



CLOSED CASE SUMMARY

ISSUED DATE: MAY 16, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0704

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)
# 2	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Will Use De-Escalation Tactics in Order to Reduce the Need for Force	Sustained

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 used excessive force on the Subject and that the Named Employee failed to de-escalate prior to using force.

SUMMARY OF INVESTIGATION:

Named Employee #1 (NE#1) and Witness Officer #1 (WO#1) were dispatched to an assault. The incident occurred at a Target store and it was reported that a male suspect punched a store employee. No description of the suspect was provided in the initial call notes.

Both officers recorded Body Worn Video (BWV); however, NE#1's activation was delayed. As such, WO#1's BWV provides the best view of the inception of the incident.

WO#1 BWV showed the officers walking down the street towards the Target entrance. They walked by a man wearing red – who was later identified as the Subject. The Subject gestured towards the store while making a comment. The comment could not be heard because the BWV was still in pre-record mode and did not capture audio. The Subject was standing still at the time and was not making any aggressive movements.

As the officers arrived at the entrance, a store employee emerged and pointed towards the Subject. While this was occurring, the Subject took several steps towards the entrance, situating himself by the corner of the building wall next to the entrance. NE#1 turned around and began walking towards the Subject. WO#1 was putting on gloves at the time and remained by the entrance. NE#1 made a motion with his hand as if to signify to the Subject to turn around. The Subject was standing still at the time. Similar to his behavior when first approached by the officers, the Subject was not engaging in any behavior that suggested aggressiveness on his part. NE#1 approached the Subject



and grabbed onto his arm. The Subject then pushed off of NE#1 taking a step back against the wall of the building. While not clearly captured on BWV, security video from the Target showed the Subject pushing out at NE#1, appearing to make contact with NE#1's upper chest and/or neck area. NE#1's head moved backwards in response to the push. NE#1 then punched the Subject once in the face, and they started struggling. NE#1 pulled the Subject towards him and then pushed him back against the wall, trying to control his body.

WO#1 came over and put his hand on the Subject's back. At this point, the audio of the BWV began recording. The Subject yelled: "I didn't do nothing." WO#1 repeated "hey" and "look at me" multiple times to the Subject, and said "no need," in an apparent reference to the physical struggle. The Subject stopped moving and again stood still. He looked at WO#1 and said that Target employees took a backpack that he paid for. He stated: "you weren't supposed to talk to them first...you [should] talk to me." WO#1 continued to speak to the Subject calmly, telling him that it was "okay" and that they were going to handcuff him. The Subject replied: "Alright." WO#1 asked for the Subject's name and he provided it. The Subject said that the officers were "supposed to ask" and "do an investigation first." The Subject continued: "You're supposed to ask what happened first instead of him [NE#1] punching me." WO#1 asked the Subject to sit down and he did. The Subject again said: "You're supposed to ask me what happened first before you sock me." WO#1 asked other officers to go inside and complete the investigation while he remained with the Subject. The Subject asked NE#1 why he hit the Subject prior to investigating the incident.

NE#1 went into the Target and spoke with store employees. Two employees confirmed that they approached the Subject who was acting erratically while within the store. They first asked him about his lack of a facemask. While they were speaking, the Subject grew upset and, according to the employees, took a backpack that he said was compensation for the store's treatment of him. When one of the employees tried to take the backpack back, the Subject punched that employee, knocking a tooth out. The employees struggled with the Subject until he left the store, after which they contacted 911. The Subject was subsequently arrested for assault and was transported from the scene.

During a supervisory review of the force, the incident was screened with OPA. After that screening review, OPA requested that a referral be made and commenced this investigation. As part of its investigation, OPA reviewed the BWV and the documentation generated by the responding officers. OPA also interviewed both NE#1 and WO#1.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #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.*)

As discussed more fully below, OPA finds that NE#1 failed to de-escalate prior to using force. As such, OPA concludes that NE#1, through his actions, increased the likelihood that force would need to be used. This was contrary to



policy. However, that NE#1 failed to de-escalate does not, standing alone, require a finding that the force, itself, was outside of policy. In vast majority of cases, while recognizing the connection between de-escalation and the use of force, OPA has assessed these two allegations separately.

Here, the BWV indicated that, when NE#1 grabbed onto the Subject, the Subject pushed him in the upper chest/neck area, causing his head to move back. NE#1 responded immediately by striking the Subject once in the face. They then grappled with each other until WO#1 intervened. OPA notes that, at this time, NE#1 believed that the Subject was the perpetrator of a felony assault and that this, based on his reporting, elevated his threat assessment.

Given this and, due to the fact that the Subject committed an assault, NE#1 was permitted to use force to prevent him from further doing so and to take him into custody. The punch, while a relatively high level of force, was authorized based the circumstances of this incident and was consistent with NE#1's training for responding to an assault on his person. While OPA thinks it likely that, had he engaged in de-escalation, this force would have been avoided, OPA does not find, given what transpired here, that the punch violated policy. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #2

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

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.

When asked about his de-escalation at his OPA interview, NE#1 said that, when he initially walked by the Subject, he did not perceive the Subject to present a threat. This was the case even though he described the Subject as continuing to "yell and rant." He stated that people often berated and "chirped at" him and other officers. He said that the store employee then identified the Subject as the perpetrator of the assault, and it "clicked" for NE#1 that the Subject did present a threat. He believed that the store employee said something along the lines of: "that's the



guy who knocked [the] tooth out.” He said that the Subject was also “approaching” Target security guards at the time and NE#1 felt that more assaults could possibly occur. He described the Subject as “highly agitated” and NE#1 believed that he needed to act immediately to ensure that the Subject could be controlled and would be prevented from escaping.

NE#1 said that he did not feel that he had time to call additional resources to the scene prior to contacting the Subject. He stated that he quickly created a hasty plan in his head but did not communicate that plan to WO#1. He further said that he felt that his response was exigent, and he did not have time to wait for WO#1, who was still putting on his gloves, before approaching the Subject.

When asked about his use of time, distance, and shielding, NE#1 said that he gave the Subject an order to move back. Other than that, he did not identify any further acts that he took. He said that it was not possible to apply distance given where he, the Subject, and other community members were situated.

NE#1 said that he did consider whether there was crisis, mental illness, or drug/alcohol usage that may have impacted the Subject’s compliance or lack thereof. In fact, he felt that crisis/mental illness was at issue here. However, he said that this would not have impacted his response regardless. He stated that he did not know all the circumstances and what was going on with the Subject until after the fact when WO#1 began communicating with the Subject.

When asked about why he approached the Subject without WO#1 and while WO#1 was still putting his gloves on, NE#1 said that he actually thought that WO#1 was with him at the time. However, he said that, even had WO#1 been next to him, he likely would have handled the incident the same. He confirmed that he had no verbal communication with WO#1 prior to making physical contact with the Subject. He further stated that he could not read the Subject’s mind.

Ultimately, NE#1 asserted that he fully complied with the de-escalation policy during this incident.

OPA also questioned WO#1 about his perspective of his incident and concerning whether he felt that there was proper de-escalation. WO#1 recalled that he was at the entrance of the Target and was waiting for additional information concerning what occurred prior taking law enforcement action. At that time, he heard a commotion to his right and saw NE#1 struggling with the Subject. WO#1 said he then approached, took hold of the Subject, and tried to “talk him down” and “divide his attention.” This was successful.

WO#1 said that, as he walked towards the Target, WO#1 did not perceive the Subject to present a threat. The Subject was then pointed out as the perpetrator of the assault. As indicated above, WO#1 was intending on getting more information prior to taking action and said that this was consistent with his general practice when responding to scenes. WO#1 did not feel that there was a need to immediately contact the Subject and believed that they needed to know more prior to going hands on. He noted that NE#1 did not say anything to him prior to NE#1 making the decision to go hands on with the Subject. NE#1 also did not engage in any pre-planning with WO#1.

WO#1 told OPA that, prior to the physical altercation occurring, he was not aware of any threat assessment being conducted. He believed that the officers should have paused and investigated further prior to taking action. He did not witness NE#1 engage in any time, distance, or shielding, and he told OPA that he did not know why this did not occur.



When evaluating the totality of the circumstances, OPA concludes that NE#1 failed to comply with the requirements of the de-escalation policy for a number of reasons.

A. Planning and Formation of a Contact Team

At the outset, OPA finds that NE#1 failed to engage in any planning or tactical discussions prior to contacting the Subject and using force. This included not making meaningful attempts to engage in a threat assessment and/or to come up with the roles that he and WO#1 would play. Instead, he approached the Subject without saying anything at all to WO#1. By doing so, he functionally caused a two-officer response to become a solo officer response. In addition, by doing so, he eliminated any possibility of creating a coordinated response to the incident, including allowing an officer with expertise in CIT to take the lead or the development of a rapport with the Subject.

Moreover, as indicated in SPD's training materials, a core component of de-escalation is teamwork, which involves officers working together to take the Subject into custody without needing to use force unless necessary. NE#1's unilateral actions and lack of communication and coordination with WO#1 were contrary to training.

B. Consideration of the Subject's Mental Condition or Impairment

OPA further finds that NE#1 did not fully consider whether the Subject suffered from a mental condition or from another impairment that prevented him from voluntarily complying. This was the case even though NE#1 asserted at his OPA interview that he believed the Subject was potentially in crisis and/or suffering from mental illness. While NE#1 said that this would not have changed his response, he was required to engage in this analysis under policy.

C. Open Communication

The de-escalation policy sets forth the expectation that officers will engage in verbal techniques that are most likely to "calm an agitated subject and promote rational decision making." This is echoed in Department training, where communication and trying to create a dialogue with an individual are stressed. NE#1 did not engage in any communication aside from ordering the Subject to turn around just seconds before making physical contact with him. This is not, by itself, sufficient to constitute de-escalation. NE#1 provided virtually no opportunity for the Subject to voluntarily comply. Notably and in contrast, WO#1 was extremely effective in doing so and was able to de-escalate the Subject almost immediately. This suggests that communication would have been effective had NE#1 chose to comply with this requirement.

D. Time, Distance, and Shielding

NE#1 also failed to avail himself of time, distance, and shielding. He made physical contact just seconds after deciding to approach the Subject. Moreover, he did so even though he could have taken additional time to communicate with the Subject, while backed by WO#1, and from a safe distance. Compelling to OPA is WO#1's account of the incident and, specifically, his assertion that the officers could have been more deliberate in their handling of this incident and that he did not perceive NE#1 to utilize any time, distance, or shielding.



NE#1 said that he could not engage in time, distance, and shielding because of the exigent need to make contact with the Subject. WO#1, on the other hand, expressly denied that there was an exigent need to go hands on with the Subject, pointing out that the Subject was not acting aggressively and that no one in the surrounding area appeared to be in imminent danger. When assessing the BWV, OPA believes that WO#1's interpretation of the incident is more consistent with the objective evidence. OPA disagrees with NE#1 that there was an exigent need to contact the Subject that obviated the requirement to de-escalate or that made de-escalation neither safe nor feasible.

E. Tactics and Decision-Making

Lastly, when evaluating all of the above together, OPA finds that NE#1 engaged in tactics and made decisions that increased the likelihood that force would be required. Again, fundamental to this determination was NE#1's lack of awareness of where WO#1 was situated, his lack of any communication or planning, his purposeful elimination of time, distance, and shielding, and his failure to abide by and apply his training.

When considering the totality of the circumstances, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**