



## ***CLOSED CASE SUMMARY***

ISSUED DATE: SEPTEMBER 3, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0138

### **Allegations of Misconduct & Director's Findings**

Named Employee #1

Allegation(s):		Director's Findings
# 1	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)
# 2	8.300-POL 2 – Use of Force – TASER / Conducted Electrical Weapons 4. Officers May Use TASERs in the Following Circumstances...	Not Sustained (Lawful and Proper)
# 3	8.400 – Use of Force Reporting and Investigation 8.400-TSK-5 Use of Force – Involved Officers' Responsibilities During a Type II Investigation	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 Force Review Board alleged that the Named Employee may have failed to thoroughly explain the rationale supporting his deployment of a Taser. OPA also added allegations concerning the Taser application, itself, and the Named Employee's de-escalation prior to using force.

### **SUMMARY OF INVESTIGATION:**

On March 19, 2021, the Force Review Board (FRB) evaluated a Taser deployment by Named Employee #1 (NE#1). The FRB found that the deployment itself was within policy; however, the FRB noted that there were deficiencies in NE#1's report that prevented them from fully determining the propriety of the force. Given this, the FRB initiated an OPA referral to assess this matter and to ask further questions to more completely evaluate the deployment. This investigation ensued.

In reviewing this matter, OPA looked the shortcomings of NE#1's report, and also focused on the Taser deployment, itself, and whether NE#1 de-escalated prior to using force as required. As part of its assessment, OPA reviewed NE#1's reports, Body Worn Video (BWV) capturing NE#1's response to the call, and the FRB's findings. OPA further interviewed NE#1 concerning his actions, as well as spoke with two witness employees and SPD's Taser Coordinator.

### **ANALYSIS AND CONCLUSIONS:**



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**Named Employee #1 - Allegation #1**

***8.300 - Use of Force Tools 2. Uniformed Officers Are Required to Carry at Least One Less Lethal Weapon***

As discussed above, OPA first assessed whether NE#1 properly de-escalated prior to using 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.*)

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.

OPA’s review of the evidence indicated that NE#1 responded to a building where it was reported that the Subject had engaged in multiple assaults. Upon arrival, NE#1 verified that there were several victims and that the Subject was still in the building. He accordingly called for additional units to respond to the location. However, while waiting for these units to arrive for around 10 minutes, NE#1 and his partner observed security video that showed the Subject commit another assault. At that time, NE#1 believed that there were exigent circumstances that required him to act and that he could not wait to do so. NE#1 advised dispatch that he and his partner were going to make contact with the Subject and provided their anticipated location. NE#1 and his partner took the elevator to the fourth floor of the building and contacted the Subject after exiting. NE#1 ordered the Subject to get onto the ground and the Subject refused to do so. NE#1 performed an arc test with his Taser, but this did not gain compliance. He then issued a Taser warning and deployed.

At his OPA interview, NE#1 asserted that he needed to act because of the ongoing assaults being perpetrated by the Subject. He said that he gave the Subject multiple warnings and the opportunity to comply, but that the Subject refused to do so. He further asserted that, under the circumstances, it would have been impractical for him to back off and not take enforcement action. He contended that he fully de-escalated prior to using force.

The Taser Coordinator reviewed the video of the incident and provided his opinion that the deploying of the Taser at that time was appropriate and that the warnings provided to the Subject constituted sufficient de-escalation.

Ultimately, OPA agrees with both NE#1 and the Taser Coordinator. Here, NE#1 took multiple steps to de-escalate prior to using force. Upon assessing the incident, he called for additional units. He waited for those additional units to



respond and only contacted the Subject without having more backup because of the ongoing assaults. Moreover, he provided ample warnings to the Subject and gave the Subject time to comply with those warnings. However, the Subject made the choice not to do so. At this point, further de-escalation was not safe or feasible under the circumstances and there were compelling law enforcement interests in taking the Subject into custody quickly and without engaging in an extended physical altercation to do so.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

**Named Employee #1 - Allegation #2**

***8.300-POL 2 – Use of Force – TASER / Conducted Electrical Weapons 4. Officers May Use TASERs in the Following Circumstances...***

OPA next assessed NE#1's Taser deployment to determine whether it was consistent with policy.

The BWV indicated that, after directing the Subject to get onto the ground, performing an arc test, and providing a Taser warning, NE#1 deployed the Taser. At that time, the Subject was not actively moving towards the officers or threatening violence; however, he was significantly larger than both of them and was not complying with the officers' orders. After the first deployment, the Subject began walking away. NE#1 appeared to twice reenergize the probes as his partner tried to take the Subject down to the ground and the Subject punched the partner in the head and face multiple times, which caused the partner to fall to the ground. NE#1 deployed the Taser a second time, on this occasion resulting in full neuromuscular incapacitation.

SPD Policy 8.300-POL-2(4) 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.*) The force must also be reasonable, necessary, and proportional.

Based on the totality of the circumstances, OPA finds that the Taser deployments were consistent with policy. While, at the time of the first deployment, the Subject was not advancing towards the officers or physically or orally threatening them, he had assaulted several other individuals, including one just recently. As such, the officers had a reasonable belief that the Subject presented a risk of harm. Moreover, he did not comply with the officers' lawful orders to him to get on the ground.

Given this, OPA believes that NE#1 met the second prong of the policy, namely that there was a need to take the Subject into custody and that, because of the Subject's prior violence, it was likely that he could resist, resulting in injury to both himself and the officers. Indeed, this is exactly what occurred here, which warranted the additional deployments. OPA further concludes that the force was reasonable, necessary, and proportional under the circumstances. In this respect, OPA agrees with the conclusions reached by the Taser Coordinator, NE#1's chain of command, and the FRB.

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



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

**Named Employee #1 - Allegation #3**

***8.400 – Use of Force Reporting and Investigation 8.400-TSK-5 Use of Force – Involved Officers’ Responsibilities During a Type II Investigation***

SPD Policy 8.400-TSK-5 governs the responsibilities of involved officers during a Type II force investigation. Relevant to this case, it provides guidance on the requirements of officers’ Type II use of force reports, specially mandating the following: “A detailed description of any force and non-force actions used, how those actions furthered the intended law enforcement objective, and the observed results.”

Here, the FRB found that, while NE#1 described the force he used, he did not fully address why the force was justified. This prevented the FRB from holistically assessing whether the force was consistent with policy.

After reviewing NE#1’s report, OPA agrees. NE#1 did not explain why he used force and, particularly, why he felt that four separate deployments of his Taser were appropriate under the circumstances. This included not describing how the force met one of the two prongs of the Taser policy and also why it was reasonable, necessary, and proportional.

Ultimately, OPA does not believe that this constitutes intentional misconduct warranting discipline. Instead, OPA feels that NE#1 would benefit from retraining and counseling concerning report writing and the specific expectations and requirements of use of force reports. As such, OPA recommends that this allegation be Not Sustained and issues the below Training Referral.

- **Training Referral:** NE#1 should receive retraining and counseling from his chain of command concerning the information he is required to include in use of force reports. He should be specifically instructed that he must describe why the force was used and provide a justification for it, not just give a recitation of his acts. OPA is aware that the FRB has also made this recommendation to the chain of command. To the extent the retraining and counseling has already been conducted, it does not need to be repeated. Any retraining and counseling that does take place should be documented, and this documentation should be maintained in an appropriate database.

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