



CLOSED CASE SUMMARY

ISSUED DATE: MAY 26, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0766

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 (Training Referral)
# 2	8.300 - Use of Force Tools 4. Officers May Use TASERs in the Following Circumstances:	Not Sustained (Training Referral)
# 3	8.300 - Use of Force Tools 5. TASERs Shall Not Be Used In any Environment Where an Officer Knows That a Potentially Flammable, Volatile, or Explosive Material is Present	Sustained
# 4	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force.	Not Sustained (Lawful and Proper)
Imposed Discipline		
Written Reprimand		

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 failed to de-escalate prior to using force and that his tasing of the Complainant may have been contrary to SPD policy.

SUMMARY OF INVESTIGATION

A. Incident and Force Used

Named Employee #1 (NE#1) and another officer – referred to here as Witness Officer #1 (WO#1) – were on patrol when they observed an individual – referred to here as the Complainant – pushing a shopping cart. The officers noticed that the Complainant was carrying a sealed package and an uncapped gasoline container. The officers heard an update over the radio concerning package theft nearby. Given their observations and this report, they decided to stop the Complainant. When they stopped him, he was no longer carrying the package. The officers asked him where it went, and he denied having it. NE#1 went to look for the package while WO#1 remained with the Complainant. NE#1 did not locate it. As NE#1 returned to where the Complainant and WO#1 were standing, WO#1 told NE#1 that the Complainant threw the package over a fence. WO#1 then walked over to the patrol vehicle to run the Complainant's information. NE#1 remained with the Complainant.



NE#1 discussed the objects in the Complainant's shopping cart and possession, including a purse and a watch. They discussed the gasoline container, which the Complainant said was for his mother. NE#1 asked the Complainant whether there was actually gasoline in the container and the Complainant replied that there was a "little bit."

WO#1 ultimately returned to where the Complainant and NE#1 were situated. He informed the Complainant that they determined that the package was stolen. WO#1 told the Complainant that he was going to be placed under arrest and that they needed to take the items he was carrying on his body, including the gasoline container, off. WO#1 reached towards the Complainant and the Complainant pulled back and faced him. WO#1 pushed the Complainant backwards into a bush. The gasoline container remained on the Complainant's person. As WO#1 struggled with the Complainant, NE#1 gave him two Taser warnings. Specifically, NE#1 told him to stop resisting or he would be tased. The Complainant continued to deny stealing the package. WO#1 told him to turn over because he was under arrest. The Complainant responded, raising his voice: "I'm not under arrest." At this point, the Complainant was lying on his back, against the bush. WO#1 was standing over him in his immediate vicinity. WO#1 was grabbing the Complainant with both hands and the Complainant was actively physically resisting him. The gasoline container was lying by the Complainant's right side. NE#1 told WO#1 to "move back" and then tased the Complainant. After doing so, he said: "Taser, Taser, Taser." The Taser took effect and incapacitated the Complainant. WO#1 pulled the Complainant away from the bushes and onto his stomach. The Complainant was then placed into handcuffs.

The officers called for medical assistance for the Complainant, as well as for a supervisor. Other officers arrived on scene and assisted with securing the Complainant. The Complainant began striking his own head on the ground. The officers prevented him from further doing so. The officers screened the force they used with their supervisor. At that time, WO#1 told the supervisor that he had gasoline on him from his struggle with the Complainant.

The supervisor subsequently screened this incident with OPA. Specifically, the supervisor screened the Complainant's later allegation that the officers slammed his head onto the ground as unsubstantiated. OPA agreed that this was the case; however, OPA also identified concerns with the propriety of NE#1's Taser application and the potential lack of de-escalation on his part. OPA self-initiated an intake and this investigation ensued.

B. OPA Investigation and Interviews

As part of its investigation, OPA reviewed the Body Worn Video (BWV), which fully captured the initial detention of the Complainant, the effectuating of the arrest, the struggle between the Complainant and WO#1, and the Taser application. OPA also reviewed the documentation generated by the officers concerning this incident.

OPA conducted interviews of NE#1 and WO#1, as well as of two Training Unit employees.

1. Named Employee #1

NE#1 described that, at the time of the tasing, he observed the Complainant struggling with WO#1. From NE#1's perspective, it appeared that the Complainant was fighting with WO#1 and was trying to bite him. NE#1 did not believe that he had other force tools that were a better option than using his Taser. NE#1 believed that the force was appropriate to prevent the Complainant from continuing to fight with WO#1.



NE#1 said that he did not immediately go hands-on with the Complainant because he needed to go over the radio to call for back-up and to let radio know that he and WO#1 were in a physical fight with the Complainant. He stated that, once WO#1 and the Complainant were involved in the altercation, there was not room for NE#1 to go in and assist.

With regard to using his Taser when the Complainant was holding a gasoline container, NE#1 said that he thought the container was closed and he did not think that there was gasoline on WO#1. He stated that he did not know that it was contrary to policy to use his Taser in this situation, and he believed that this was inconsistent with what he was taught in training. Specifically, he referenced one of his instructors discussing someone standing in the vicinity of a gasoline pump. He recalled that the general instruction from the training unit was to do what you had to do.

NE#1 told OPA that he believed that both he and WO#1 de-escalated prior to using force. NE#1 explained that he spoke to the Complainant calmly, took time to explain the incident, and used the Complainant's first name. NE#1 stated that he did not think to tell the Complainant to sit down to place him at a position of disadvantage. He further did not believe that more officers were needed prior to effectuating the arrest. He stated that, once the Complainant was told that he was going to be arrested and began physically resisting, further de-escalation was no longer safe or feasible.

2. Witness Officer #1

WO#1 stated that he tried to de-escalate the situation by speaking with the Complainant calmly, using his first name, and explaining the basis for the arrest. However, the Complainant was non-cooperative and was ultimately physically resistive. WO#1 said that, at the time of the tasing, the fight was ongoing, and he did not believe that it was on the verge of stopping. WO#1 felt that he was being assaulted by the Complainant.

WO#1 believed that NE#1's Taser application was reasonable, necessary, and proportional under the circumstances facing them. He further stated that it had the desired result and ended the conflict. WO#1 did not know of the prohibition on tasing around gasoline and other flammable materials until after the incident.

3. Training Officer #1

Training Officer #1 (TO#1) stated that he taught the new Taser operator course that NE#1 would have taken after the academy. Training Officer #2 (TO#2) ran the Taser recertification course. TO#1 said that the prohibition on tasing around flammable materials was discussed "both visually and audibly" during the new operator course and was part of the policy at that time.

TO#1 opined that NE#1's Taser application violated Department policy. He further stated that he could not think of a situation where deploying under the circumstances that NE#1 faced would have been appropriate.

TO#1 was asked about a trainer telling officers, in the context of a question regarding tasing someone at a gasoline pump, to do what they had to do. TO#1 told OPA that he highly doubted that he said this. TO#1 referenced explicit instruction to avoid tasing in such situations.



4. Training Officer #2

TO#2 told OPA that the prohibition on tasing in and around flammable materials had always been in the Taser policy. TO#2 did not believe that the slide concerning flammable materials was included in the last two years of the recertification course. However, he confirmed that all officers were instructed to read and be familiar with the entirety of the Department's Taser policy.

TO#2 confirmed that NE#1's Taser application in this incident violated the plain language of the policy. TO#2 said that such a Taser application could feasibly be appropriate where there was the risk of "great bodily harm" to NE#1 or WO#1; however, he acknowledged that such harm did not appear to be present here.

When asked about the "do what you got to do" comment in the context of Tasing at a gasoline pump, TO#2 explained that NE#1 appeared to miss the context of the training. TO#2 told OPA that the trainers discussed the risks of tasing where flammable materials are present and asked the students whether there were situations where doing so could be appropriate. Generally, students would bring up situations where subjects are armed. TO#2 stated that the trainers would tell the students that they need to weigh the risks and benefits of a Taser application under such circumstances but that no direction was given that tasing in the vicinity of a gasoline pump was always permissible..

TO#2 ultimately stated that, given that the Complainant's gasoline container was uncapped and that there was gasoline on WO#1's person, NE#1's Taser application was inconsistent with policy.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

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

As discussed more fully below, OPA finds that SPD policy prohibited NE#1 from using his Taser under the circumstances that faced him here. As such, the Taser application could not have been reasonable, necessary, and proportional. That being said, as OPA already recommends that Allegation #3 be Sustained, OPA deems it unnecessary to also sustain Allegations #1 and #2. Instead, OPA recommends that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1 should receive a refresher Taser training from the Training Unit. The training should specifically cover when it is appropriate to use the Taser and the application of the Taser around flammable materials. This retraining should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #1 - Allegation #2

8.300 - Use of Force Tools 4. Officers May Use TASERS in the Following Circumstances:

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

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



Named Employee #1 - Allegation #3

8.300 - Use of Force Tools 5. TASERS Shall Not Be Used In any Environment Where an Officer Knows That a Potentially Flammable, Volatile, or Explosive Material is Present

SPD 8.300-POL-2 governs the use of Tasers. SPD Policy 8.300-POL-2(4) states that Tasers may be used under two circumstances: (1) “When a subject causes an immediate threat of harm to any person”; or (2) “When public safety interests dictate that a subject needs to be taken into custody and the level of resistance presented by the subject is “likely to cause injury to the officer” or presents a greater risk of prospective injury from going hands on than from using the Taser. The policy further explains that, under either scenario, the use of the Taser – like all force – must be reasonable, necessary, and proportional. (SPD Policy 8.300-POL-2(4).) Lastly, and relevant to this case, SPD Policy 8.300-POL-2(5) prohibits Tasers from being used in “any environment where an officer knows that a potentially flammable, volatile, or explosive material is present.”

OPA finds that SPD policy clearly prohibited NE#1’s use of a Taser here. As the BWV conclusively established, at the time of the tasing, the Complainant was holding an uncapped gasoline container and there was gasoline on WO#1’s person. While it is fortunate that no one was harmed, this could have resulted in either or both of the struggling parties combusting and could have caused significant injuries. This is the exact reason why the policy precludes such conduct.

While NE#1 and his Guild Representative attested that NE#1’s training did not discourage and, in fact, encouraged his conduct, this was contradicted by TO#1 and TO#2. Indeed, both stated that NE#1’s Taser application did not comply with policy and noted that not tasing around flammable materials was discussed at the new operator training. Moreover, TO#2 explained that NE#1’s belief that the training approved tasing around gasoline pumps indicated that he missed the context of this portion of the instruction. Both TO#1 and TO#2 clarified that this was not the lesson imparted by the training and that NE#1 acted inconsistent with Department instruction.

Further, NE#1’s contention that he was not aware of this portion of the policy does not excuse his non-compliance. Notably, TO#2 explained that, at the recertification training, officers were reminded of the obligation that they read and understand the entirety of the Taser policy.

Lastly, OPA notes that, given that the use of a Taser was strictly prohibited during this incident, it is unnecessary to evaluate whether, had there been no gasoline container involved, the application would have been reasonable, necessary, and proportional.

For the above reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegations #4

8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, 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.

Based on the totality of the evidence, OPA finds that NE#1 acted consistent with the Department’s de-escalation policy during this incident. OPA recognizes that both NE#1 and WO#1 spoke calmly and respectfully to the Complainant during their initial investigation of the incident. They questioned him without accusing him and ensured that he remained compliant without needing to go hands-on. OPA further agrees with NE#1 that two officers were sufficient to effectuate a misdemeanor arrest and not calling for backing officers did not violate policy. The officers’ main tactical shortcomings were failing to have the Complainant sit down, informing him that he would be arrested prior to having some control of his person, and not requiring him to first remove the objects draped on his body, including the gasoline container. However, as with not calling for backing officers, these do not constitute policy violations.

Lastly, OPA agrees with NE#1 that, once the Complainant began pulling away and physically resisting, no further de-escalation was safe or feasible. OPA reaches this conclusion even though it finds that the ultimate force used by NE#1 was outside of policy.

For the above reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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