



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 8, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0144

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)

Named Employee #2

Allegation(s):		Director's Findings
# 1	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	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 the Named Employees subjected the Subject to excessive force. OPA further alleged that Named Employee #2 made have made unprofessional statements towards the Subject.

ADMINISTRATIVE NOTE:

The OIG did not certify this case for thoroughness. Elements of the non-certification, which OPA largely agrees with, are discussed below.

SUMMARY OF INVESTIGATION:

OPA received a complaint concerning incidents that occurred on March 12, 2021. The Complainant stated that she was watching officers take two individuals into custody when a third individual – referred to as the Subject – began arguing with the officers. The Complainant believed that he was defending the two individuals that were under arrest. The Complainant stated that, while the Subject was raising his voice, he was not engaged in any physically threatening conduct. At one point, the Subject said that he wanted to get a mask and turned to go back into his car. The officers said that he could not do so and slammed him against the car. The officers then brought him around to the side of the car and handcuffed him. The Complainant asserted her belief that the Subject did not appear to have done anything to warrant his arrest under these circumstances. The Complainant also contended that the force used may have been excessive “as evidenced by the 7 cars and 10+ officers in the area.”



After receiving the complaint, OPA opened this investigation. OPA made a number of attempts to interview the Complainant but was ultimately unable to do so. However, OPA was able to locate and interview the Subject. He said that he drove up to where the arrests were occurring when he was confronted by approximately seven officers. He said that he reached into his vehicle to get a facemask when a female officer yelled at him telling him not to do so. He began yelling at the officers and, while doing so, a small piece of pizza (he had been eating this earlier) flew out of his mouth and struck the female officer. The officers believed that he spit on the female officer and placed him under arrest. After he was handcuffed, the officers told him that he was resisting and they pulled his arms up, causing him pain. The Subject also stated that, after he was brought to the precinct, he was pushed by a Black officer who “glared” at him. He further said that officers laughed at him when he was at the precinct. Lastly, the Subject asserted that officers within the confines of the East Precinct have been harassing him, including tailgating his vehicle.

OPA reviewed the incident reports relating to this matter and was able to identify Named Employee #1 (NE#1) and Named Employee #2 (NE#2) as the primary officers who took the Subject into custody. In addition, OPA identified NE#2 as the female officer who yelled at the Subject to not go back into his vehicle. Given the information contained in the initial complaint and the statement provided by the Subject, OPA added excessive force claims against both Named Employees. OPA also added a professionalism claim against NE#2 based on profanity used during the Subject’s arrest. However, OPA did not include allegations surrounding the arrest of the Subject and, specifically, whether it was supported by probable cause and/or whether it was retaliatory. These were issues identified by the OIG in the partial certification of this matter. While OPA believes that these allegations can be addressed fully in the context of the reasonableness of the Named Employees’ use of force, OPA should have added separate allegations and not doing so was an oversight. OPA further neglected to add allegations concerning the use of force involving the first two individuals. Again, this was an oversight. However, OPA notes that the Complainant opined that the force was purportedly excessive because of the number of patrol vehicles and officers at the scene, not because of the physical acts engaged in by the officers. The quantity of resources at the scene does not cause force to be excessive, and, absent additional information provided by the Complainant (who declined to participate in this investigation), OPA would not find any policy violations.

As part of its investigation into the use of force against the Subject and the professionalism of NE#2, OPA reviewed Body Worn Video (BWV) and the officers’ incident reports.

OPA determined that the Named Employees were dispatched to a fight involving four individuals. Multiple other officers responded to the scene.

The BWV showed officers taking two individuals into custody. The Subject’s red car was stopped in the street next to where the arrest was occurring. He exited his vehicle and began arguing with officers concerning the arrest of the other two individuals. He contended that officers were “terrorizing people.” He was not wearing a mask at the time. The Subject turned, opened the door of his vehicle, and leaned inside. NE#2 told another officer to not let the Subject go into the vehicle. The officer reached towards the Subject and tapped him on the back and NE#2 told him to get out of the car. The Subject quickly turned around and faced the officers. He stated: “I’m getting my mask. I’m getting my mask. Don’t yell in my face.” NE#2 told him: “Don’t fucking reach in your car!” The Subject asked if he could get a mask and NE#2 replied: “No you cannot. You’re fine.” The Subject reached his hands in his pocket and took them out quickly, asking the officers: “What are you guys so afraid of?” He then made a motion with his tongue and a noise consistent with spitting something out. NE#2 immediately yelled: “You just fucking spit in my face.” Both she and NE#1 pushed the Subject against the vehicle and began to turn him around in order to handcuff him.



They struggled with the Subject for a short period of time. He denied spitting at NE#2, and she repeated: "You spit on my fucking face." The officers told him to turn around and relax. He said that he was relaxed as the officers continued to struggle with him. NE#2 yelled: "No you're fucking not, you're tense." The officers applied the handcuffs. NE#1 remarked: "We'll get you a mask." NE#2 stated: "Get him a spit mask." The Subject again denied spitting at NE#2. She stated: "You spit in my fucking face, bro."

The officers walked him over to a patrol vehicle, holding his arms behind his back. When they arrived, they leaned the Subject forward while they searched him incident to arrest. He asked why he was being arrested and he was told that it was for assaulting an officer. He denied that he did that. He told NE#2 that he did not even touch her. She said again: "You fucking spit in my face." He replied that he had something in his mouth. At one point, while being held at the patrol vehicle, he told the officers that the handcuffs were too tight. He also told the officers that they were pulling his arm and that they were breaking his arm. He was then walked to the passenger side of the patrol vehicle and placed inside. Neither of the Named Employees interacted further with him. While in the patrol vehicle, the Subject told officers that he "spat a little bit" but had something in his mouth.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 – Allegation #1

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

Both the Complainant and the Subject alleged that excessive force was used on the Subject. While the Complainant did not specifically state why she believed that the force was excessive, the Subject asserted that the officers improperly pulled up his arms, causing him pain.

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 assessing the reasonableness of force, a threshold determination is whether the officer had the lawful authority to use physical compulsion on the Subject. Here, it was alleged that such lawful authority did not exist. The Complainant contended that the Subject was just arguing with the officers and did not engage in acts that would have justified his arrest, while the Subject asserted that he did not spit at NE#2. The BWV is ultimately the best evidence of what occurred and whether the arrest was appropriate. When slowed down, the video showed that an object and/or spittle came from the Subject's mouth and struck the facial area of NE#2. This was the immediate precursor of NE#1 exclaiming that he spit in her face and the officers taking the Subject into custody. Even if the Subject did not intend to spit in NE#2's face and was trying to remove an object from his mouth as he contended, there was still probable cause to arrest him based on his acts. As such, any claim that the Subject was unlawfully arrested is unsupported by the evidence. Moreover, the video evidence showed that the Subject was arrested for the spitting, not for his arguing with officers, dispelling any retaliation claim.



As there was a legal basis to take the Subject into custody, the officers were permitted to use an appropriate level of force to do so. Here, the force used by the Named Employees was comprised of the following: (1) pushing the Subject against the vehicle; (2) controlling his body at the vehicle, turning him around, and placing him into handcuffs; and (3) holding his arms while walking him to the patrol vehicle and as he was standing in front of the patrol vehicle.

With regard to the first two categories of force used, OPA finds that both were reasonable under the circumstances. First, it was reasonable to push the Subject against the vehicle in the aftermath of the spitting in order to prevent him from spitting again and to control his body. Second, it was reasonable to hold the Subject against the vehicle, physically compel him to turn around, and then apply handcuffs on him. All of this was required to place him into custody. With regard to the holding of the Subject's arms, OPA's finds no video evidence supporting the Subject's contention that the officers unduly pulled them up with the purpose of hurting him. While they held the Subject's arms tightly and pushed him down at times, this was because he was non-compliant for portions of the arrest and was continuing to argue with them. The tactic that they used was purposed to control his body, not to harm him. This force was also reasonable.

For these same reasons as articulated above, the force was also necessary. Again, the force used was necessary to effect the lawful purposes of preventing the Subject from further spitting, for taking the Subject into custody, and then to control his body and to prevent him from resisting. Moreover, only that level of force needed to achieve the officers' lawful goals was used.

Lastly, OPA finds that the force was proportional. Despite the Subject's claims to the contrary, the force was of a low level and was proportional to the need to take the Subject into custody and his continued resistance.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both of the Named Employees.

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

Named Employee #2 – Allegation #1

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

For the same reasons as stated above (see Named Employee #1 – Allegation #1), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 – Allegation #2

5.001 – Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees "strive to be professional at all times." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." (SPD Policy 5.001-POL-10.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person." Lastly, the policy



instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

The BWV indicated that NE#2 used profanity on multiple occasions during this incident. Under SPD policy, profanity is only expressly prohibited when used as an insult. This was not the case here. However, OPA – and, for that matter, SPD’s chain of command – has consistently found that excessive profanity should not be used.

OPA recognizes that NE#2’s adrenalin was pumping during this incident; however, her use of profanity early on during the incident served to escalate her interaction with the Subject. While she may have had a legitimate law enforcement interest in telling the Subject to get out of the car, using profanity directly to his face once he had already emerged seemed unnecessary. Similarly, repeatedly telling the Subject that he spit in her “fucking face” seemed unnecessary and should have been avoided, even if NE#2 was warranted in being upset at the Subject’s conduct.

This being said, OPA does not feel that NE#2’s repeated profanity rose to the level of a policy violation. Instead, OPA recommends that she receive the below Training Referral. Also informing this decision is the fact that NE#2 has never been previously disciplined or, as far as OPA can tell, counseled for a lack of professionalism.

- **Training Referral:** NE#2’s chain of command should review the BWV of this incident with her and counsel her on her repeated use of profanity. Profanity should be avoided when possible and, when used, it can escalate incidents and reflect poorly on the Department. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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