



OFFICE OF PROFESSIONAL ACCOUNTABILITY

Closed Case Summary

Complaint Number OPA#2015-1149

Issued Date: 05/10/2016

Named Employee #1	
Allegation #1	<u>Seattle Police Department Manual</u> 8.100 (5) Using Force: Use of Deadly Force (Policy that was issued 01/01/14)
OPA Recommendation	Sustained
Chief's Finding	Not Sustained (Lawful and Proper)
Final Discipline	N/A

Named Employee #2	
Allegation #1	<u>Seattle Police Department Manual</u> 8.100 (5) Using Force: Use of Deadly Force (Policy that was issued 01/01/14)
OPA Recommendation	Sustained
Chief's Finding	Not Sustained (Lawful and Proper)
Final Discipline	N/A

Named Employee #3	
Allegation #1	<u>Seattle Police Department Manual 8.100 (5) Using Force: Use of Deadly Force</u> (Policy that was issued 01/01/14)
OPA Recommendation	Sustained
Chief's Finding	Not Sustained (Lawful and Proper)
Final Discipline	N/A

INCIDENT SYNOPSIS

The Named Employees responded to a call to investigate a domestic violence (DV) disturbance. The 911 caller reported that her boyfriend was kicking in the front door. The Named Employees arrived and saw the man, the subject, at the front door. Named Employee #1 and #2 took the subject to the front of a patrol car. Named Employee #3 spoke first with the 911 caller and then with the subject. As Named Employee #3 walked toward the subject in front of the patrol car, multiple gunshots came from the east. Officers reported they heard bullets whizzing past their heads. Named Employee #1 and #2 pulled the subject to the ground. All three Named Employees took cover behind the patrol car. While the shots were coming towards the officers, a vehicle drove towards the patrol car and then stopped. All three Named Employees fired at this vehicle. The driver of the vehicle exited his car and yelled that there was a car behind him shooting at him. Officers ceased fire. Named Employee #1 informed Dispatch of the driver's statement that a different vehicle was firing the shots. The driver-side door was struck multiple times by the shots fired by the Named Employees. The Named Employees were aware that there was a threat of assault to officers on this particular night and that there already had been recent violent crimes in the area.

COMPLAINT

The complainant, the Force Review Unit, alleged that the documentation provided by the Named Employees failed to adequately describe the threat the officers perceived that justified the use of deadly force.

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. Review of the Force Investigation Team witness interviews
5. Interviews of SPD employees

OPA ANALYSIS AND CONCLUSIONS

Deadly force may only be used in circumstances where threat of death or serious physical injury to the officer or others is imminent. For circumstances to be considered imminent, the policy imposes a three-pronged test: the suspect must (1) be acting or threatening to cause death or serious physical injury, (2) have the means or instrumentalities to do so, and (3) have the opportunity and ability necessary to cause death or serious physical injury. The evidence and testimony reviewed and collected in this investigation leave little doubt that all three Named Employees were reasonable in believing they and others were under imminent threat of death or serious physical injury. They heard gunshots and experienced the sensation of bullets passing close by. Under such circumstances, each officer was authorized under this policy to use deadly force against the person or persons who posed the threat and met the three-pronged test articulated in the policy and summarized above.

Named Employee #1 testified that he perceived that the vehicle stopping behind the police car was the source of the shots being fired at him and the other officers. He stated he fired at the driver's side of the vehicle with the intention of striking its driver. Further, Named Employee #1 stated he could neither see the driver, nor any weapons in or associated with the vehicle, nor did he report seeing muzzle flashes or other signs that the person or persons firing at him were inside the vehicle. Given the totality of the circumstances known to Named Employee #1 at the time he did not have a reasonable basis to believe that any of those persons posed an imminent threat of death or serious physical injury.

Named Employee #2 testified that he saw a vehicle driving towards him and concluded that the people inside the vehicle had been the source of the earlier gunfire directed at him and that they were attempting to "ambush" him and his fellow officers. He believed that, if the vehicle was not immediately stopped, it would drive right up to the officers and place them in danger of being shot and killed. He saw the car after hearing the sound of the shots and observed that the car was coming from the same direction as the shots. Other than this, Named Employee #2 had insufficient factual basis to conclude that the driver or other occupants of the vehicle were acting or threatening to cause death or serious physical injury, or that they had the means or instrumentalities to do so.

Named Employee #3 testified that she looked and saw another car stopped in the street directly behind the police car. The headlights from both the police car and the car behind it were shining right at Named Employee #3. She said that she saw the driver's window of the other car was down and that the driver's hand was out of the window. Because she had just been shot at and the driver's hand was out of the window, Named Employee #3 concluded the driver of that vehicle had just shot at her and the other officers. She then fired two shots, aiming at the driver of the car. She did not report seeing any muzzle flash coming from the car, nor did she observe the driver shooting or holding a gun in his hand. Based on the totality of the circumstances known to Named Employee #3 at the time, she had insufficient factual basis to conclude that the driver or other occupants of the vehicle were acting or threatening to cause death or serious physical injury, or that they had the means or instrumentalities to do so.

OPA RECOMMENDATIONS

Named Employee #1, #2 and #3

Allegation #1

Given the totality of the circumstances known to the Named Employees at the time, the OPA Director concluded they had insufficient factual basis to conclude that the driver or other occupants of the vehicle were acting or threatening to cause death or serious physical injury, or that they had the means or instrumentalities to do so. Therefore a **Sustained** finding was recommended by OPA for *Using Force: Use of Deadly Force*.

CHIEF'S FINDINGS

Named Employee #1, #2 and #3

Allegation #1

Chief O'Toole determined that the three officers involved in this shooting acted reasonably based on the information available to them at the time they were called upon to make an instantaneous decision to protect not only their lives but the life of the civilian they were interviewing at the time. Chief O'Toole changed the finding to **Not Sustained** (Lawful and Proper) for *Using Force: Use of Deadly Force*.

See attached letter from Chief O'Toole regarding her findings of this case.

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.



City of Seattle

Seattle Police Department

April 8, 2016

Mayor Ed Murray
Seattle City Hall
600 4th Avenue
Seattle, WA 98124-4769

Council President Bruce A. Harrell
Seattle City Hall
600 4th Avenue
Seattle, WA 98124-4769

RE: OPA 15-1149

Dear Mayor Murray and Council President Harrell:

I am writing to report on the findings in 2015-OPA-1149. The underlying incident in this case involves an officer-involved shooting – the most serious action that any law enforcement officer can take. All officer-involved shootings are of significant concern to the community and the Seattle Police Department, and critical and careful review of these incidents is among the highest of the Department's responsibilities to the community, is vital to the Department's mission, and is an obligation I, and the Department, take extremely seriously. OPA plays a crucial role in that review process, and here, fairly and fully gathered information and assessed the facts of this case. After its considerable work, OPA found that the officers' actions violated the Department's policy on the use of deadly force. I have reviewed the record in this case thoroughly, including the Force Investigation Team's analysis, the Force Review Board's report, OPA's investigation, officer and witness statements, and available video. I have also taken into consideration the statements made during the *Loudermill* meeting, and my own experience as a law enforcement officer. Based on my analysis, explained below, I do not agree with OPA's application of the facts of this case to Department policy. I find that, under the totality of the circumstances they confronted that night, the officers' conduct was lawful, proper, and did not violate Department policy. I am therefore changing the recommended Sustained finding for violation of the Department's Use of Force policy to Unsustained.

Factual Summary

Late on December 31, 2014, four officers were investigating a potential domestic violence disturbance at a private residence in South Seattle. In the course of this investigation, two officers were interviewing one party to the dispute outside by a patrol car, while another officer was inside the house. As a fourth officer was moving from the house to the patrol car, multiple gun shots were fired in the direction of the officers from the east (behind the parked



patrol car). All three of the officers who were outside of the house, with the individual they were interviewing, reported that they heard gunshots and heard bullets “whiz” by their heads.

The officers observed a single vehicle coming towards them. All three officers stated that this car was the only thing they saw moving, and that it was coming from the direction they believed the bullets were coming from. They could identify no other potential source of the shots fired in their direction. All three officers were also aware that there were active discussions on social media describing December 31, 2014 as “Kill the PIG [a reference to police] Night.” They knew that a fatal drive-by shooting had occurred in the area earlier that same night, that the suspect in that shooting was still at-large, and they knew of reports of shots fired from a vehicle in the same neighborhood a few days prior. All three officers believed they were being ambushed by the occupants of the car that was headed towards them, and all three officers returned fire towards the vehicle. Commendably, before firing, one officer at the patrol car took care to ensure that the civilian being interviewed was shielded by the patrol car and as out of harm’s way as possible. The officers stopped firing as the vehicle stopped abruptly and the driver opened the door, shouting that he was being shot at by a different vehicle. Although officers’ shots struck the driver’s side door, thankfully no one was injured.

The time between the shots fired in the officers’ direction and their return of fire was approximately six seconds. In total, the three officers fired ten times.

Department Policy on the Use of Force (at the time of the incident, policy 8.100(5))

Under the Department’s use of deadly force policy, “Deadly force may only be used in circumstances where threat of death or serious physical injury to the officer or others is imminent.” A fundamental principle of the Department’s policy, as with controlling case law, is that a review of force must be considered from the perspective of a reasonable officer on the scene, not in 20/20 hindsight. (Department Manual policy 8.000(1), previously policy section 8.100); *see also Graham v. Connor*, 490 U.S. 385 (1989)).

OPA found, and the Department chain of command agreed, that “the evidence and testimony reviewed and collected in this investigation leave little doubt that all three named employees were reasonable in believing they and others were under imminent threat of death or serious physical injury.” Each officer was therefore authorized to use deadly force against the person or persons who posed the threat and met the criteria for what is “imminent.” Disagreement between OPA and the chain of command lies solely in whether these officers had a sufficient basis to believe that it was the vehicle and its occupants that posed the threat they reasonably discerned.



Policy requires reasonable belief under the circumstances present at the time, including reasonable inferences from those circumstances. At the time the officers heard and felt gun shots pass near their heads, they observed a single vehicle moving towards them from the same direction as the shots. They could ascertain no other viable source of the shots. The second vehicle, which had in fact been shooting at the subject vehicle (a fact not known to the officers at the time), was not in view.

A civilian witness to the incident also reported a belief that the shots were coming from the vehicle headed towards the officers.

Findings

Here, viewing the incident as would a reasonable officer at the scene, based on the totality of the record developed in the OPA investigation, but without the benefit of hindsight or the additional information that was learned only after the incident, I conclude that the officers' actions were reasonable and consistent with Department policy. I believe that under the totality of the circumstances – including the fact that it was dark, that officers knew there was a threat of assault on officers on this particular night that had been publicized on social media, that there had been other recent violent crimes in the area, that they felt and heard shots go by their heads, and had no other identifiable source from which to conclude the shots were being fired (a point confirmed by the civilian witness) – a reasonable officer would have responded exactly as these officers did. Indeed, based on my experience as a law enforcement officer, I have no reason to believe that I would have acted any differently had I been in that situation; the Department's Deputy Chief, the Assistant Chief of Patrol Operations, and other Department leaders have likewise stated the same.

A decision to discharge one's duty weapon is the most serious decision an officer may be called upon to make. As police officers, we have the power, authority, and responsibility to make decisions that can alter the lives and safety of others – and unfortunately, we are often forced to make those decisions in a matter of seconds. We have the highest obligation to ensure that decisions are made in a manner consistent with our policies, training, and skilled observations. Through the lens of hindsight, with the benefit of information that is later learned during the course of an investigation, it is often the case that one can find points to criticize; indeed, it is in part the purpose of the Department's Force Review Board to parse these incidents in just that manner to find opportunities for improvements to policy or training (as the Force Review Board did here in recommending additional training). But it is not – and cannot be – the case that an analysis as to whether the officers' actions were within policy can turn on the same post hoc analysis.

For these reasons, there is no question in my mind, after full and careful analysis, that the three officers involved in this shooting acted reasonably based on the information available to them at the time they were called upon to make an instantaneous decision to protect not



City of Seattle

Seattle Police Department

only their lives but the life of the civilian they were interviewing at the time. With full respect and appreciation to OPA and its thorough, fair investigation, but because I disagree with the application of that investigation to Department policy, I am changing the recommended Sustained finding for violation of the Department's Use of Force policy to Unsustained (Lawful and Proper). I conclude that the officers' actions were consistent with Department policy and their public safety obligations.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen O'Toole".

Kathleen O'Toole, Chief of Police
Chief of Police

cc: Peter Holmes, Seattle City Attorney
Pierce Murphy, Director Office of Professional Accountability
Sally Bagshaw, Councilmember
Tim Burgess, Councilmember
Lisa Herbold, Councilmember
Lorena Gonzalez, Councilmember
Rob Johnson, Councilmember
Debora Juarez, Councilmember
Mike O'Brien, Councilmember
Kshama Sawant, Councilmember
File