



## CLOSED CASE SUMMARY

ISSUED DATE: JUNE 22, 2018

CASE NUMBER: 2017OPA-1308

### 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	Not Sustained (Lawful and Proper)
# 2	8.400 – Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force	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:

It was alleged that the Named Employee may have used a strike to the Complainant’s face and that the Named Employee failed to report this force as required by policy.

#### ANALYSIS AND CONCLUSIONS:

##### Named Employee #1 - Allegations #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.” (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.*)

The Complainant filed a complaint with OPA in which he made allegations of criminal conduct on the part of Named Employee #1 (NE#1). These allegations were criminally investigated by SPD and ultimately deemed to be meritless. The case was then referred back to OPA. During its preliminary evaluation of this matter, OPA watched the Department video of the Complainant’s arrest. On that video, it appeared that NE#1 may have struck the Complainant in the face after being spit on. OPA further determined that, to the extent such a strike occurred, that force had not been reported by NE#1.

OPA interviewed NE#1. NE#1 stated that he did not believe that he struck the Complainant. He, instead, described his actions in the following manner:



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That, when he turned to spit I had, you have an initial reaction, though delayed. The first being to raise my hand to my face because I'd just been struck by something in the face. And then realizing what had happened to try to control his mouth and his head so that I wouldn't be spit on in the future. It happens very quickly and it's clearly delayed because he was able to spit in my face. But I think I was reacting to his pulling back and turning his head towards me. And I was simply trying, I was simply, rather than striking him, blocking his mouth and pushing his face away [from] me.

In summary, NE#1's contention was that, immediately after being spit on in his face, he used an open hand technique to control the subject's head and face to ensure that he could not spit again. As such, instead of striking the Complainant, he characterized his actions as blocking the Complainant's mouth and pushing his face away.

When reviewing the video, the open hand technique by NE#1 occurred virtually immediately after he was spit on. The motion was fast and jab like, but it did not appear to cause the Complainant any pain and the Complainant did not complain of pain. Indeed, the Complainant did not even pause what he was saying or react in any manner to NE#1's actions. NE#1 then placed his hand on the top of the Complainant's head and held it against the hood of the patrol vehicle. The Complainant continued to try to lift his head up and NE#1 kept pushing it down. Another officer came to assist NE#1 and it took several minutes until they were able to secure the Complainant and place him into handcuffs. During this time, the Complainant continued to yell and resist, but never complained of pain. Eventually, a spit sock was placed over the Complainant's head. He was then secured to a gurney and was transported from the scene in an ambulance. Notably, even after he had been spit on, NE#1 remained calm. He did not ever appear to lose his temper with the Complainant, although he was constantly operating under stressful circumstances and with an incredibly difficult subject.

The Complainant did not make any complaints of pain until he asserted that the handcuffs were hurting him. This complaint of pain was reported to a supervisor and was documented by NE#1 in a Type I use of force report. As discussed more fully below, the open hand technique used by NE#1 was neither reported nor documented.

In evaluating whether the force used by NE#1 was consistent with policy, OPA reviewed a training module concerning a spitting subject. (Spitting Subject Role Play Training.) This training instructed officers to use "ICC techniques for controlling the suspect and affixing a 'spit sock.'" (*Id.*) Specifically, officers were trained to take the following steps: "ICC Under hook, bend suspect at the waist, open hand check face away from officer, cup hand at rear base." (*Id.*) In one role playing scenario, an officer applies handcuffs to a subject who then prepares to spit on the officer. (*Id.*) The officer "uses [an] open hand 'check/push' to stop the suspect from spitting and an "under-hook to table top," which are identified as the "reasonable/necessary force options." (*Id.*)

From OPA's evaluation of the ICV, NE#1's force appears to have been consistent with his training. He used a reactive open hand check to the Complainant's face to move it away from him. This force was reasonable under the circumstances to control the Complainant and to ensure that the Complainant did not again spit on NE#1. I find that the force was also necessary given the safety threat presented by the Complainant spitting in NE#1's face, which could constitute a significant health hazard. The threat was exacerbated by the fact that the Complainant was not handcuffed at the time of the spitting, as well as due to the fact that there were no other officers in NE#1's immediate vicinity at the time. I further do not find that there was any reasonable alternative to applying the force that NE#1 had been trained to use in these exact circumstances. Lastly, I find that the force was proportional to the



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threat. The sole force used was the instantaneous open hand technique to prevent further spitting. After that point, NE#1 used only that level of force needed to hold the Complainant's head to the vehicle and to control his body. I do not believe that open hand technique was a strike and I find that it was appropriate under the circumstances facing NE#1 at the time.

For these reasons, I find that this force was consistent with policy and I recommend that this allegation be Not Sustained – Lawful and Proper.

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

### **Named Employee #1 - Allegation #2**

#### ***8.400 – Use of Force Reporting and Investigation 1. Officers Shall Report All Uses of Force Except De Minimis Force***

SPD Policy 8.400-POL-1 requires that officers report all uses of force except de minimis force. The policy defines de minimis force as: "Physical interaction meant to separate, guide, and/or control that does not cause pain or injury. The next level of force is Type I. (SPD Policy 8.400-POL-1.) Relevant to this case, one example of Type I force set forth in the policy is an: "Open hand technique with sufficient force to cause complaint or indication of pain." (*Id.*) Type II force includes force that causes physical injury or that could be reasonably expected to cause injury. (*Id.*) Unlike with de minimis force, an officer who uses Type I or Type II force must notify a supervisor about the force that was used and document the force.

NE#1 completed a Type I use of force report concerning the Complainant's claim of pain from handcuffing. In that use of force report, he documented the Complainant spitting in his face and his actions in securing the Complainant; however, he did not document or even mention the open hand technique he used to the Complainant's face.

At his OPA interview, NE#1 explained that he believed that the force was de minimis and did not need to be reported. I do not believe that the force rose to the level of Type II. Accordingly, the question here is whether this force was de minimis or Type I. If it was, in fact, Type I, NE#1 should have reported and documented the force and his failure to do so violated policy.

Supporting classifying the force as Type I is the fact that it was an open hand technique with a measure of force behind it and that it was direct contact to the Complainant's face and head area. Notably, the policy provides the following as an example of Type I force: "open hand technique with sufficient force to cause complaint or indication of pain." However, there was no complaint of pain at the time the open hand technique was used or any indication from my review of the Department video that it caused the Complainant pain. This weighs towards a determination that the force was de minimis. While I believe it to be a close call, I find that the level of the force used by NE#1 was Type I and should have been reported and documented.

However, if I have difficulty determining which category this force fell into, I imagine that NE#1, who was operating in the immediacy of the moment and without the luxury of hindsight, did as well. Notably, as NE#1 mentioned at his OPA interview, he did not review his ICV prior to generating his use of force report. For these reasons, and even though I conclude that the force was Type I and should have been reported and documented, I do not recommend that this allegation be Sustained.



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That being said, I do find that, as NE#1 recognized at his OPA interview, he should have included a description of this force in the Type I report that he generated or, in the alternative, in his General Offense Report. Moreover, he should have screened this force with a supervisor. According to NE#1's sergeant, who was interviewed by OPA, the open hand technique was never mentioned by NE#1. As the sergeant explained, it would have been best practice for NE#1 to have done so, especially since he was already screening a Type I. For this reason, I recommend that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1 should be counseled by his chain of command concerning his failure to report or document the open hand technique he used on the Complainant's in this case. By memorializing his actions before and after but omitting a description of that force, it raised the appearance that he deliberately failed to report it. While I do not believe that this was NE#1's and I find that he acted in good faith, he should be instructed to more closely screen and document the entirety of the force he uses in the future. Lastly, NE#1's chain of command should retrain him concerning the elements of SPD Policy 8.400, and, specifically, when force rises to the level of Type I. This counseling and retraining should be documented and this documentation should be maintained in an appropriate database.

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