



OFFICE OF PROFESSIONAL ACCOUNTABILITY

Closed Case Summary

Complaint Number OPA#2014-0216

Issued Date: 12/13/2016

Named Employee #1	
Allegation #1	<u>Seattle Police Department Manual</u> 6.220 Voluntary Contacts and Terry Stops (Policy that was issued 01/30/2014)
OPA Finding	Not Sustained (Training Referral)
Allegation #2	<u>Seattle Police Department Manual</u> 8.100 (1) Using Force: Use-of-Force: When Authorized (Policy that was issued 01/01/2014)
OPA Finding	Sustained
Allegation #3	<u>Seattle Police Department Manual</u> 8.100 (2) Using Force: Use-of-Force: When Prohibited (Policy that was issued 01/01/2014)
OPA Finding	Sustained
Allegation #4	<u>Seattle Police Department Manual</u> 8.100 (3) Using Force: When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force (Policy that was issued 01/01/2014)
OPA Finding	Sustained
Final Discipline	Termination of Employment

INCIDENT SYNOPSIS

The Named Employee responded to a call and arrested a subject.

COMPLAINT

The complainant, a supervisor within the Department, alleged that the Named Employee (a) used force against the subject that was not reasonable, necessary and/or proportional; (b) used prohibited physical force in violation of policy; (c) failed to use de-escalation tactics as required by policy; and (d) lacked sufficient basis for the scope, length and nature of the detention of the subject in violation of policy.

INVESTIGATION

The OPA investigation included the following actions:

1. Review of the complaint memo
2. Review of In-Car Videos (ICV)
3. Search for and review of all relevant records and other evidence
4. Interview of SPD employee
5. Review of criminal investigations
6. Review of external investigations
7. Review of forensic video analysis

ANALYSIS AND CONCLUSION

During this incident, the Named Employee conducted a Terry Stop and then made the decision to convert the Terry Stop into an arrest. The evidence from the investigation established that the Named Employee had sufficient basis to detain the subject for investigation of potential domestic violence telephone harassment when he first encountered her in front of her (former or estranged) boyfriend's house. The investigation is less clear as to whether the Named Employee had probable cause to convert the Terry Stop into an arrest, as will be discussed in detail below.

Terry Stop: By the time the subject arrived on scene, the Named Employee had either received reports of, or witnessed, a total of three phone calls from the subject to the boyfriend that contained threats or what the Named Employee classified as fighting words. First, the Named Employee had been told by the boyfriend's mother that her son told her that the subject had called on the phone and threatened to come to their house and fight him. The boyfriend appeared to be upset and agitated. When the Named Employee asked the boyfriend if the subject had threatened him, the boyfriend did not answer directly and would only confirm that she had been calling him. The Named Employee had also witnessed the boyfriend receive two additional telephone calls that the Named Employee believed to be from the subject. The boyfriend seemed upset by them.

Shortly after this, the subject showed up in front of the house and followed the boyfriend on foot down the sidewalk. The Named Employee said it looked to him like the boyfriend was trying to avoid the subject and that she was "stalking" him. At this point the Named Employee

approached the subject and began to question her, thus marking the beginning of her detention while the Named Employee further investigated the possibility that she had committed the crime of telephone harassment.

The Named Employee conducted a brief interview of the subject during which she flatly denied having threatened the boyfriend over the phone. When interviewed earlier, the boyfriend never told the Named Employee that the subject threatened him over the phone, nor did he explicitly deny this to the Named Employee. He was not forthcoming with direct responses to the Named Employee's questions, which the Named Employee stated was typical, in his mind, of the dynamic for domestic violence victims with police on the scene. The Named Employee was aware that the boyfriend had previously disconnected the phone when his mother tried to report to the police the alleged threats against him by the subject.

The Arrest: As the Named Employee was questioning the subject, she began to yell towards the mother's house. This upset the boyfriend who told the subject not to speak to his mother that way. At this point, the Named Employee announced that his patience had ended and that someone was going to jail. The Named Employee then said a phrase commonly used to indicate the use of chance to make a selection, which was followed by the Named Employee's statement that the subject was under arrest for making a threat. The Named Employee then used de minimis force to take the subject into physical custody and handcuff her.

When the Named Employee told the subject that she was under arrest and placed her into handcuffs, the detention of the subject was converted into a physical arrest. SPD Policy on Voluntary Contacts and Terry Stops states that officers must possess probable cause or an arrest warrant to convert a detention into an arrest. SPD Policy states, in part, "Actions that would indicate to a reasonable person that they are being arrested or indefinitely detained may convert a Terry stop into an arrest requiring probable cause or an arrest warrant".

Summarizing a definition included in SPD training material presented to the Named Employee in 2009, probable cause is a suspicion based on reasonable grounds and circumstances sufficiently strong to convince a person of "ordinary caution" to conclude that a specific person committed a specific crime. Probable cause does not require certainty, only the probability that the person committed the criminal act.

The crimes of Harassment and Harassment via Telephone were both cited by the Named Employee as misdemeanor crimes for which there was probable cause to believe the subject had committed a crime. All of the same elements that resulted in the Named Employee making a Terry Stop were relevant to a probable cause analysis. In addition, the Named Employee appeared to have factored the subject's decision to show up at the residence in the middle of the night, drunk and somewhat verbally combative, as further evidence that she likely committed the crime of Harassment via Telephone earlier in the evening, despite her denials.

The Named Employee stated that the situation between the subject and the boyfriend was escalating and he believed he needed to make an arrest rather than to continue his

investigation. The evidence supported the Named Employee's assessment that it was prudent to do something to prevent a disturbance and keep the peace. That said, options other than making an arrest, regardless of whether or not there was probable cause, were available for the Named Employee to explore at this time. With the assistance of the two other officers on scene, the Named Employee could have further separated the subject and the boyfriend, either by having one officer go inside the house with the boyfriend or by having them go to opposite ends of the block. Such separation for the purpose of conducting confidential interviews and avoiding conflict are a standard tactic used by officers when conducting domestic violence investigations.

It was also worthy of note that the Named Employee was conscious of his obligation to make an arrest if he had probable cause to believe a domestic violence crime had been committed. This awareness of the so-called "mandatory arrest" provision of Washington's domestic violence law was acutely felt by the Named Employee because of his involvement in a previous incident several years before that resulted in a death and severe consequences for those involved. As a result, the Named Employee received specific counseling and direction on this point.

Finally, the evidence from the investigation supported the conclusion that the Named Employee converted his detention of the subject into an arrest in part through an abundance of caution to ensure that he complied with policy and made an arrest in a domestic violence situation.

Use of Force: SPD Policy authorizes officers to use physical force so long as it is reasonable, necessary and proportional.

Prior to the moment when the Named Employee placed the subject under arrest, he used force SPD considers de minimis and which would not be of sufficient seriousness to warrant a report by the Named Employee or investigation by his supervisor. The Named Employee took hold of the subject's arm and escorted her away from the boyfriend. He later grabbed the subject's arm and pulled her back to the front of the police car where he had directed her to remain while he completed his preliminary investigation. This force was reasonable and the lowest level possible to keep the subject isolated from the boyfriend. This prevented her from causing more problems or escalating the situation. The force used by the Named Employee prior to his arrest of the subject was also necessary to lawfully detain her while he continued his investigation. Finally, the force was proportional, matching the totality of the circumstances.

Beginning when the Named Employee placed the subject under arrest, the Named Employee started by using de minimis force with control holds, handcuffing and pushing the subject into the police car. Prior to the punch in the face, this level of force was reasonable and proportional given the totality of the circumstances.

However, the Named Employee's limited physical contacts with the subject for the purposes of separating her from the boyfriend and guiding her into the police car were not the only force used by the Named Employee toward the subject. Additionally, he re-entered the back of the police vehicle and punched her. This use of force was a policy violation. Hitting the subject in the face with the amount of force employed by the Named Employee was unreasonable and

excessive, given the totality of the circumstances. As will be discussed in more detail below, the Named Employee had a number of other options available to him in order to control the subject and prevent her from further injuring him or anyone else and to prevent her from escaping. Given that the subject was still handcuffed and seated in the back of the police vehicle and that the Named Employee had stepped back from the open back door of the police vehicle and was not in immediate danger from attack by the subject, it was unreasonable for him to lunge back inside the vehicle and deliver a closed fist strike to the subject's face with such force that it fractured her eye socket and inflicted substantial soft tissue damage to her face.

SPD Policy authorizes officers to use physical force so long as it is reasonable, necessary and proportional. A subsection of the same policy further restricts the use of physical force. Officers are prohibited from using physical force to punish or retaliate on handcuffed or otherwise restrained subjects except in exceptional circumstances. Exceptional circumstances are described as those in which the "subject's actions must be immediately stopped to prevent injury, escape, or destruction of property". Policy puts the burden on the officer using force on a handcuffed prisoner to articulate "the exceptional circumstances, and why no reasonably effective alternative to the use-of-force appeared to exist."

In order to determine whether or not the Named Employee's punch to the subject's face complied with the requirements of policy, it must be determined, based on the facts known from the investigation, whether the Named Employee reasonably believed one or more exceptional circumstances existed at the time, and that no reasonably effective alternative to the use-of-force appeared to exist.

In addition to what has already been summarized above with respect to the totality of the circumstances known to the Named Employee at the time, it is important to emphasize that the subject had been uncooperative and physically resistant to the directions and orders of the Named Employee. This resistance, however, could be best characterized as physically uncooperative and was without aggression or signs of aggression. At the moment the subject was pushed backwards into the backseat of the police car, the Named Employee was not aware of any facts or circumstances that would reasonably lead him to conclude that the subject posed an imminent threat of injury, escape or destruction of property. Additionally, the Named Employee believed that another officer was moving to assist him with positioning the subject in the squad car and therefore the Named Employee was not the only officer available to contain the subject, should she have increased her physical resistance.

As the Named Employee bent over and leaned toward the open door of the police car, he pushed the subject backwards through the doorway and she fell onto the seat in a sideways and partially seated position with her feet still outside the doorway. As the Named Employee released his hold on the subject, her right leg straightened and her foot moved towards the Named Employee's face. As the subject's right leg completely straightened, the Named Employee began to turn and move away from the area of her foot. Based on the preponderance of the evidence and particularly in light of the analysis provided by the forensic video analyst,

the OPA Director found it more likely than not that the subject's right foot made some physical contact with the Named Employee.

At this point, the Named Employee reasonably believed that the subject had just kicked him and may pose a continuing threat. This possible threat increased when the subject began sitting up and moving her foot towards the ground outside the police car. This movement by the subject could also be reasonably viewed as an indication that the subject may attempt to escape by getting out of the police car. These movements may have been visible to the Named Employee as he stepped back and moved away from the open back door of the car.

The subject was seated in the back of a police vehicle with her hands cuffed behind her back. To exit the back seat, the subject had to sit up and get her feet down outside the car far enough to change her center of gravity and push herself up and out through the doorway. It was reasonable to assume that the subject was capable of this feat, although it would take some time and effort. In addition, her efforts to get out of the car, if that was what she was intending to do, would be somewhat hampered by her intoxicated state, potentially slowing her ability to get up and out of the car. Once out of the car, the subject could have fled on foot and/or attempted to injure someone. Once again, both of these actions, should the subject have attempted them, would have been hampered by the fact that she was handcuffed and intoxicated.

The Named Employee chose to respond to the apparent kick to his face by moving back towards the open back door of the police car, leaning in with his head and upper body and punching the subject one time in the face. The Named Employee had a number of other alternatives available to him, including, but not limited to:

- putting greater distance between himself and the subject
- enlisting the assistance of the other officer, who was a few feet away at the rear of the same police car, to either help him control the subject if she emerged from the car or to go around to the other side of the car and control her movements by reaching in and pinning her upper body on the seat
- going around the open back door of the car and using it as a shield and partial leverage to keep the subject in the car until other resources could be employed to control her movement
- using his radio to call for additional officers to assist

In his OPA interview, the Named Employee said that his response to being kicked was "immediate", that he neither took nor had time to consider anything other than a punch to the subject's face as a means to deal with the threat posed by the subject. The Named Employee told OPA that allowing the subject to get out of the car would have increased the risk to him and the other officers by giving the subject additional space to deliver, "more powerful kicks, different kinds of kicks, a head butt". However, the opposite appeared true. Once the subject was outside the car, she would have lost the advantage she previously enjoyed of being able to kick anyone who came near the open door of the police car. With the subject outside of the car, the officers who were present could have used a variety of non-force or de minimis force tactics to keep her

from escaping or hurting someone. In fact, by putting himself back within range of the subject's feet, the Named Employee limited his available options.

The Named Employee also told OPA that he could not take any time to consider alternatives because he had been kicked and was injured and additional time might have given the subject time to knock him out and possibly kill him. For the same reason, the Named Employee told OPA that creating distance between him and the subject was not an option he considered. It was clear from the video and the Named Employee's own statements that he reacted almost immediately to being kicked. His reaction was to move back into the open doorway of the police car and punch the subject in the face. It should be noted that the Named Employee's belief that the subject was about to get out of the car so she could attack him again was only an assumption on his part. It was by no means a certainty.

The OPA Director found that the Named Employee failed to articulate why no reasonably effective alternative to the punch was available. Other alternatives were available, but the Named Employee neither considered nor attempted any alternatives to the punch as a means of reducing the threat posed by the handcuffed subject.

De-escalation: Prior to being kicked, the Named Employee employed a number of de-escalation tactics to prevent violence between the subject and the boyfriend and to minimize the necessity and nature of force he had to use to detain the subject and continue his investigation. He tried verbal persuasion, humor, and de minimis escort holds to some success.

However, once the Named Employee was kicked and after he was out of range of the subject's feet and able to move further from the open car door, the Named Employee failed to use or attempt to use any de-escalation tactics. He gave no warnings or commands, attempted no other verbal tactics or persuasion, did not move from his position of vulnerability to a safer one, moved back into a position of increased vulnerability, did not use distance or cover to limit his exposure to danger from the subject, failed to summon help from the other officer who was just a few feet away at the rear of the police car, or any other recognizable de-escalation tactic. He simply moved back into the open doorway of the police car and delivered a single punch to the subject's face.

The OPA Director found that the Named Employee failed to use or even attempt to use a single de-escalation tactic between the time he moved away from the car door after being kicked and the time he punched the subject. He further found that the Named Employee had the opportunity to attempt to de-escalate the situation in order to reduce the need for him to use force.

FINDINGS

Named Employee #1

Allegation #1

The evidence supports that Named Employee #1 converted his detention of the subject into an arrest in part through an abundance of caution to ensure that he complied with the policy on domestic violence situations. Therefore a finding of Not **Sustained** (Training Referral) was issued for *Voluntary Contacts and Terry Stops*.

Required Training: The Named Employee should receive substantial retraining in the following areas to improve his ability to handle similar situations in the future:

- Voluntary Contacts, Terry Stops and Arrests
- Current case law regarding Reasonable Suspicion and Probable Cause and their practical application
- Domestic Violence Laws: Obligations of Police Officers
- SPD Procedures and Tactics for Handling Reports of Domestic Violence

Allegation #2

The evidence supports that Named Employee #1 violated the policy. Therefore a finding of **Sustained** was issued for *Using Force: Use-of-Force: When Authorized*.

Allegation #3

The evidence supports that Named Employee #1 violated the policy. Therefore a finding of **Sustained** was issued for *Using Force: Use-of-Force: When Prohibited*.

Allegation #4

The evidence supports that Named Employee #1 violated the policy. Therefore a finding of **Sustained** was issued for *Using Force: When Safe Under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force* .

Discipline imposed: Termination of Employment

NOTE: The Seattle Police Department Manual policies cited for the allegation(s) made for this OPA Investigation are policies that were in effect during the time of the incident. The issued date of the policy is listed.