



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 17, 2018

CASE NUMBER: 2018OPA-0258

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Allegation Removed
# 2	8.200 - Using Force 2. Use of Force: When Prohibited	Allegation Removed

Named Employee #2

Allegation(s):		Director’s Findings
# 1	8.400 - Use of Force Reporting and Investigation 3. The Sergeant Will Review the Incident and Do One of the Following:	Not Sustained (Training Referral)
# 2	6.010 - Arrests 6.010-TSK-1 Sergeant Screening and Approving An Arrest	Not Sustained (Lawful and Proper)
# 3	11.030 – Guarding Detainees at a Hospital 11.030-PRO-1-Hospital Guard	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
# 3	11.030 – Guarding Detainees at a Hospital 11.030-PRO-1-Hospital Guard	Not Sustained (Lawful and Proper)

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:

It was alleged that Named Employees #1 and Named Employee #3 may have used impermissible force on a handcuffed subject. It was further alleged that Named Employee #2 failed to properly notify the Force Investigation and failed to appropriate screen and approve the subject’s arrest. Lastly, it was alleged that both Named Employee #2 and Named Employee #3 failed to assign a hospital guard to watch the subject.

STATEMENT OF FACTS:

Named Employee #1 (NE#1) and Named Employee #3 (NE#3) responded to a call concerning a shoplift. NE#1 and NE#3 picked up a loss prevention officer from the store and drove around the area, searching for the subject. They located the subject and the loss prevention officer confirmed that the subject was the individual who had previously stolen from the store. NE#1 and NE#3 made contact with the subject. The officers were ultimately able to take the subject into custody without using force. They observed that he was wearing some of the clothing that he had stolen.



The officers walked the subject to the rear passenger door of their patrol vehicle. At that point, NE#3 was on his left side and was holding his left arm. NE#1 was to the subject's right. NE#1 told the subject, who was arguing with him, that he was going to get into the car. NE#3 pulled the subject towards the car by his left arm and the subject moved backwards towards NE#3. NE#3 described that the subject shoved his left elbow and shoulder into NE#3, causing NE#3 to momentarily lose his breath. NE#3 then pushed the Subject forward towards the car. NE#3 reported that he did so in order to pin the subject's body against the patrol vehicle and to gain control over him. When this occurred, the subject bent over at the waist, causing him to strike the top of his head on the patrol vehicle's door. This resulted in a significant laceration to the top of his head and bleeding.

The officers summoned their supervisor, Named Employee #2 (NE#2), to the scene. The officers also called for medical assistance. At that time, the subject stated, in regard to the force used: "What you trying to hit my head on the wall for?" He further stated, referring to NE#3: "I thought he was a good cop." The subject later told NE#1: "I bumped up against [NE#3] but you know it ain't no big no deal, I ain't, I ain't no punk."

NE#2 then arrived at the scene. She spoke to the subject who stated: "Yeah, well, he just kinda slammed my head up against the bar." NE#2 told the subject that she would speak with him further once he received medical treatment. The medics provided treatment and determined that the subject would need stitches. The subject was placed in an ambulance to be transported to the hospital. NE#2 interviewed the subject in the ambulance. The subject said to NE#2: "So I kinda shoved the officer a little bit, 'cause I was stressed out about it." He further told NE#2: "As he tried to put me in the car, I'm, I, accidentally hit the, uh, accidentally hit the, hit the, the door of the car. And that was it." When NE#2 asked him whether any force was used on him, he stated "no." He further said "it wasn't nothing much" and "it wasn't really that tough."

NE#2 ordered NE#3 to complete Type II use of force report and NE#1 to complete a witness officer report. She did not screen the incident with the Department's Force Investigation Team (FIT) at that time. She spoke to the officers and they discussed charging by officer given that the subject had been arrested for a misdemeanor. NE#2 further made the determination that, given the charge, it was unnecessary to assign a hospital guard. The subject was transported to the hospital where he received eight staples to his head.

Later at the precinct, NE#3 mentioned to his Lieutenant that he had been involved in a Type II use of force. She asked for more details and NE#3 provided them. The Lieutenant then ordered NE#2 to screen the incident with FIT as a Type III. NE#2 did so and FIT commenced an investigation.

As part of that investigation, FIT interviewed a number of witnesses, including the Named Employees. FIT also interviewed one of the EMTs, who confirmed that the subject said that his head had been slammed against the patrol vehicle and that he was going to sue the officers. FIT also interviewed two civilian witnesses who witnessed the incident. One witness recalled that the subject pushed back against NE#3 and then lunged forward, hitting his head on the patrol vehicle door. This witness stated that it appeared that the subject was fighting with NE#3. The second witness described that the subject pushed back against NE#3 and, when NE#3 pushed forward, it appeared that the subject lost his balance and hit the vehicle. FIT tried to interview the subject, but he had already left the hospital and FIT could not locate him. The FIT Lieutenant made an OPA referral based on the failure of NE#2 to screen this incident with FIT, which, in FIT's opinion, ultimately resulted in the unavailability of the subject.



OPA then initiated this investigation. OPA reviewed the documents from FIT, the Force Review Board, and those relating to the underlying incident. OPA also reviewed the Department video. OPA interviewed all of the Named Employees. OPA tried to contact the subject on multiple occasions to set up his interview but was unsuccessful.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.200 - Using Force 1. Use of Force: When Authorized

Based on my review of the Department video and the investigatory documents in the record, only NE#3 used force against the subject. NE#1 was standing away from the subject at the time that NE#3 pushed him towards the patrol vehicle, causing his injury.

Given the above, I recommend that this allegation be removed as against NE#1.

Recommended Finding: **Allegation Removed**

Named Employee #1 - Allegation #2

8.200 - Using Force 2. Use of Force: When Prohibited

For the same reasons as stated above (see Named Employee #1, Allegation #1), I recommend that this allegation be removed.

Recommended Finding: **Allegation Removed**

Named Employee #2 - Allegation #1

8.400 - Use of Force Reporting and Investigation 3. The Sergeant Will Review the Incident and Do One of the Following:

SPD Policy 8.400-POL-3 sets forth the responsibilities of a sergeant when reviewing a use of force. The policy states that the sergeant will review force and classify it by type. The policy instructs the sergeant to “[c]all the Captain of the FIT Unit and screen a Type III response by FIT” when there is a “[u]se-of-force that results in, or could reasonably be expected to result in, great bodily harm...or substantial bodily harm..., to include broken bones and an admission to the hospital for treatment...” (SPD Policy 8.400-POL-3.)

Here, the subject suffered substantial bodily harm in the form of a large laceration to the top of his head. Moreover, he was admitted to the hospital for treatment. Based on this, NE#2 should have screened this matter with FIT. This was particularly the case given that the injury was to the subject’s head, he told her that his head had been slammed into a door, and because NE#2 knew that the subject was handcuffed at the time the force was used. While he later backed off of his statement concerning his head being slammed into the door, NE#2 still should have known to screen this matter with FIT. Notably, her failure to promptly do so resulted in FIT’s inability to fully explore what occurred by interviewing the subject.



In failing to screen this matter with FIT, I find that NE#2 clearly violated Department policy. However, I recommend that she receive a Training Referral instead of a Sustained finding for two main reasons. First, while in the ambulance, the subject recanted his allegation that he had been slammed into the door and asserted that no force had been used. While this did not obviate the need to notify FIT, it apparently made the question closer in NE#2's mind. Second, FIT was ultimately notified and was able to investigate this case, even if that investigation was limited and was not commenced until several hours after the incident. That being said, I counsel NE#2 to learn from this case and to not to make this error again in the future.

- **Training Referral:** NE#2 should be retrained concerning the elements of SPD Policy 8.400-POL-3. She should be counseled by her chain of command concerning her failure to make a FIT notification in this case she should be informed that this was required by the clear language of the policy. NE#2 should be counseled to avoid revisiting this type of situation in the future and to screen these matters with FIT even when it is a close call in her mind. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegation #2

6.010 - Arrests 6.010-TSK-1 Sergeant Screening and Approving An Arrest

SPD Policy 6.010-TSK-1 concerns the obligation of sergeants to screen and approve arrests. The sergeant is required to do the following: (1) review the circumstances surrounding the incident and the physical condition of the person arrested or detained; (2) determine the appropriateness of the offense charged and the disposition of the person arrested or detained; (3) complete an arrest screening supplemental form; and (4) review the reports for completeness. (SPD Policy 6.010-TSK-1.)

NE#2 told OPA that, once she arrived on the scene, she spoke to the officers concerning what had occurred. She discussed the basis for the subject's arrest and learned that it was for misdemeanor theft. The officers screened charging by officer with her and she agreed that this was the appropriate course of action. This was captured on Department video. The Department video also showed that NE#2 spoke with the Subject and determined his physical condition. Lastly, NE#2 also reviewed the officers' reports for completeness and, herself, completed an arrest screening supplemental form.

Given the above, I find that NE#2 satisfied all of the requirements of this policy. As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #3

11.030 – Guarding Detainees at a Hospital 11.030-PRO-1-Hospital Guard

SPD Policy 11.030 governs the guarding of detainees at hospitals. The policy instructs that a hospital guard is required where the detainee was arrested for a felony, a felony warrant, a repeat DUI offense, or domestic violence. (SPD Policy 11.030.) Otherwise, it is a discretionary decision. (Id.) In this respect, the policy states that: "Officers may



use the Charge by Officer Program (CBO) instead of providing a hospital guard for detainees arrested for a non-domestic violence misdemeanor.” (Id.) This decision is ultimately up to the sergeant. (SPD Policy 11.030-PRO-1.)

Here, FIT alleged that, due to NE#2’s failure to assign a hospital guard, the subject left the hospital and they were unable to interview him as part of their investigation. While this was certainly problematic, it did not constitute a policy violation. As discussed above, the subject was arrested for a misdemeanor and NE#2 decided to charge by officer, as she had the discretion to do. Accordingly, there was no requirement for a hospital guard and NE#2’s failure to assign one did not violate policy.

For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #1

8.200 - Using Force 1. Use of Force: When Authorized

This allegation was classified based on the subject’s allegation that NE#3 slammed his head into the patrol vehicle door. If true, and if this occurred while the subject was in handcuffs, that could plausibly constitute excessive force.

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.*)

As a starting point, I find that the force used by NE#3 was reasonable. NE#3 contended that, at the time he used force to push the subject against the patrol vehicle, the subject had just struck NE#3 with his elbow and shoulder. NE#3 explained that this caused him to momentarily lose his breath and to suffer transitory pain. NE#3 explained that the force was used to prevent the subject from causing NE#3 to suffer any additional injuries. He further stated that his intention was to pin the subject against the patrol vehicle and to control his body. I find that it was reasonable for NE#3, who had just been struck by the subject, to try to push him forward in order to brace him against the car. That this resulted in an unfortunate injury to the subject does not change this analysis.

I further find that the force was necessary to prevent the subject from further harming NE#3 and to ensure that he was under control. I also find that there did not appear to be any reasonably effective alternatives at that time to NE#3 other than the force used. Lastly, I find that the force was proportional to the risk of harm to NE#3. The subject admittedly struck NE#3 and it seems likely that, had NE#3 not used force, the subject would have tried to do so again. While, as discussed above, the injury suffered by the subject was significant, this does not lessen the proportionality of the force.

For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper.



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

Named Employee #3 - Allegation #2

8.200 - Using Force 2. Use of Force: When Prohibited

This allegation was classified for investigation based on the fact that force was used on the Subject while he was in handcuffs. SPD Policy 8.200-POL-2 states that force is prohibited: "On restrained subjects (e.g. including handcuffed or contained in a police vehicle) except in exceptional circumstances when the subject's actions must be immediately stopped to prevent injury, or escape, destruction of property. All such force shall be closely and critically reviewed." (SPD Policy 8.200-POL-2.)

As discussed above, NE#3 explained that the subject caused him injury when he pushed back against NE#3 with his elbow and shoulder. NE#3 further articulated his belief that, had he not acted, the subject may have tried to do so again. I find that this scenario presents the "exceptional circumstances" for when force is appropriate on a handcuffed individual. As such, I do not find that NE#3 used prohibited force and I, accordingly, recommend that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

11.030 – Guarding Detainees at a Hospital 11.030-PRO-1-Hospital Guard

After NE#3 screened the arrest of the subject for a misdemeanor and the decision to charge by officer was made, NE#2 decided to not assign a hospital guard. NE#3 was entitled to rely on that decision and was not required to act as a hospital guard or to ensure that a guard was assigned.

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

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