



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 19, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0174

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	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)

Named Employee #2

Allegation(s):		Director's Findings
# 1	8.100 – De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities	Not Sustained (Training Referral)
# 2	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 3	8.200 – Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
# 4	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

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 Employees may have used excessive force and made unprofessional statements towards the Subject. It was further alleged that Named Employee #2 may also have used prohibited force and may have failed to de-escalate prior to using force.

SUMMARY OF INVESTIGATION:

An administrative lieutenant reviewed a use of force stemming from the arrest of an individual – referred to here as the Subject. The Subject was passed out in a vehicle and believed to be intoxicated. When Named Employee #1 (NE#1) and Named Employee #2 (NE#2) made contact with him, he woke up and began revving the engine of his vehicle. NE#2 punched the Subject multiple times. The administrative lieutenant also identified that NE#1 may have also struck the Subject in the face, but that NE#1 did not document this. The administrative lieutenant asked him to do so. NE#1 submitted an additional report in which he asserted that he pushed the Subject's face down with his hand. NE#1 said that it was not a strike. After reviewing this additional report, the administrative lieutenant believed that NE#1's force may have been excessive. Specifically, the administrative lieutenant felt that the force may have been unnecessary under the circumstances. The administrative lieutenant did not allege any other policy violations on the part of NE#1 or any policy violations on the part of Named Employee #2 (NE#2), who also used force during this incident.



The remainder of the Named Employees' chain of command also reviewed the force but did not deem it to be excessive. The chain of command also evaluated whether the officers properly de-escalated before using force and found that they did so.

The watch lieutenant asserted that the officers engaged in de-escalation because they did the following: assessed that the Subject was intoxicated and passed out; repositioned their patrol vehicle and activated their emergency equipment; came up with a "hasty plan" prior to making contact, and then gave multiple orders to gain voluntary compliance prior to using force. The watch lieutenant found that, once the Subject did not comply and then physically resisted, further de-escalation was no longer safe or feasible. The watch lieutenant also reasoned that the Named Employees' force was consistent with policy. He assessed each of NE#2's six punches. He stated that punch one occurred after the Subject was warned he could be struck if he did not get out of the vehicle and when the Subject began to rev the engine and tried to get it in gear. The watch lieutenant noted that NE#2 reasonably believed that, if the Subject was allowed to drive away, he would place NE#1, himself, and others in danger. This strike momentarily stopped the Subject from trying to drive away; however, he again began trying to get the car in gear. NE#2 then struck the subject three more times and tried to pull him from the car. These strikes prevented the Subject from driving away, but the officers were not able to extract the Subject. NE#2 hit the Subject twice more when the Subject began to hit him. The watch lieutenant contended that this force was appropriate for NE#2 to defend himself. With regard to NE#1's face pushes, the watch lieutenant felt that they were appropriate both to prevent spitting by the Subject and the transmittal of blood-borne pathogens, and to control the resisting Subject's head during the arrest.

The acting captain who reviewed the force agreed that the officers properly de-escalated. He cited much of the same analysis articulated by the watch lieutenant, and also focused on the Subject's possession of a "weapon" – the car – and how this decreased the options available to the officers and increased their need to act quickly. The acting captain further agreed that the force used by both officers was consistent with policy under the circumstances.

While both the watch lieutenant and the acting captain explicitly disagreed with the administrative lieutenant's decision to make an OPA referral and his assessment of NE#1's force, OPA commenced an investigation into this matter. OPA added allegations of excessive force against both Named Employees. OPA further added professionalism allegations against both Named Employees. For NE#1, this allegation concerned his use of profanity towards the Subject. For NE#2, the allegation involved his failure to act when the Subject was on the wet ground and asking for assistance. OPA additionally alleged that NE#2 may have failed to de-escalate and that he may have used prohibited force when he pulled the handcuffed Subject off of the ground causing the Subject to exclaim in pain. As part of its investigation, OPA reviewed the incident reports, use of force reports, and chain of command force reviews. OPA also reviewed Body Worn Video (BWV) for this incident, which fully captured what occurred. Lastly, OPA interviewed NE#1 and NE#2 concerning their actions and decision-making, as well as interviewed two witness officers.

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.*)

In assessing the BWV, OPA believes that the force used by NE#1 was a head push, as he described, and not a strike. Regardless, to be consistent with policy, this force must still have been reasonable, necessary, and proportional.

NE#1 told OPA that he used this force for two reasons. First, he initially pushed the Subject’s head in order to move him in the opposite direction so that he could be taken into custody. NE#1 noted that he was still resisting at the time. Second, NE#1 pushed the Subject’s head away a second time when the Subject turned to face him. NE#1 said that he did so because there was blood and saliva present and, due to the Subject’s continued resistance and earlier conduct. NE#1 believed that the Subject could possibly spit on him. NE#1 pushed the Subject away to prevent him from doing so.

OPA finds that the BWV is consistent with NE#1’s contention that he used the first face push to move the Subject away from him and where he wanted the Subject to go. With regard to NE#1’s justification for the second push, the BWV did show the Subject turn to face NE#1 with blood and possibly saliva by his lips; however, it did not provide conclusive evidence that the Subject was preparing to spit. That being said, OPA cannot say that NE#1’s real-time belief that this could happen was unreasonable. Moreover, pushing the face of a possibly spitting person away with an open hand is consistent with SPD training.

Ultimately, the BWV establishes that the face pushes were low level force. Moreover, NE#1’s rationale for this force appears to be consistent with the video. There is no basis, from OPA’s perspective, to conclude that it was excessive. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - 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.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers” whether on or off duty. (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.” (*Id.*) 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.*)

From OPA’s review of the BWV, NE#1’s use of profanity was outside of the expectations set forth in policy. NE#1 clearly recognized this, both when he initially self-reported to his sergeant and, again, at his OPA interview. NE#1 explained that, at the time, his emotions were running high, and he believed that the Subject had made decisions and taken actions to put the life of NE#2 – who he cared for – in danger. While he acknowledged that this was not an excuse, he provided this information to give OPA insight into his state of mind.

NE#1’s supervisor counseled him on his statement and reported issuing him a PAS entry. OPA could find no evidence of any such PAS entry when it reviewed NE#1’s file. That being said, OPA believes that counseling and retraining NE#1, rather than disciplining him, was reasonable under the circumstances. OPA reaches this conclusion for three main reasons. First, the incident was intense, and NE#1 had an imperfect human reaction to the stimuli facing him. Second, NE#1 took responsibility for what he did wrong and immediately self-reported. Third, NE#1 has no recent case in which



he has engaged in similar misconduct. Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#1 should be counseled and retrained concerning his statement during this incident. This retraining and counseling should be documented as the sergeant failed to do so previously. As part of this counseling, NE#1 should be instructed that he cannot engage in similar conduct in the future and that doing so will result in discipline.

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

Named Employee #2 - Allegation #1

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

“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)

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.” (SPD Policy 8.100-POL-1) 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.

OPA agrees with the chain of command that the officers did take some de-escalation steps. Most notably, NE#1 made the decision to move and reposition the patrol vehicle in order to ensure that it would be closer and could serve as cover and it would be more visible to the Subject. In addition, the Named Employees engaged in very brief planning prior to opening up the door. But for these actions, OPA would have found that NE#2 violated SPD’s de-escalation policy. Indeed, even with these actions, OPA has significant concerns with the tactics and decision-making he used.

Most notably, OPA struggles to understand why the officers did not take more time to engage in planning and to try to communicate with the Subject prior to opening up the door. At the time, the Subject was sleeping. There was no rush. Moreover, the officers had probable cause to arrest the Subject for DUI physical control and drug possession, and there was no evidence that the Subject had committed a crime of violence or was armed. As such, the need to quickly take the Subject into custody did not outweigh the expectation that they would have come up with a plan and employ the elements of de-escalation.

Further, as indicated above, the officers made no substantive effort to communicate with the Subject prior to opening the door. For example, going over their patrol vehicle’s PA system could have served to wake the Subject up and would have minimized the risk that – as happened here – they would surprise the Subject and the interaction could go sideways. By doing so, they could have remained a distance away by the patrol vehicle and treated this incident akin



to a high-risk felony stop. Again, this would have provided time, distance, and shielding, none of which were present under the plan effectuated by the officers.

In addition, within 11 seconds of opening the door, the officers began issuing orders with raised voices and threatening force if the Subject did not comply. While the officers were entitled to do so, they failed to consider that, perhaps, the Subject was not responsive because he was high, still waking up, confused, and unsure of his surroundings. OPA notes that SPD has trained officers on a similar situation – one where officers from another jurisdiction ended up shooting a suspect who was passed out behind the wheel of a car – and have cautioned officers to be cognizant of the mental state of a just awaking driver and the risk not doing so can pose to all involved.

Here, OPA finds that, while their response was flawed in a number of respects, the Named Employees engaged in the bare minimum of de-escalation. Again, had they not moved the patrol vehicle and engaged in some planning, OPA would have issued a Sustained finding. That they took these steps informs OPA's decision that a Training Referral is the appropriate result here.

- **Training Referral:** NE#2's chain of command should discuss this incident with him and review together the BWV. NE#2's chain of command should go over the elements of de-escalation with him and go over which he met and analyze why he did not meet the majority of the expectations set forth in the policy. The chain of command should specifically discuss NE#2's decision to move forward with opening the door, as opposed to creating a plan that afforded him and NE#1 more time, distance, and shielding. Lastly, NE#2 should be required to meet with SPD's Training Unit to go over this incident and review best practices when contacting a passed-out driver. This retaining and 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

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

Despite OPA's concerns with the sufficiency of NE#2's de-escalation, OPA finds that his force, while significant, was consistent with policy. In reaching this conclusion, OPA places finds helpful the analysis of the watch lieutenant, which OPA believes to be correct.

As a general matter, NE#2 had probable cause to arrest the Subject for DUI physical control and drug possession (heroin). Given this, he was allowed to use force to take the Subject into custody. He was further allowed to use force if needed, to remove the Subject from the vehicle in order to effectuate the arrest. As noted in the chain of command reviews, the vehicle presented a threat as, if the Subject pulled away from the location, he could strike one of the officers and, due to his impairment, could also harm community members.

On each of the occasions that he struck the Subject, NE#2 was responding to a direct physical threat. On the first occasion, the Subject was revving his engine and trying to get in gear. This clearly presented a threat to the officers and others and NE#2 was permitted to try to stop this conduct. After he did so, NE#2 ceased using force until he perceived a second threat.

The second threat, like the first, involved the Subject trying to operate his vehicle. Again, as discussed above, NE#2 was permitted to use force to stop this conduct given the threat it posed.



The third grouping of punches was in response to the Subject physically resisting and, in NE#2's perception, striking NE#2. He was allowed to use force to defend himself. It was further appropriate given the totality of the Subject's conduct and the reality that he remained behind the wheel of a vehicle and non-compliant.

Based on the above, OPA finds that the force was justified under the circumstances of this case. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #3

8.200 - Using Force 2. Use of Force: When Prohibited

The BWV showed that, after the Subject's arrest, NE#2 picked him up off the ground, pulling him up by his arm. The Subject made a complaint of pain. It was alleged that this may have constituted prohibited force.

SPD Policy 8.200-POL-2 states that an officer may not use force to punish or retaliate. SPD Policy 8.200-POL-2. While this does not prevent an officer from using force to respond to danger or an assault where reasonable, necessary, and proportional, the officer's use of force must be directed toward a legitimate law enforcement purpose.

At his OPA interview, NE#2 acknowledged pulling the Subject up off of the ground. He said that he did so in order to move the Subject away from the scene. He said that this would allow the officers to search for their equipment and to get the investigation under way. NE#2 confirmed that he was trained that, when picking a person up off of the ground a solo officer, he should roll the person over and then rock them into a standing position. He stated that he did not do so here because the ground was wet and dirty, and he did not want to seat the Subject into a puddle. He stated that he just intended to get the Subject up as quickly as possible. NE#2 denied that this constituted prohibited force or force used for an improper reason.

From a review of the BWV, OPA does not believe that NE#2 engaged in inappropriate or prohibited force when he lifted the Subject off of the ground. While NE#2 did not comply with SPD training, his explanation of why he did not do so was understandable. Moreover, the BWV did not indicate that NE#2 improperly jerked the Subject's arm or picked him up in a manner that appeared to be geared towards causing the Subject pain.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #4

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

It was alleged that NE#2 may have violated SPD's professionalism policy by not initially listening to the Subject's requests to get off the ground.

When assessing the BWV, OPA finds an insufficient basis to conclude that NE#2 violated policy. While the Subject was not initially lifted up from the ground, there were legitimate reasons to keep him there while the officers made sure the scene was safe. Moreover, very soon after, NE#2, himself, said that the Subject should be lifted off of the ground



and he held back from doing so because of what another officer advised. Lastly, NE#2 ultimately lifted the Subject off of the ground.

As OPA finds no basis to conclude that NE#2 was unprofessional, OPA recommends that this allegation be Not Sustained – Unfounded.

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