



## CLOSED CASE SUMMARY

ISSUED DATE: MARCH 24, 2019

CASE NUMBER: 2018OPA-1035

### Allegations of Misconduct & Director’s Findings

**Named Employee #1**

Allegation(s):		Director’s Findings
# 1	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)

**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	8.200 – Use of Force 1. When Authorized	Not Sustained (Lawful and Proper)
# 2	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)
# 3	8.300-POL-3 Use of Force - CEW/Conducting Electric Weapons (Taser) 4. Officers Shall Only Deploy CEW When Objectively Reasonable	Not Sustained (Lawful and Proper)
# 4	8.300-POL-3 Use of Force - CEW/Conducting Electric Weapons (Taser) 6. Officers Shall Issue a Verbal Warning to the Subject and Fellow Officers Prior to Deploying the CEW	Not Sustained (Training Referral)

***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 Named Employee #2 subjected him to excessive force when he tased the Complainant twice. It was further alleged that Named Employee #2 may not have issued a Taser warning. Lastly, it was alleged that both of the Named Employees may have failed to de-escalate before force was used.

**ANALYSIS AND CONCLUSIONS:**

**Named Employee #1 - Allegations #1**

***5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing***

This allegation was also alleged against Named Employee #1 (NE#1) because Named Employee #2 (NE#2) appeared to use his Taser at NE#1’s request. However, for the same reasons as stated below (see Named Employee #2, Allegation #2), I recommend that this allegation be Not Sustained – Lawful and Proper.



---

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

**Named Employee #2 - Allegations #1**

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

Officers, including NE#1 and NE#2, responded to a call of a man who was brandishing a gun. The man, who was later identified as the Complainant, was located by the officers. The officers identified themselves and ordered the Complainant to stop. He did not comply with these orders, was verbally unresponsive, and continued to walk away. The Complainant then turned towards the officers and started swinging his hands as if to hit the officers while moving slightly towards them. NE#2 then used his Taser on the Complainant, causing the Complainant to experience neuromuscular incapacitation and to fall to the ground. The officers then converged on the Complainant and attempted to place him into handcuffs. The Complainant physically resisted the officers' attempts to do so. NE#2 then used his Taser one more time after NE#2 reported seeing the Complainant's hand move towards his waistband. NE#2 did not apply the Taser for the full five second cycle. The Complainant was then placed into handcuffs, secured, and no further force was used.

The Complainant later alleged that the Taser applications constituted excessive force. This investigation ensued. During its intake investigation, OPA added additional allegations against NE#1 concerning the Taser application and, specifically, concerning whether or not NE#1 issued a Taser warning to the Complainant. OPA also included an allegation against both NE#1 and NE#2 concerning the potential failure to de-escalate.

As part of its investigation, OPA reviewed the documents generated as part of the underlying incident. OPA also reviewed the Department video of the force. Lastly, OPA interviewed NE#1 and NE#2. OPA did not ultimately interview the Complainant and he had retained an attorney at the time of OPA's investigation.

At his OPA interview, NE#2 stated that he believed the force he used was consistent with policy. He explained that he thought the Complainant was in an elevated state of mental crisis. Moreover, based on the Complainant's behavior, NE#2 felt that the Complainant presented an active risk of harm to the officers and/or himself were the officers required to go hands-on. This was based both on the Complainant throwing punches towards the officers and the fact that the Complainant was believed to possibly be armed. Even though the officers did not see a gun on his person, they thought that it could be in one of his pockets or his waistband. NE#2 asserted that probable cause existed to arrest the Complainant and, given the Complainant's repeated refusal to comply with the officers' lawful orders, force was warranted to take the Complainant into custody.

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.*)



---

Based on OPA’s review of the record – most notably, the Department video, I agree with NE#2 that his Taser applications were consistent with policy. At the time of the Taser applications, the officers had probable cause to arrest the Complainant. With the legal authority to take the Complainant into custody came the right to use force, if necessary, to do so. When the Complainant started to move towards the officers while swinging his fists, the use of force was reasonable. Moreover, it was objectively reasonable to use a Taser under these circumstances as, consistent with SPD Policy 8.300-POL-3(4): the Complainant appeared to present an immediate risk of harm to the officers; and public safety interests compelled the arrest of the Complainant and there was the likelihood that he and/or the officers would be injured if the officers went hands-on.

For the same reasons, the force was necessary. I find that no reasonable alternative to using the Taser appeared to exist to NE#2 or, for that matter, the other involved officers. Indeed, NE#1 requested that NE#2 use his Taser. Moreover, I conclude that the force used was only that necessary to take the Complainant safely into custody and then to prevent him from physically resisting.

In addition, I find that the force was proportional to the threat posed by the Complainant. Notably, even though they did not see a gun in his possession, the officers believed it possible that he was armed given the initial call. NE#2 noted that the Complainant could have had the firearm secreted on his person and could have easily drawn the weapon and fired at them. Moreover, at the time of the first Taser application, the Complainant was swinging his fists and moving in the direction of the officers. At the time of the second Taser application, the Complainant was physically resisting the officers’ attempts to control his person and was reported to be reaching for his waistband. During both occasions, the Complainant posed a threat of harm to the officers and the force used was proportional to ensure officers’ safety.

Lastly, while not determinative for OPA, I note that the Department’s Force Review Board (FRB) also found that NE#2’s force was consistent with policy. This further informs OPA’s decision in this regard.

For the above reasons, I find that NE#2’s Taser applications were consistent with policy and I recommend that this allegation be Not Sustained – Lawful and Proper.

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

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

***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.*) 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; and
- Using “any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject.

(*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.

Here, the officers responded to a report that the Complainant was brandishing a firearm and appeared to potentially be in crisis. When the officers arrived at the scene, the Complainant was acting aggressively, was verbally not responsive, and was not compliant with the officers’ orders. While the officers, including NE#2, were separated from the Complainant by parked vehicles, he began advancing towards them while swinging his fists. At that time, NE#1 called for a Taser to be used. NE#2 was a Taser operator and he prepared to use his Taser. NE#2 provided a Taser warning and then applied the force tool, causing the Complainant to fall to the ground.

Both NE#1 and NE#2 expressed concern regarding the Complainant’s continued refusal to respond to their orders, as well as his aggressive behavior. Both indicated that they were worried that he could cause them or others physical harm. Both also stated that, while they did not see the firearm on his person, they thought it possible that it was in his waistband or a pocket. This provided support for their belief that they needed to act to prevent danger to themselves, the Complainant, and other community members in the area.

NE#1 and NE#2 explained that, at the time the decision to use force was made, further de-escalation was no longer safe or feasible. As such, NE#1 and NE#2 believed that they complied with the Department’s de-escalation policy.

Based on OPA’s review of the evidence, including the Department video of the incident, I agree. I find that the officers first tried to verbally de-escalate the matter, by trying to speak with the Complainant and then giving him lawful orders. Moreover, I find that the officers applied time, distance, and shielding when they remained behind parked cars while trying to reason with the Complainant. Lastly, I find that the officers engaged in appropriate



tactical discussions at the scene and then used those tactics appropriately, in compliance with the de-escalation policy. When force was ultimately used, I conclude that further de-escalation was no longer safe or feasible.

Again, while not determinative, the FRB also found that the officers properly de-escalated. This provides further support for OPA's decision on this allegation.

For the above reasons, I recommend that this allegation be Not Sustained – Lawful and Proper as against both Named Employees.

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

**Named Employee #2 - Allegation #3**

***8.300-POL-3 Use of Force - CEW/Conducting Electric Weapons (Taser) 4. Officers Shall Only Deploy CEW When Objectively Reasonable***

SPD Policy 8.300-POL-3 concerns the use of Tasers. The policy mandates that Tasers may only be used when objectively reasonable, and refers to SPD Policy 8.000. (*See* SPD Policy 8.300-POL-3(4).) The policy specifically delineates two scenarios in which Taser use is appropriate: first, "when a subject causes an immediate threat of harm to the officer or others"; or second, "when public safety interests dictate that a subject needs to be taken into custody and the level of resistance by the subject is likely to cause injury to the officer or to the subject if hands on control tactics are used." (*Id.*) Notably, the policy is silent on the use of Tasers on fleeing subjects. (*See id.*)

As discussed above, I find that these elements were met and, as such, that the Taser applications were objectively reasonable. Accordingly, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

**Named Employee #2 - Allegation #4**

***8.300-POL-3 Use of Force - CEW/Conducting Electric Weapons (Taser) 6. Officers Shall Issue a Verbal Warning to the Subject and Fellow Officers Prior to Deploying the CEW***

SPD Policy 8.300-POL-3(6) requires that officers provide a verbal warning (to both the subject and other officers) prior to using their Tasers and that they give the subject a reasonable amount of time to comply with the warning. Where, however, providing a warning would "compromise the safety of the officer or others," a warning is not required. (SPD Policy 8.300-POL-3(6).) If a warning is not provided, the officer must document the reasons for not doing so in the use of force report. (*Id.*)

At his OPA interview, NE#2 stated that he provided the Complainant with a Taser warning prior to the application. He stated that he told the Complainant: "Get down on the ground or you will be tased." This statement could not be heard on NE#2's BWV as it did not have audio because it was recording in the buffer mode at the time. OPA was able to discern the statement on In-Car Video (ICV), as well as on the other officers' BWV. OPA did so by using video editing software that isolated the audio. OPA determined that NE#2 did, in fact, provide a Taser warning approximately one second prior to using the Taser.



---

While NE#2 clearly provided a Taser warning, the policy also requires that the Complainant be given a “reasonable amount of time to comply.” From OPA’s perspective, one second would not be a reasonable amount of time as contemplated by the policy. That being said, there were arguably reasons why a longer period of time would not have been feasible or appropriate under the circumstances present in this case; however, NE#2 did not engage in any such discussion in his force documentation.

Given the above, and the lack of explanation provided by NE#2 for only using a one second warning, I cannot say that he complied with this policy. However, I do not believe that a Sustained finding is warranted. Instead, I recommend that NE#2 receive a Training Referral.

- **Training Referral:** NE#2 should be reminded that SPD Policy 8.300-POL-3(6) requires not only that a Taser warning be given but also that a subject is provided with a reasonable amount of time to comply. His chain of command should discuss with him whether one second is a reasonable amount of time as contemplated by the policy. Lastly, NE#2’s chain of command should instruct him that where he does not give a reasonable amount of time to comply, he should explain why he did not do so in his use of force report. This would serve to prevent the need for later administrative investigations to determine these facts. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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