



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 6, 2018

CASE NUMBER: 2017OPA-0950

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings	Chief’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Inconclusive)	
# 2	6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful	Sustained	Not Sustained (Inconclusive)
# 3	6.220 - Voluntary Contacts, Terry Stops & Detentions 2. Officers Must Distinguish Between Voluntary Contacts and Terry Stops	Not Sustained (Training Referral)	
# 4	8.100 - De-Escalation 1. 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	Not Sustained (Lawful and Proper)	
# 5	5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times	Sustained	Not Sustained (Inconclusive)

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:

During a force investigation, the Complainant, who was under arrest, made allegations that the Named Employee assaulted him and used excessive force. OPA’s review of the incident also revealed additional allegations of the potential failure to have reasonable suspicion to detain, the potential failure to de-escalate and potential unprofessional conduct on behalf of the Named Employee that may have unnecessarily escalated the event and caused the need to use reportable force.

STATEMENT OF FACTS:

At his OPA interview, Named Employee #1 (NE#1) reported observing what he described as a disturbance involving a number of individuals. It was unclear what role the Complainant played, if any, in that disturbance. Indeed, NE#1 described “two people” that he “thought were clashing.” He stated that he also viewed vehicles pulling around them. According to NE#1, he did not see the Complainant until later when he was walking down the street with a woman who had a three or four-foot pipe that was approximately ¾ to one inch thick. After seeing the woman, NE#1 reported hearing the pipe hit the ground, but he did not know what the woman had done with the pipe. NE#1



noted that the pipe had been dropped prior to him seeing the Complainant walking towards his car and before he effectuated the stop. NE#1 stated that he heard yelling and cursing from a group of individuals, but he stated that he did not observe a fight. He also stated that he did not see the woman or the Complainant at that point.

When asked at his OPA interview why he decided to effectuate the stop of the Complainant, NE#1 stated: "He was the first one I came to. He'd been out in the street, and he was naked. And, as far as I knew he was part of whatever disturbance was happening down the street." NE#1 later added that he had reasonable suspicion to stop the Complainant for "crisis intervention, possible involvement in the disturbance involving a metal pipe, [and] making an assault."

The initial stop and detention of the Complainant was captured by NE#1's In-Car Video (ICV); however, the disturbance that NE#1 witnessed observing, the woman carrying the pipe, the cursing and yelling by the group, and the reported obstruction of traffic all were not captured on the ICV.

Prior to the stop occurring, the Complainant was walking in the direction of NE#1's patrol vehicle. There was a group of individuals approximately 50 feet or more behind him. It is unclear what those individuals were doing. NE#1 was wearing a covering over his genital area that appeared to be a loincloth adorned with leaves and branches, as well as red and blue pieces of clothing draped around his neck.

The ICV depicted the Complainant walking around the front left of the patrol vehicle when he was stopped by NE#1. The first thing NE#1 said to the Complainant when he stopped his vehicle was "why don't you have a seat for me." The Complainant began to respond and NE#1 stated: "have a seat and we'll talk about it in a second." At his OPA interview, NE#1 indicated that it was not necessary for the Complainant to take a seat, but that "it typically puts [NE#1] in a position of advantage and gets people to calm down."

The Complainant asked if he was being detained and NE#1 responded: "yes you are." The Complainant then stated "for what reason," to which NE#1 stated "this." The Complainant tried to explain to NE#1 that he had "coverage" over his genital area, but NE#1 interrupted him, telling him to have a seat twice. The Complainant then asked if NE#1 had a camera and when NE#1 said yes, the Complainant walked in front of the car and stated "as you can see, I'm completely covered." Only at that point did NE#1 ask: "why is this lady following you down the street with a pipe." The Complainant stated that the woman was "going to hurt someone else," and appeared to try to further explain himself to NE#1 when NE#1 again cut him off several times, telling him to have a seat.

NE#1 asked the Complainant whether he thought that NE#1 was being unreasonable, to which the Complainant responded that he was. When NE#1 asked how he was being unreasonable, the Complainant explained that he was being told to have a seat without being given the reason for why he was being detained.

The Complainant grew frustrated and lost his temper and became physically animated, yelling that he wanted the reason why he was being detained (and using the word "fuck" at one point). He pulled clothing off of the upper half of his body, including a red piece of clothing that he attempted to tie around his waist. At one point, NE#1 told the Complainant that he was not going to engage with him if the Complainant was yelling and that the Complainant could not control his emotions. The Complainant responded that NE#1 was right and that he would stop yelling at him. After further requests for the reason why he was being detained that were not answered, NE#1 walked away around the right front of the patrol vehicle.



The Complainant again asked if he was being detained and NE#1, who was following the Complainant around the vehicle, said yes and raised his voice. NE#1 then used force against the Complainant, including pushing him against the right side of the vehicle. NE#1's left hand appeared to cup the back of the Complainant's neck and his right hand held the Complainant's hands. All throughout this, the Complainant continued to ask why he was being detained. NE#1 told the Complainant to put his head down on the hood of the patrol vehicle twice, and the Complainant stated no. NE#1 switched his grip on the back of the Complainant's neck from his left hand to his right hand and similarly switched his grip on the Complainant's hands from his right hand to his left hand. NE#1 and the Complainant moved around to the front of the vehicle, with the Complainant pulling away from NE#1 and continuing to ask why he was being detained and NE#1 failing to provide an explicit answer. All throughout this interaction, the Complainant continued to grow more and more upset.

The Complainant then offered to take a seat and calm down and NE#1 told him that they were "past that." The Complainant began to struggle to move to turn around from facing the car. NE#1 maintained a strong grip on the back of the Complainant's neck with his right hand. The Complainant, who was seated at that point, stated: "calm down dog, I've already taken a seat." NE#1 responded "no, turn around and face away from me." NE#1 told the Complainant that he needed to relax and then forcibly pushed the side of the Complainant's head and held it to the hood of the patrol vehicle using his right palm. The Complainant grabbed hold of NE#1's hand to push it off his face. NE#1 stated: "don't touch my hand." The Complainant then pulled away from NE#1 and ran. NE#1 gave chase.

While not captured on video, NE#1 and another officer followed the Complainant as he tried to dive into a tent. The officers pulled him out and handcuffed him. Based on the officers' reporting, no further force was used. A Sergeant responded to the scene to screen the force. The Complainant alleged to the Sergeant that he had been assaulted by NE#1 and that he had been falsely arrested. The Sergeant referred the subject's allegation of excessive force to OPA.

Ultimately, NE#1 interviewed the woman with the pipe. She stated that she was going to use it over a dispute with someone concerning her dog. She said that she did not know the Complainant and that he was not involved in the dispute. NE#1 generated a Type I use of force report, a General Offense Report, and a Crisis Template. He did not complete a Terry template. The Complainant was ultimately arrested for and charged with obstruction and ultimately served between 20 to 21 days in jail.

During its investigation, OPA attempted to contact the Complainant by telephone and letter. The Complainant did not respond to OPA and, accordingly, was not interviewed as part of this case. OPA interviewed NE#1.

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." (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.*) These three factors and my conclusions as to each are outlined below.

This is a difficult allegation to evaluate. On one hand, as detailed below, I find that there was no legal basis for the Terry stop of the Complainant. Thus, in some respects, any force that flowed from an unlawful stop is arguably *per se* unreasonable and outside of policy. On the other hand, even if I find that the stop was ultimately impermissible, it appears that NE#1 did not believe this to be the case at the time of the stop and the force. In his mind, he had given the subject a lawful order to stop, had informed him that he was being detained, and the Complainant was walking away and not cooperating. As such, and under those circumstances, he would have been permitted to use reasonable, necessary and proportional force to stop the subject from walking away and to prevent any physical harm to his person.

Ultimately, I am split on this issue and cannot come to a conclusive determination as to whether the force was in or out of policy. I note, however, that I had particular concern with NE#1’s use of his palm to forcibly push the Complainant’s head away from him and down onto the hood of his patrol vehicle. NE#1 asserted that he did so based on his fear that he would be spit on, but I did not see evidence of spitting or even the attempt to spit on the ICV. I thought this force was questionable, but it does not sway my finding from inconclusive.

For the reasons stated above, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #1 - Allegation #2

6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful

SPD Policy 6.220-POL-1 stands for the proposition that Terry stops are seizures of an individual and, as such, must be based on reasonable suspicion in order to be lawful. SPD Policy defines a Terry stop as: “A brief, minimally invasive seizure of a suspect based upon articulable reasonable suspicion in order to investigate possible criminal activity.” (SPD Policy 6.220-POL-2(b).) SPD Policy further defines reasonable suspicion as: “Specific, objective, articulable facts, which, taken together with rational inferences, would create a well-founded suspicion that there is a substantial possibility that a subject has engaged, is engaging or is about to engage in criminal conduct.” (*Id.*) Whether a Terry stop is reasonable is determined by looking at “the totality of the circumstances, the officer’s training and experience, and what the officer knew before the stop.” (*Id.*) While “[i]nformation learned during the stop can lead to additional reasonable suspicion or probable cause that a crime has occurred, it “cannot provide the justification for the original stop.” (*Id.*) Lastly, officers are required to inform the detainee of the reason for the detention as early on in the contact as safety permits. (SPD Policy 6.220-POL-5.)

At his OPA interview, NE#1 asserted that he had reasonable suspicion to stop the Complainant for a number of potential crimes. Each purported basis is discussed below.

First and foremost among these was, in NE#1’s opinion, that the Complainant was in violation of RCW 9A.88.010, which prohibits indecent exposure. Indecent exposure is established where a person “intentionally makes any open or obscene exposure or his or her person or the person of another knowing that such conduct is likely to cause



reasonable affront or alarm.” Seattle Municipal Code section 12A.10.130 mirrors the RCW. At his OPA interview, NE#1 repeatedly referred to the Complainant as “naked.” However, this is simply not supported by the video. Even if, as NE#1 contends but which I cannot view on the ICV, a portion of the Complainant’s genitals could be seen through his covering, that would not standing alone establish this crime. In order to stop the Complainant, NE#1 needed specific, objective, articulable facts that not only was NE#1 exposing himself, but that he had done so intentionally to cause affront or alarm. Notably, there was no victim that reported experiencing alarm or affront. Accordingly, there was simply no reasonable suspicion that the Complainant had been or was committing a crime by wearing a loincloth over his genitals.

NE#1 additionally contended that he had reasonable suspicion to stop the subject concerning his role in a “disturbance.” NE#1 had absolutely no evidence to believe that NE#1 was engaged in the disturbance, let alone that he had committed any crime in that regard. Simply yelling and cursing at another person is not a crime and NE#1 did not have any reason to believe that the Complainant had actually engaged in either that conduct or an assault. Again, reasonable suspicion is not what ifs and conjecture, NE#1 needed to have facts that established that NE#1 could have been engaged in a disturbance or an assault. He did not have those facts here.

NE#1 also stated that he had reasonable suspicion to stop the Complainant because he had previously been standing near or walking with a woman who was holding a pipe. First, just because the woman was holding a pipe does not mean that she (let alone the Complainant) was engaged in criminal activity. Second, the woman, not the Complainant, was the individual holding the pipe. Third, at the time NE#1 stopped the Complainant, the woman holding the pipe was nowhere near him and had, in fact, already dropped the pipe. If NE#1 was going to stop anyone, he should have stopped the woman holding the pipe, not the Complainant. When NE#1 asked the Complainant about the woman holding the pipe, the Complainant explained that she wanted to hurt someone else and that he was not involved. Instead of listening to him and realizing that any reasonable suspicion to stop NE#1 on this basis, if it ever existed, had dissipated, NE#1 instead repeatedly interrupted him and apparently failed to listen to the Complainant’s explanation.

NE#1 additionally opined that he had reasonable suspicion to stop the Complainant for “being out in the street.” At the outset, I am unsure what that even means. NE#1 did contend that the group he viewed before stopping the Complainant was obstructing traffic, but he did not conclusively state that he had any knowledge that the Complainant was part of that group. Moreover, when he approached the Complainant to stop him, the Complainant was not obstructing traffic as is conclusively established by the ICV.

NE#1 lastly argued that he had reasonable suspicion to detain NE#1 for “crisis intervention.” Notably, “crisis intervention” is not a crime. Moreover, aside from NE#1’s concern about the clothes the Complainant was wearing, there is no evidence in any of NE#1’s statements or from the ICV that NE#1 had any evidence that the Complainant was experiencing crisis *before* he detained him. Simply effectuating a stop to determine an individual’s mental status based on the clothing that the individual is wearing is inconsistent with Department policy and the United States and Washington Constitutions.

In summary, any argument by NE#1 that the stop was effectuated for any reason other than his mistaken belief that the Complainant was naked and engaging in indecent exposure is contradicted by the video evidence. Indeed, it is clear from the ICV, which documents the inception of the contact, that the stop was based solely on the fact that



NE#1 believed that the Complainant's clothing, or lack thereof, was in violation of law. As discussed above, this belief was misguided and there was no reasonable suspicion supporting the stop of the Complainant.

For these reasons, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

6.220 - Voluntary Contacts, Terry Stops & Detentions 2. Officers Must Distinguish Between Voluntary Contacts and Terry Stops

SPD Policy 6.220-POL-2 directs officers that they must distinguish between voluntary contacts and Terry stops, and sets forth the definition and scope of each.

As I recommend that Allegation #2 be sustained and as I evaluate elements of this policy in that section, I deem it unnecessary to also sustain this allegation. As such, I recommend that this allegation be Not Sustained – Training Referral.

- **Training Referral:** NE#1 should receive re-training from his chain of command or another appropriate entity concerning the elements of SPD Policy 6.220, generally, and, specifically, when he has reasonable suspicion to perform a Terry stop. NE#1 should be reminded that a Terry stop must be based on specific, objective, and articulable facts, not just, as it appeared here, conjecture. NE#1 should also be counseled concerning his obligation to inform a detainee of the reason for a stop – using an actual explanation comprised of words, not just pointing at the individual and saying “this.” Lastly, NE#1 should be reminded of the elements of the crime of indecent exposure and specifically that the individual engaging in the conduct must know that it is likely to cause “reasonable affront or alarm.” This re-training and associated counseling should be memorialized in a PAS entry.

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

Named Employee #1 - Allegation #4

8.100 - De-Escalation 1. 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

“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.*)



As detailed more fully below, I find that NE#1's conduct and demeanor towards the Complainant at the inception of the stop unnecessarily escalated this incident resulting in force ultimately being used. This misconduct, however, is discussed in the context of the professionalism allegation against NE#1. (See Allegation #5.) With regard to this allegation, I construe it as evaluating whether it was feasible for NE#1 to de-escalate at the moment before NE#1 gave chase to the Complainant and used force to remove him from a tent and handcuff him. As such, I separate this allegation from the misgivings I have concerning the propriety of NE#1's initial actions that are discussed in Allegation #5, below.

At the time the Complainant ran from NE#1 and NE#1 gave chase, there was no further opportunity to de-escalate. Moreover, during the foot pursuit, NE#1 claimed that the Complainant threw a table in NE#1's direction, apparently in an attempt to slow him down. While NE#1 could have certainly not pursued the Complainant, the decision to do so was not outside of policy. Moreover, at the time he made the decision to do so, de-escalation was not feasible.

As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #5

5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times

SPD Policy 5.001-POL-9 instructs that SPD employees shall strive to be professional at all times. It further states the following: "Regardless of duty status, employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." Officers "will avoid unnecessary escalation of events even if those events do not end in reportable uses of force."

Immediately upon detaining the Complainant, the Complainant asked NE#1 why he was being detained. NE#1 responded "this." NE#1 recounted that when he said this, he was pointing at the Complainant's attire with his hand. NE#1 explained that by "this" he meant the Complainant's physical appearance and clothing. Based on a review of the ICV, NE#1 then asked the Complainant, "why is this lady following you down the street with a pipe." While the Complainant was in the process of answering NE#1's question (he stated: "she was going to go hurt someone else"), NE#1 interjected and asked him to "have a seat." NE#1 again told the Complainant to have a seat and did not ask any additional follow up questions concerning the Complainant's response to his question.

Based on OPA's review of the ICV, during the 2 ½ minute initial interaction between the Complainant and NE#1, NE#1 told the Complainant to have a seat 9 times and the Complainant asked why he was being detained 15 times. In response to the Complainant's repeated inquiries, NE#1 stated: "I already answered it," "I think it should be obvious what the reason is," and "I told you." Notably, NE#1 never told the Complainant that he was being stopped based suspected indecent exposure or for any other valid investigatory reason. Indeed, NE#1 provided absolutely no verbal explanation or reasoning whatsoever to the Complainant.

During the beginning of their interaction, NE#1's tone of voice remained calm and measured. However, his failure to respond to the Complainant's repeated requests for a reason as to why he was being detained and, instead, his continuous direction to the Complainant to sit down, clearly agitated the Complainant and escalated this situation. NE#1 stated that he believed that the Complainant knew why he had been detained, as the Complainant was ripping



clothes from other parts of his body and placing it on his groin area. However, from my review of the ICV, the Complainant clearly believed that he was sufficiently covered and not nude and, thus, wanted an actual explanation from the Complainant as to why he was being detained and his liberty infringed upon. From my review of the video, and as discussed more fully in the context of Allegation #2, I agree that the Complainant was sufficiently clothed and accordingly believe that the stop was unlawful.

I note that even after the initial confrontation between NE#1 and the Complainant, the Complainant did, in fact, apologize for losing his temper and sat down on the front bumper of the patrol vehicle. However, he was told by NE#1 that they were “past that.” When NE#1 started to use force on him, the Complainant asked him to calm down and NE#1’s response was “no.”

Ultimately, by effectuating a stop without sufficient legal basis and by failing to provide an oral explanation for the stop, even after being requested to do so 15 times by the Complainant, NE#1 engaged in conduct that served to unnecessarily escalate this matter. His failure to do so was a direct cause of the Complainant losing his temper out of apparent frustration and was ultimately, in my opinion, the reason why force was applied. I believe this to have been in violation of the Department’s professionalism policy. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

CHIEF’S FINDINGS:

Named Employee #1 - Allegation #2

6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful

Chief Best concluded that based on the record developed in the OPA investigation, and without the benefit of additional testimony or material contrary evidence, there may have been lawful authority for a Terry stop. Ultimately, officers are not the adjudicators or whether a stop is deemed lawful, and reasonable minds can differ as to the legal application of Terry to these facts. However, as there are facts to reasonably support a competing argument, it could not be concluded the stop was lawful and proper. Chief Best changed the finding to Not Sustained (Inconclusive) for *Voluntary Contacts, Terry Stops & Detentions: Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful*.

Named Employee #1 - Allegation #5

5.001 - Standards and Duties 9. Employees Shall Strive to be Professional at all Times

Chief Best agreed with the OPA Director that the officer could have done more to explain the situation to the Complainant, and that the Complainant may have responded more calmly had the officer shown him more compassion. However, the Chief did not believe the brevity of the officer’s explanation as to why he was being stopped violated the Department’s professionalism policy. Chief Best changed the finding to Not Sustained (Inconclusive) for *Standards and Duties: Employees Shall Strive to be Professional at all Times*.

See attached letter from Chief Best regarding her findings of this case.