



## ***CLOSED CASE SUMMARY***

ISSUED DATE: NOVEMBER 8, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0196

### **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 Will Use De-Escalation Tactics in Order to Reduce the Need for Force	Sustained
# 2	8.300-POL-12 – Use of Force – Firearms 5. An Officer May Draw their Firearm in the Line of Duty When...	Not Sustained (Training Referral)
# 3	8.200 – Using Force 1. Use of Force: When Authorized	Allegation Removed
# 4	8.200 – Using Force 6. Recognizing the Urgency of Providing Medical Aid...	Not Sustained (Training Referral)

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:**

The Complainant alleged that the Named Employee violated policy when he failed to de-escalate, improperly drew and pointed his firearm, and did not place a tased subject into the recovery position.

### **SUMMARY OF INVESTIGATION:**

Named Employee #1 (NE#1) and Witness Employee #1 (WE#1) were dispatched to a call concerning the theft of a utility trailer from a COVID testing site. The officers arrived at the scene and located the trailer, which had been attached to a pickup truck. The suspect – who is referred to the Subject here – was standing outside of the truck. The officers pulled up to the truck and trailer with their overhead lights on. The officers positioned themselves by their patrol vehicles – using the vehicles as cover – and began the process of identifying themselves as police officers and giving commands. NE#1 further drew his firearm. The Subject put his hands up and moved towards the driver's seat of the truck. As he did so, NE#1 broke cover and moved towards the truck. The driver got into the truck and began to start it in order to drive away. NE#1 moved his firearm back towards his holster as he moved towards the truck (it was unclear from the video whether he fully reholstered it). However, once he arrived at the truck, he again drew his firearm and pointed it at the truck's window. As the truck moved, he got onto the running board. He jumped off about a second later. The truck proceeded forward, ultimately colliding with other vehicles. The Subject then got out and started running. He was tased by WE#1. NE#1 assessed the Subject's breathing and called for medical attention.



NE#1's response to this incident was later reviewed by his chain of command. On April 17, 2021, NE#1's Lieutenant identified that his leaving of cover and running up and onto the truck may have violated SPD's de-escalation policy. The Lieutenant also alleged that the pointing of the firearm while at the truck was not reasonable, necessary, and proportional, and that there were less invasive force options available. Lastly, the Lieutenant asserted that the failure of NE#1 to place the Subject in the recovery position after the tasing also violated policy. The Lieutenant made an OPA referral on April 22, 2021, and this investigation ensued.

OPA reviewed the Body Worn Video (BWV) and In-Car Video (ICV) for this incident (which are summarized above). OPA also interviewed NE#1.

NE#1 told OPA that he left cover to run up to the truck because he knew that they would not be able to engage in a vehicle pursuit and this was the only way he could think of to secure the trailer. He felt that there was a high need to stop the truck because the Subject was stealing from a COVID test site, and they were in the middle of a pandemic. He felt that, given the Subject's actions, further de-escalation was not safe or feasible. He also felt that his only other option was to just do nothing, which was undesirable.

With regard to his drawing of a firearm, NE#1 said that he first did so when he and WE#1 were conducting a functional high-risk felony stop. He stated that he tried to reholster his firearm as he proceeded towards the truck. He told OPA that he drew the firearm a second time when the truck started moving and he was holding onto it. He said he pointed the firearm to get the driver to stop moving the truck. When this was unsuccessful, he jumped off the truck and again reholstered his firearm.

Lastly, NE#1 told OPA that, after the Subject was tased, he checked on the Subject's breathing and then called for medical attention. He confirmed that he did not place the Subject into the recovery position but said that he did not know (at the time) that he was required to do so.

#### **ADMINISTRATIVE NOTE:**

At the discipline meeting in this matter, the allegations herein were discussed with the Named Employee's chain of command. A robust conversation was had concerning which errors precipitated the misconduct at issue in this case and how those errors could have been corrected – and should be corrected in the future – to avoid a safety risk to involved officers, subjects, and members of the public. Specifically, the reviewers discussed which allegations most squarely addressed the misconduct at issue in order to clearly communicate to NE#1 which decisions led to a sustained finding in this matter. OPA originally recommended sustained findings for both Allegations #1 and #2. Following the discipline meeting, OPA amends its recommendations such that Allegation #2 is changed to Not Sustained (Training Referral). Allegation #1 remains sustained.

#### **ANALYSIS AND CONCLUSIONS:**

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

***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)

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.*)

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.

(*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 finds that the tactics used by NE#1 at the inception of the incident were sound. He began effectuating a high-risk felony stop – which OPA agrees was appropriate under the circumstances – and gave the Subject commands while behind cover. He also used distance and tried to use time.

However, the Subject did not comply and began to move to the vehicle. Here is where, in OPA’s opinion, NE#1’s tactics fell apart. Without communicating with WE#1, NE#1 quickly moved to the truck. By doing so, he left cover and eliminated time and distance. He further got onto the running board of the truck, which had begun moving, and pointed his firearm at the window. By doing this, he took a two-officer response and turned it into a solo response. He further increased the level of prospective force to potentially deadly force when he pointed his firearm at the window.

This was inconsistent with the Department’s de-escalation policy, it was unsafe, and it put NE#1 in a position where he could have suffered a catastrophic injury and/or caused one to the Subject or the truck’s passenger.



While perhaps not satisfactory, the better option would have been to remain behind cover and to call in a description of the truck so that it could be sought by other units. This would have allowed the truck to be tracked, even if he and WE#1 could not pursue it.

Though NE#1 appears to have been trying to do what he felt was right, his decision to abandon time, distance, and shielding improperly created a near deadly-force situation. Given this, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

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

***8.300-POL-12 – Use of Force – Firearms 5. An Officer May Draw their Firearm in the Line of Duty When...***

***a. Recommendation - Original***

SPD Policy 8.300-POL-12 governs when officers may draw their firearms in the line of duty. The policy states that an officer may do so: “When the officer reasonably believes it may be necessary for his or her own safety or for the safety of others.” The policy further provides that: “Unnecessarily or prematurely drawing their firearm may limit an officer's alternatives in controlling a situation, may create unnecessary anxiety on the part of the public, and may result in an unwarranted or unintentional discharge of the firearm.” Lastly, the policy directs that: “Officers will not draw their firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with policy on the use of firearms.”

With regard to the first drawing of his firearm, OPA finds that NE#1 acted consistent with policy. He was properly effectuating a high-risk felony stop and drawing his firearm was consistent with his training.

However, OPA has concerns with his decision to draw his firearm a second time. As discussed more fully above, NE#1 put himself in a poor tactical position that increased both the level of threat to him and the force he used. As a result of this, he pulled his firearm and pointed it at the open window of the truck. He said that he did so to stop the truck from continuing to drive away; however, this would not have provided NE#1 with a lawful right to fire his weapon at that time. Indeed, as set forth in SPD Policy 8.300-POL-12(8), officers are prohibited in virtually all cases from firing at a moving vehicle. Notably, this was not a situation where NE#1 faced a deadly threat. Moreover, even if he had faced such a threat, it was unfortunately self-created. Lastly, while NE#1 stated that he was not aware of this, there was a passenger in the car. Had his firearm discharged, he could have inadvertently harmed this person.

Ultimately, SPD's policy concerning the drawing of firearms is restrictive, and for good reason. It is purposed to reduce harm and potentially fatal occurrences. Here, even if NE#1 was acting in good faith, he improperly drew his firearm and pointed it at the window of a moving vehicle. This violated policy.

***b. Recommendation – Post Discipline Meeting***

At the discipline meeting, NE#1's chain of command argued convincingly that, under these specific circumstances, NE#1's decision to draw his firearm a second time, though clearly erroneous, was more consistent with a tactical error than a policy violation. Although OPA maintains the concerns articulated above, these are mitigated by the fact that (1) NE#1 pointed his firearm at the Subject only briefly before lowering and resecuring his firearm, (2) NE#1 admitted



his mistake, (3) the root causes of NE#1's tactical error were his failure to de-escalate, which is fully addressed in Allegation #1, and a lack of pre-planning with his partner. While NE#1's decision to draw his firearm a second time possibly rose to the level of misconduct, NE#1 did not willfully disregard SPD Policy. Accordingly, OPA issues NE#1 the below Training Referral rather than a Sustained finding.

- **Training Referral:** NE#1 should be instructed on de-escalation and SPD Manual 8.300-POL-12. NE#1's chain of command should review NE#1's BWV for this incident with him and explain how his failure to use de-escalation precipitated a series of events that endangered the Subject, NE#1, and members of the community. This counseling and any retraining provided should be documented in an appropriate database.

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

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

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

In OPA's analysis, this allegation is duplicative of Allegation #2 discussed above. Accordingly, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**

**Named Employee #1 - Allegation #4**

***8.200 – Using Force 6. Recognizing the Urgency of Providing Medical Aid...***

SPD Policy 8.200-POL-6 governs the requirement of providing medical aid to those upon which force was used. The policy specifically states that tased individuals must be placed into the recovery position.

The BWV showed that, after the Subject was tased, NE#1 did not move the Subject into the recovery position. NE#1 did, however, call for medical assistance and check on the Subject's breathing.

At his OPA interview, NE#1 said that, while he subsequently learned that tased individuals needed to be moved into the recovery position, he did not know that at the time of the incident. He further stated that this was not in the Taser training that he was a part of. NE#1 verified that he called for medical assistance and made sure that the Subject was not having difficulty breathing.

OPA reviewed the Taser training and verified that there was no specific mention of placing tased individuals into the recovery position.

While policy technically required NE#1 to do this, OPA credits his account that he was not aware of this section of policy and confirmed that he was not trained on this mandate. Accordingly, OPA issues NE#1 the below Training Referral rather than a Sustained finding. OPA also intends to request that the Taser Coordinator ensure that this language is placed into SPD Taser training moving forward.

- **Training Referral:** NE#1 should be instructed on the requirement to put a tased individual into the recovery position and he should be reminded that this is required by policy. This counseling and any retraining provided should be documented in an appropriate database.



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