community members and NE#1 indicated that the Subject should be taken down to the ground. The officers pulled the Subject down to the ground. During this time, NE#1 continued to tell the Subject to “stop” and that he was being detained, as well as that he was going to be put into handcuffs. SO#1 directed the Subject to put his hands behind his back. At this time, the Subject was lying on his right side. NE#1 had the Subject’s left arm, but his right arm was underneath his body. NE#1 calmly told the Subject that he needed to “stop.” The Subject repeated several times: “For what?” The Subject then kicked his leg out at NE#1 and NE#1 stated: “He just kicked me!” NE#1 announced that he was going to use a “cross-face” – a trained Department tactic for use with turtled subjects where the officer places the forearm bone against a subject’s face and applies pressure to gain compliance – and began doing so. A number of bystanders began yelling “let him go” and said that NE#1 was choking the Subject. The officers were able to get the Subject’s other hand behind his back and handcuffed him. The Subject began yelling that he could not breathe. Together, the officers rolled the Subject onto his side and into the recovery position. They then sat him up. The Subject repeatedly yelled at the officers. The officers eventually picked him up and walked him to the patrol vehicle. He was seated inside and transported from the scene. No further force was used.

The officers later screened the arrest and the force used with their supervisor. NE#1 stated that they took the Subject down to the ground and they tried to get control of his hands. NE#1 said that the Subject kned him in the head. NE#1 told his supervisor that, after this, he made the decision to use a cross-face and that this tactic was successful. Lastly, NE#1 recounted that the Subject calmed down but then became more agitated when he was walked to the patrol vehicle.



The force was reviewed by the chain of command. Force Investigation Team (FIT) investigators assisted in this investigation by interviewing the Complainants. The first brother recounted that an officer was on top of the Subject with a knee on the Subject's back and his forearm by the Subject's head. He stated that one other officer was around the Subject's feet. The first brother described that, during this time, the Subject kept saying that he could not breathe. The second brother also heard people telling the officers not to choke the Subject. The second brother recalled that an officer had his forearm across the Subject's neck. The second brother showed the FIT investigator using his own hand that the side of the officer's wrist was against the side of the Subject's neck. The second brother stated that the Subject was speaking during this time (saying that he could not breathe) but there was no time that the Subject could not speak or went unconscious.

The Complainants' allegation that the Subject was subjected to excessive force was referred to OPA. As part of its investigation, OPA reviewed the interviews conducted by FIT. OPA further reviewed the documentation generated by Patrol concerning the underlying incident, as well as the BWV that captured the initial contact with the Subject and the force used by the officers.

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

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

##### ***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.*)

While, as discussed in the DCM issued on October 8, 2019, OPA found that SO#1's failure to de-escalate and lack of professionalism made it more likely that force would be needed, OPA concludes that the actual force used was consistent with policy. Immediately prior to the officers making physical contact with the Subject, he made his hand and fingers into the shape of a handgun and pointed it towards the officers while saying that he would not lose any subsequent physical altercation. The officers stopped him with the intention of investigating this threat.

Even though the Subject was intoxicated at the time, was walking away from the officers, and appeared to have no actual intent or capability of following through with the threat, the officers were legally permitted to detain him. Moreover, they had an additional lawful basis to detain him to investigate his role in the alleged DV incident. When he would not comply with their directions, they were permitted to use appropriate force to cause him to do so.

Initially, the officers took hold of the Subject's arms and attempted to control his body. He moved around and prevented them from doing so. When the Subject continued to struggle against the officers, they made the decision to take him to the ground. The takedown was controlled, and the Subject did not appear to be injured or complain of injury at that time. While on the ground, the Subject prevented the officers from accessing his right arm, which was underneath his body. The Subject then struck NE#1 with his leg. Whether this was intentional or not, it elevated the threat towards the officers and constituted an assault on NE#1. As such, the officers were allowed to use a



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higher level of force. NE#1 chose to apply a cross-face, which is a technique trained for exactly this type of situation. The BWV indicated that NE#1 did, in fact, use a cross-face and that he did not, instead, use a neck or carotid restraint. Notably, the cross-face can appear, for someone unfamiliar with the tactic, to resemble a choke hold. As such, the Complainants and others could have legitimately perceived that the Subject was being choked, even if this was not actually the case. Notably, during the entirety of the cross-face, the Subject continued to speak – which is inconsistent with his breathing being impaired – and there was no indication that any medical professionalism identify any physical evidence suggesting that the Subject had been choked (for example, redness to the throat/neck or petechial hemorrhaging).

Ultimately, the force used here – a controlled takedown, control holds and body weight on the ground, and a cross-face – were reasonable, necessary, and proportional. Accordingly, I find that this force was consistent with policy and I recommend that this allegation be Not Sustained – Lawful and Proper as against NE#1.

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