



## ***CLOSED CASE SUMMARY***

ISSUED DATE: FEBRUARY 5, 2020

CASE NUMBER: 2019OPA-0365

### **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 (Unfounded)

#### **Named Employee #2**

Allegation(s):		Director's Findings
# 1	8.400-POL-1 Use of Force Reporting and Investigation 1. Officers Shall Document in a Use-of-Force Report All Uses of Force Except De Minimis Force	Not Sustained (Training Referral)
# 2	8.400-POL-1 Use of Force Reporting and Investigation 3. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Following any Use of Reportable Force, As Soon As Feasible	Not Sustained (Training Referral)
# 3	8.200 - Using Force 1. Use of Force: When Authorized	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:**

The Complainant alleged that he was subjected to excessive force by Named Employee #1. OPA alleged that Named Employee #2 may have failed to notify his supervisor of force and to document that force. Lastly, the Force Review Board alleged that Named Employee #2 may have used excessive force.

### **ADMINISTRATIVE NOTE:**

Due to heavy workloads and other ongoing responsibilities, this case was not completed prior to the expiration of the 180-day deadline and is, thus, untimely. OPA's notes that none of the findings in this case would have been recommended Sustained even had the 180-day deadline been met.

Consistent with SMC 3.29.135(C), OPA's completion of this case beyond the 180-day deadline will be documented in a letter transmitted to the Mayor, the City Council, the City Attorney, the Office of Inspector General for Public Safety, and the Community Police Commission. This will also be reflected in the final Closed Case Summary for this matter, which will be provided to the Complainant and shared with the public, which is also consistent with SMC 3.29.135(C).

### **SUMMARY OF INVESTIGATION:**

The Named Employees responded to a report of a domestic violence (DV) incident. When they arrived, they developed probable cause to arrest the Complainant for assaulting the victim. Notably, the officers found the victim's bloody hair clenched in the Complainant's hands. After he was handcuffed, the Complainant ran from the

officers. The officers pursued him. NE#1 caught up to the Complainant and reached out towards him. At that instant, the Complainant fell down onto the ground. Prior to hitting the ground, the Complainant's pants had begun falling down. No force was used while the Complainant was on the ground. After falling down, the Complainant accused NE#1 of pushing him. He also alleged that the officers were "beating his ass."

The officers eventually stood the Complainant up and walked him to their patrol vehicle. The officers attempted to seat the Complainant into the patrol vehicle, but he was non-compliant. In order to secure him in the rear seat, Named Employee #2 (NE#2) went to the other side of the patrol vehicle and began to pull the Complainant in by his left arm. NE#2 then used his left hand to push the Complainant's head down towards the seat. He grabbed onto what appeared to be the Complainant's chin area. NE#2 also used his right hand to push down on the Complainant head. He then gripped the Complainant's left arm with his right hand and, keeping his left hand on the Complainant's chin area, pulled the Complainant fully into the patrol vehicle. The Complainant kicked out at NE#1 and the officers both instructed the Complainant not to do so. NE#2 put his left hand on the side of the Complainant's neck and pushed his head down. NE#2 again cupped the Complainant's chin with his left hand and used his right hand to grab onto the Complainant's left arm. NE#2 quickly pulled the Complainant forward into the car. Once the Complainant was fully inside, NE#2 removed his hand from the Complainant's chin. At that time, the Complainant said: "I can't breathe man, come on man." The Complainant sat up and the doors of the patrol vehicle were closed. No further force was used on the Complainant.

NE#1 later reported to his supervisor that the Complainant fell when he was running away. NE#1 denied pushing him to the ground or making any contact with the Complainant that caused him to fall. NE#2 later documented in his use of force statement that he observed the Complainant fall and that this was not a result of force used by NE#1. NE#2 did not document that he made contact with the Complainant's neck area or that, at the time his hand was in the vicinity of the Complainant's neck, the Complainant made an allegation that he could not breathe.

This matter was referred to OPA and this investigation ensued. OPA identified that the Complainant alleged that he was subjected to excessive force by NE#1. OPA further classified for investigation NE#2's failure to report both the neck contact and the Complainant's claim that he could not breathe. The force was subsequently reviewed by the Department's Force Review Board (FRB). The FRB had concerns with NE#2's contact with the Complainant's neck area and decision to forcibly pull the Complainant across the rear seat. As such, the FRB alleged that NE#2's force may have been out of policy.

As part of its investigation, OPA reviewed the Body Worn Video (BWV), the In-Car Video (ICV), and the documentation generated regarding the Complainant's arrest and the force used by the officers. OPA also reviewed the FRB's conclusions. Lastly, OPA interviewed the Named Employees and their supervisor.

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

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

Based on OPA's review of the totality of the circumstances, OPA finds that NE#1 did not make contact with the Complainant's back when he was fleeing and either push him or the ground or otherwise cause him to fall down.

The BWV showed NE#1 pursuing the Complainant on foot and reaching out as if to grab him. NE#1's outstretched hand came extraordinarily close to the Complainant, but it does not appear that NE#1 ever made contact with him. While OPA cannot conclusively rule this out, other evidence supports this finding and suggests that the Complainant tripped. Most notably, at the time the Complainant fell, he was running away with his hands behind his back in handcuffs and with his pants falling down. Moreover, he was running on pavement towards an uneven surface. The combination of these factors yields the conclusion that, when applying a preponderance of the evidence standard, it is more likely than not that the Complainant tripped rather than was pushed down. OPA also notes that, even had NE#1 made contact with the Complainant's back, it would have been inadvertent and, thus, there would have been no reason for him to withhold this information from his supervisor. This is particularly the case given that NE#1 believed that the force would have been fully captured on BWV and, thus, would have had little motivation to provide an account inconsistent with the evidence.

Lastly, NE#1 provided a thorough and credible account of the force he used during his OPA interview and he denied pushing the Complainant. OPA has not found any evidence sufficient to prove otherwise.

For these reasons, OPA finds that NE#1 did not use force to cause the Complainant to fall to the ground while fleeing. As such, OPA recommends that this allegation be Not Sustained – Unfounded.

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

#### **Named Employee #2 - Allegations #1**

##### ***8.400-POL-1 Use of Force Reporting and Investigation 1. Officers Shall Document in a Use-of-Force Report All Uses of Force Except De Minimis Force***

SPD Policy 8.400-POL-1(3) states that officers, including witness officers, will verbally notify a supervisor immediately unless not practical, following any use of reportable force. Officers are required to do so completely and accurately so as to allow the supervisor to properly classify the force for investigation. In addition, SPD Policy 8.400-POL-1(1) instructs that, where officers use reportable force, they must document that force in a use of force report. Again, the expectation is that officers will do so to the best of their ability.

Based on OPA's review of the BWV, NE#2 clearly used reportable force when he grabbed the Complainant around the chin area and his arm and pulled him across the rear seat of the patrol vehicle. He further did so when he pressed down on the side of the Complainant's neck and then again pulled him across the rear seat by the Complainant's chin and arm. Even if this force were arguably de minimis – which it was not – the Complainant's assertion that the force caused him not to be able to breathe was another trigger for notifying a supervisor and for reporting.

At his OPA interview, NE#2 explained that he did not realize that he contacted the Complainant's neck area or hear the Complainant say that he could not breathe. He told OPA that he was aware that he was required to report such force and that he would have done so had he recognized it.

OPA concludes that NE#2 used reportable force and that he acted contrary to policy when he failed to notify a supervisor and document that force. However, based on OPA's review of the record – including the BWV, OPA credits NE#2's assertion that he did not realize at the time that he had contacted the Complainant's neck and that he did not hear the Complainant's statement. OPA further notes that this is the first time that NE#2 has been found to have acted contrary to these policies. These findings support a determination that retraining rather than discipline is the appropriate result for this case. OPA is hopeful that this retraining will ensure that NE#2 does not revisit these mistakes in the future and feels confident that this will be the case.

- **Training Referral:** NE#2 should receive retaining concerning his failure to notify his supervisor of the force he used, as well as his failure to document that force in a use of force report. NE#2 should be specifically retrained concerning neck contacts and that such contact, even when inadvertent, must be reported. NE#2 should be reminded that this is particularly the case when subjects assert that they are having trouble breathing. This 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 #2 - Allegation #2**

### ***8.400-POL-1 Use of Force Reporting and Investigation 3. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Following any Use of Reportable Force, As Soon As Feasible***

OPA recommends that this allegation be Not Sustained and refers to the above Training Referral (see Named Employee #2, Allegation #1).

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

## **Named Employee #2 - Allegation #3**

### ***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.*)

In evaluating NE#2’s force, OPA recognizes that he did not use a trained tactic for getting a non-compliant subject into a patrol vehicle. While this does not, in and of itself, yield the force out of policy, it certainly increases the scrutiny of that force. OPA further recognizes that, at the time the force was used, the Complainant was in handcuffs. Again, while not dispositive, this also serves to increase the scrutiny applied by reviewers.

The FRB asserted that, in their collective opinion, the force may have been out of policy. The FRB specifically identified that it was potentially not reasonable or necessary under the circumstances. While OPA shares the FRB’s concerns regarding NE#2’s decision-making and his use of an untrained and risky tactic, OPA disagrees that the force clearly violated policy.

At the time NE#2 used force, the Complainant, who perpetrated a serious DV assault, had fled from them, had continually physically resisted attempts to take him into custody and to secure his person, and had fought the officers’ attempts to get him into the patrol vehicle. As such, it was reasonable to use force to compel the Complainant to enter the rear seat. Moreover, given that the officers’ sustained efforts to do so were not working, additional force was necessary to effectuate this lawful goal. NE#2 articulated that he did not believe that he had a reasonable alternative to the force he ultimately used. OPA, like the FRB, believes that there were alternatives to the force NE#2 used. However, OPA cannot say that NE#2’s force was so outside of the bounds of what was appropriate so as to be unnecessary. In reaching this finding, OPA finds it significant that, while NE#2’s hand cupped the Complainant’s chin area, the force he used to drag the Complainant into the patrol vehicle predominantly consisted of NE#2 pulling the Complainant’s arm. From OPA’s review of the video, it appeared that NE#2 placed little if any pressure on the chin area at that time and used his hand there more as leverage to prevent the Complainant from moving around. Moreover, even though the Complainant asserted that he could not breathe, it did not appear to OPA that NE#2 ever actually impacted the Complainant’s neck area or even that he exerted pressure on the Complainant’s neck. Lastly, OPA finds that the force used – particularly when crediting NE#2’s account that he did not actually make contact with the Complainant’s neck and that any contact that did occur was inadvertent and fleeting – was proportional to the ongoing threat posed by the Complainant.

While OPA does not find the force out of policy, for the reasons cited by both OPA and the FRB, NE#2 clearly needs substantial retraining in this area. As such, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#2 should be retrained on the appropriate tactics to be used to secure a non-compliant subject into a patrol vehicle, especially where that individual is in handcuffs. OPA also believes that NE#2 would benefit in general retraining on defensive tactics and when force is consistent with SPD policy. This should include a discussion of making contact with subjects' throat and neck areas and whether and when this is ever appropriate. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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