



CLOSED CASE SUMMARY

ISSUED DATE: FEBRUARY 8, 2019

CASE NUMBER: 2018OPA-0740

Allegations of Misconduct and the 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	8.100 - 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	Sustained
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Sustained
# 4	8.300 - Use of Force Tools 4. Officers Shall Only Deploy CEW When Objectively Reasonable. See Section 8.000	Not Sustained (Management Action)
# 5	5.001 - Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication	Not Sustained (Inconclusive)
# 6	8.200 - Using Force 8. Consistent With the Timelines in Section 8.400, Officers and Supervisors Shall Ensure That the Incident Is Accurately and Properly Reported, Documented, and Investigated	Sustained

Named Employee #2

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Not Sustained (Lawful and Proper)
# 2	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Not Sustained (Lawful and Proper)
# 2	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Lawful and Proper)

EXECUTIVE SUMMARY:

It was alleged that Named Employee #1 violated Department policy during a use of force incident. It was further alleged that Named Employee #2 and Named Employee #3 failed to investigate or refer serious policy violations and abused their discretion when they deemed Named Employee #1's force to be consistent with policy.



ADMINISTRATIVE NOTE:

In the initial DCM, OPA recommended that Allegation #5, which concerned potential dishonesty on the Named Employees part, should be Sustained. The dishonesty in question related to the Named Employee's contention, both in his reporting and at his OPA interview, that he dropped rather than threw his Taser. At the discipline meeting, the Named Employee's chain of command, while recognizing that the Named Employee appeared to throw his Taser, asserted that the evidence was insufficient to establish that he engaged in dishonestly, rather than simply inaccurately or incompletely reported his actions. The chain of command argued that Allegation #3, which concerned the unprofessionalism of the act of throwing the Taser, and Allegation #6, which covered the inaccuracy of the Named Employee's reporting in this regard, sufficiently captured and held him accountable for his conduct.

After further consideration, and while OPA still has concerns regarding the Named Employee's truthfulness at his interview and in his paperwork, OPA agrees with the chain of command and amends its previous decision on this allegation from Sustained to Not Sustained – Inconclusive.

SUMMARY OF INVESTIGATION:

The Detention and Force Used

Named Employee #1 (NE#1) and his partner – referred to here as Witness Officer #1 (WO#1) – responded to a Trader Joe's grocery store in West Seattle regarding a suspicious circumstances call. They located an individual in the parking lot who was dressed in all black, wearing gloves, a black ski hat, and a backpack. They directed this individual – who was later identified as the Subject – to be seated. The Subject complied with that order. The officers asked the Subject what he was doing in the parking structure of the closed grocery store, asked why he had been looking into windows, and told him that his actions were suspicious. He told the officers that he was taking a "piss" and that his girlfriend was waiting for him in their car. WO#1 stayed with the Subject and gathered his personal information while NE#1 walked around the structure to investigate what had occurred. He engaged in a phone call with someone, who appeared to be a supervisor, and discussed the basis for the stop of the Subject. He told that other individual that he saw the Subject's girlfriend's car (a black Infiniti) and that she drove away when she saw the officers approach. NE#1 further told the other individual that, while he believed that he had sufficient reasonable suspicion supporting the stop, he did not believe that he had probable cause to arrest at that time.

NE#1 got off of the phone and returned to where the Subject and WO#1 were. NE#1 told the Subject that the grocery store had been the target of ongoing burglaries and that they had been watching the building each night. NE#1 told the Subject that he looked around and there was no urine anywhere. He further stated to the Subject: "I know you're fucking lying to me." The Subject denied that he was. He told NE#1 that he was about to urinate when the officers stopped him and that his girlfriend was still in the near vicinity waiting for him.

At around this time, radio dispatched that the Subject had an open warrant. After hearing the amount of the warrant, NE#1 said "oh shit" and walked back to where the Subject and WO#1 were. As NE#1 approached the Subject, WO#1 told the Subject to stand up. NE#1 then directed the Subject not to stand up and he remained seated. The officers each grabbed one of the Subject's arms and WO#1 then told the Subject: "You have a felony warrant." The Subject pulled his arms away from the officers and stood up. NE#1 stated to him: "I'll tase the shit out of you." NE#1 further stated: "I will fucking kill you, get the fuck down."



The officers continued to try to hold the Subject's arms as he tried to pull away from them. Approximately nine seconds after the officers went hands on with the Subject, NE#1 struck him in the face with a closed fist. The Subject exclaimed: "Oh shit, Ok, ok, ok, dude your fucking punched my eye out." The Subject went down to his knees.

WO#1 directed the Subject to get onto the ground. He went down to his hands and knees. WO#1 told the Subject to get onto his stomach and he stood up. They continued to struggle and NE#1 stated: "I'm going to tase the shit out of you dude." Seconds later, NE#1 pulled out his Taser and said to the Subject: "Get on the ground or I am going to tase you, I'm gonna fucking tase you." NE#1 performed an arc warning with his Taser. At this point, NE#1 was beside the Subject, who was walking down the ramp to exit the parking structure. WO#1 was behind them. WO#1 grabbed onto the Subject's backpack and pulled it, causing him to fall to the ground. NE#1 called for the Seattle Fire Department (SFD) to respond to the scene to provide medical assistance. The Subject got back up and, when he turned to face NE#1, NE#1 tased him. The Subject said "oh shit" and ran forward several steps. NE#1 tased the Subject again and he then fell to the ground on his back. NE#1 again cycled the Taser while the Subject was on the ground and the Subject appeared to temporarily experience neuromuscular incapacitation (NMI). The Subject got up and began to run away from the officers. The officers ordered him to get back down and it appeared, from the video, that NE#1 attempted to tase the Subject one more time but it was unsuccessful.

The Subject ran across the street and away from the officers. NE#1, who was running after the Subject, threw his Taser at him. The Taser travelled approximately 10-20 feet into the middle of the street. The Subject's girlfriend drove her vehicle in his direction, the Subject got in, and they drove from the scene. NE#1 cancelled the call for SFD to respond to the scene, stating that "the Taser was ineffective."

After the Subject escaped, NE#1 and WO#1 discussed the case. NE#1 referenced a community member who may have witnessed the incident. He stated: "And this bitch up here been yelling fuck the police for the last half hour so that's been great." A supervisor responded to the scene. NE#1 described the force that he used. When the officers were asked whether they were hurt, they said that they were not. In response to that question, NE#1 further stated: "just our pride." During this conversation, NE#1 told his supervisor that he tased the Subject and, when his Taser was no longer operative, he threw it down and started chasing the Subject. NE#1 mentioned his Taser two additional times. He stated that he "dumped" it and then that he dropped the Taser in the street prior to giving chase to the Subject. He never told his supervisor that he threw the Taser. NE#1 also screened that he punched the Subject once. He told his supervisor that the Subject was fighting with him and WO#1; however, NE#1 did not contend that the Subject ever struck him or WO#2. The supervisor asked if there were any witnesses to the incident other than the officers. NE#1 answered non-verbally, but he responded in the negative. NE#1 did not affirmatively inform his supervisor about the female witness who he had referenced to WO#1 earlier.

Force Reporting and Review

NE#1 and WO#1 completed use of force reports. In that report, NE#1 stated that he punched the Subject once in the face due to the Subject's ongoing physical resistance, which included the Subject swinging his arms and elbows back. He also described the tasing. When doing so, he referenced observing the Subject's girlfriend standing by the Infiniti, which had its trunk open and an orange glow coming from within. NE#1 wrote that he was concerned that the Subject was running towards his girlfriend, who was a possible accomplice, and towards the vehicle's truck, which could have



weapons therein. He provided this as the basis for why he was justified in tasing the Subject as he ran away. Lastly, NE#1 wrote that he “dropped” the Taser when he began chasing the Subject.

The force was reviewed by multiple supervisors in NE#1’s chain of command. The Administrative Lieutenant, Named Employee #2 (NE#2), approved the force used by NE#1 as consistent with policy. With regard to the punch, she wrote that NE#1 “stated that he punched [the Subject] in an attempt to gain control and protect himself from [his] swinging elbow.” NE#2 wrote the following with regard to the Taser applications:

[The Subject] broke free and turned towards the parking exit where [NE#1] was standing. [The Subject] took a step toward [NE#1]. [NE#1] warned [the Subject] that he was going to tase him and initiated an arc warning. [The Subject] continued and did not comply. [NE#1] deployed his taser. This deployment was not effective and [NE#1] deployed another taser application as [the Subject] started to run down the sidewalk toward a waiting vehicle. [NE#1] stated that he could see the vehicle with the trunk open and [the Subject’s] girlfriend standing next to the car. [NE#1] stated that he deployed his second taser application to prevent [the Subject] from getting to the vehicle where there were possible weapons in the trunk.

NE#1’s Lieutenant next evaluated the force. She found that it was inconsistent with policy. Specifically, she found that NE#1’s Taser application was neither necessary nor proportional. She noted that, in a matter of seconds after the Subject pulled away from the officers, NE#1 “threatened to kill [the Subject] and used type one and type two force on a suspect who on ICV and BWV, appears to only be trying to get away.” The Lieutenant noted that, when NE#1 punched the Subject, the Subject “has his arms spread out to his sides and is not fighting with the officers, he is bent over and trying to run away.” The Lieutenant reasoned that there was “never any mention in [NE#1’s] statement that [the Subject] is trying to assault him or his partner, just that he was swinging his arms and elbows back to overcome their grip while continuously moving forward because he is trying to run away. The ICV and BWV does not appear to show [the Subject] swinging his arms and/or elbows.” She viewed this as evidence supporting the conclusion that the Taser application was not warranted under the facts of this case. As further evidence of this conclusion, the Lieutenant stated the following:

[NE#2] then wrote in her review that when she asked [the Sergeant] where the hazard reports were for this incident, he replied that after talking to the officers he did not believe the reports were warranted because the officers told him [the Subject] was only resisting to get away and not intentionally attempting to assault them. There was no assault on an officer nor were there any threats made per [the Sergeant’s] conversation with the officers. That statement contradicts the use of CEW per policy and the punch to the head may not be within policy either.

The Lieutenant noted that, at the time the Subject was fleeing from the officers, he was a fleeing felon, but not for a violent felony. The Lieutenant pointed out that, while Dispatch cautioned that the Subject was “armed and dangerous,” the only information that the officers had about the open warrant was that it was for a narcotics offense. They did not know until after the incident that the warrant had a weapons possession component.



The Lieutenant called into question NE#1's assertion that he tased the Subject while he was running away due to NE#1's concern that the Subject was running towards the open trunk of the Infiniti. The Lieutenant stated that she observed the following from her review of the video:

[The Subject] runs to the passenger side of the Infiniti, at which point on [NE#1's] BWW you can see a person standing outside the driver's side door, the trunk is closed and the brake lights flash in a manner that indicates the person standing outside the driver's side door has just unlocked the car doors with a FOB.

The Lieutenant also questioned why, if NE#1 was afraid of the possibility of weapons, he ran "right by the passenger side of the car." Based on the above, the Lieutenant concluded that NE#1's description of those events "does not appear to be entirely accurate."

The Acting Captain, Named Employee #3 (NE#3), disagreed with the Lieutenant's conclusions. Indeed, he sent her review back to her and asked her to reanalyze the Taser application. The Lieutenant did not change her view that this aspect of the force was contrary to policy. Regardless, NE#3 approved the force as consistent with policy. Concerning the punch, he wrote that: "[NE#1] uses a fist strike to the Suspect's face as the Suspect is swinging his arms and hit [WO#1] near her face and hit her glasses with an elbow." He found the punch appropriate to stop these purportedly assaultive actions on the Subject's part. With regard to his conclusion that the Taser application was appropriate, he wrote the following:

Both of the officers sustained minor injuries in this fight with the Suspect. This fact might not have been realized by either officer at the time. However, The Suspect swinging his arms, pulling away from the officers, and running through the street could likely be considered to cause injury to himself, the pursuing officers, or innocent bystanders. There was a clear public safety requirement to apprehend this dangerous wanted felon. A second taser deployment was attempted with mixed results. The Suspect stumbles and is laying on the ground. If the taser was initially effective and caused him to stumble it was not adequate to cause NMI lockup for the entire 5 second cycle. The Suspect was able to get back up to his feet and run away...Where my opinion differs from [the Lieutenant's] is in judging the Suspect's actions as intentionally assaultive or recklessly aggressive. He is clearly physically resisting arrest, swinging his arms to break free, fighting to get away, and running towards the officer. Each officer was injured by the Suspect's actions whether he was trying to hurt them or not. The use of force policy is written as such to negate further injuries when trying to subdue somebody in a situation like this.

The incident was later reviewed by the Department's Force Review Board (FRB). The FRB reserved on opining as to whether the force was consistent with policy as OPA's investigation was already pending; however, the FRB did evaluate the involved officers' tactics and decision-making. The FRB identified multiple issues with the officers' handling of the incident. Among what the FRB found included the following: the officers did not request additional units for containment prior to contacting the Subject; NE#1 left WO#1 alone twice with the Subject and had no line of sight on either occasion; the officers did not frisk the Subject at the time of the detention, even though they believed that he was engaged in an active burglary and he had a backpack and "bulky" clothing; the officers permitted the



Subject to sit up, rather than placing him in the prone position; and they used poor team tactics and failed to communicate regarding how they were going to take the Subject into custody.

The Lieutenant forwarded this matter to OPA and this investigation ensued. OPA reviewed the documentation from the underlying incident, the Department video, and interviewed NE#1, WO#1, and a number of other witness officers.

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.*)

First, with regard to reasonableness, while none of the below factors are dispositive, I find that the majority of the factors weigh in favor of a finding that the force was within policy.

- **Severity of the Offense:** At the time of the force, NE#1 believed that the Subject was potentially involved in a burglary. Moreover, NE#1 knew that the Subject had a felony warrant for narcotics offenses, but, as discussed by the Lieutenant, was not aware that he was also wanted for weapons possession. In addition, NE#1 was informed by dispatch that the Subject was “armed and dangerous.”
- **The Level of Threat or Resistance and the Conduct of the Subject:** At the time the force was used, the Subject was physically resisting the officers. While it is unclear whether he was swinging his arms and elbows as NE#1 described and while there is no evidence that he physically struck or harmed either officer, the Complainant was acting aggressively towards them. Moreover, the Subject resisted several attempts by the officers to take him into custody, pulling from them, walking away, and ultimately fleeing. While the Subject did appear to have his arms spread and on the floor when he was punched by NE#1 and while he had his right hand up at the time the arc test was effectuated, he was clearly non-compliant. Moreover, the incident unfolded very quickly and it is very likely that NE#1 perceived this as one continuous incidence of resistive behavior.
- **Potential Threat to the Community:** There was no apparent threat to the community at the time the force was used. NE#1 contacted the Subject in a business parking structure after hours. No community members except for the Subject’s girlfriend could be observed in the near vicinity.
- **Potential of Injury to Bystanders and Officers:** As explained above, there was no actual risk of harm to bystanders. There was the risk of potential of injury to the officers; however, some of this risk was caused by the officers’ tactical errors.



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- ***The Risk or Apparent Attempt by the Subject to Escape:*** The Subject clearly attempted to escape on multiple occasions and did, in fact, successfully flee from the scene. This was the case even though the Subject was walking away from them at the inception of the incident and was not running. Moreover, the officers knew that the Subject's girlfriend was in the near vicinity with a vehicle and that the vehicle could be used as a mechanism for escape.
 - ***The Time Available to the Officer to Make a Decision:*** The entirety of the incident, from when NE#1 initially went hands on to when the Subject escaped after the last Taser application, was just over one minute (01:02) The time that elapsed from hands on to the punch and hands on to the first Taser application were approximately 10 seconds and approximately 40 seconds, respectively. The time that elapsed between the two Taser applications was less than 10 seconds.
 - ***The Availability of Other Resources:*** As discussed more fully herein, both officers made a number of tactical errors during the inception of this incident. Most notably, these included their failure to call for additional units to assist them and their use of poor team tactics and communication. These resulted in an increased need to use a higher level of force. This factor weighs against a finding of reasonableness.
 - ***The Training and Experience of the Officer:*** NE#1 has had substantial training on using a Taser and concerning the use of defensive tactics on resisting individuals.
 - ***The Subject's Proximity to or Access to Weapons:*** There was no direct evidence that the Subject was armed. However, dispatch did indicate that he was "armed and dangerous." He was wearing all black and appeared to have been engaging in or attempting to commit a burglary. The Department trains its officers to approach burglary subjects as potentially armed. Moreover, the Complainant had a backpack on that could have contained weapons. It was a tactical error to not frisk the Complainant and take the backpack away from him at the time of the detention; however, this does not, by itself, cause this factor to not weigh in favor of reasonableness.

I further note that under the policy, itself, a Taser application is objectively reasonable: "when public safety interests dictate that a subject needs to be taken into custody and the level of resistance presented by the subject is (1) likely to cause injury to the officer; or (2) if hands-on control tactics or other force options would be likely to cause greater injury to the subject than the use of CEW." As discussed in several other investigations, OPA believes that this prong of the policy is way too broad; however, it has not been changed by the Department and is the operative rule. Under this policy, it is hard to see how this Taser application – or, for that matter, any application – is unreasonable.

Lastly, I reach this decision even though I note that NE#1's recounting of the incident both to his supervisor and in his report, as well as his rationale for the force, were, at least in part, inaccurate and unsupported by the record. For example, while NE#1 claimed that his second Taser application was justified because the Subject was running towards the open trunk of the Infiniti, this was not actually borne out by the video evidence. However, this does not prevent a finding of reasonableness given the totality of the circumstances.



Necessary Factor

With regard to whether the force was necessary, I find that the force was needed to effectuate the lawful purpose of taking the Subject into custody. Moreover, given the situation that NE#1 placed himself in given his tactics and decision-making, I find that NE#1 reasonably believed that he had no reasonable alternative to that force. OPA's concerns regarding NE#1 putting himself in the place to use this force is addressed in the context of de-escalation. However, once the situation was upon him, the force used was necessary.

Proportionality Factor

As with reasonableness and necessity, NE#1's approach to this situation and failure to properly de-escalate increased the need to use force. It further created a scenario where he was required to use a higher level of force. However, given the resistance that he faced at the time and given the permissive language of the policy, I find that this force was proportional. Notably, the Subject was physically resisting, was not complying with the officers, and was indisputably trying to flee the scene.

For these reasons, and while I have significant reservations concerning both the force used by NE#1 and the Taser policy, I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - 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;



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- 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.

Based on OPA’s review of the evidence – most notably, the Department video, OPA concludes that NE#1 failed to sufficiently de-escalate prior to using force.

First, NE#1 failed to call other resources to the scene in order to assist with taking the Subject into custody. NE#1 had time to do so but, instead, made the decision to go hands on with only WO#1 present. Along these lines, NE#1 failed to take any steps to contain the threat and to use time, distance, and shielding.

Second, the officers used poor team tactics and failed to communicate regarding how they were going to take the Subject into custody. Instead, NE#1 approached the Subject and, without engaging in any planning with WO#1, grabbed the Subject’s arm. WO#1 then told the Subject that he had an open warrant and, virtually immediately thereafter, he pulled away from the officers and began looking for an avenue of escape. Better planning and coordinated tactics could have prevented this and could have significantly lessened the need to use high-level force.

Third, NE#1’s language was immediately escalating. For example, nearly immediately after grabbing the Subject’s arms, NE#1 yelled: “I’ll tase the shit out of you” and “I will fucking kill you, get the fuck down.” This caused the situation to be more fraught rather than de-escalating it.

NE#1’s suboptimal tactics and decision-making, which were outlined fully by the FRB, directly contributed to the need to use force and the high level of force that was used. He failed to fully apply the de-escalation tools that officers are trained on and expected to use by the Department. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-10.) The policy further states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed



as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*) Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

Based on OPA’s review of the video, NE#1 was unprofessional in a number of respects. First, his use of excessive profanity towards the Subject was inappropriate. During the incident, NE#1 made the following statements: “I’ll tase the shit out of you”; “I will fucking kill you, get the fuck down”; “I’m going to tase the shit out of you dude”; and “get on the ground or I am going to tase you, I’m gonna fucking tase you.” Of particular concern is the statement that NE#1 was going to “fucking kill” the Subject. While isolated profanity, particularly that used in connection with a high-intensity incident, has been deemed acceptable by OPA and the Department, the profanity used here was beyond that scope and, thus, impermissible.

Second, NE#1’s statement concerning the female witness to the incident was also unprofessional. Specifically, NE#1 stated the following: “And this bitch up here been yelling fuck the police for the last half hour so that’s been great.” While this insulting and pejorative statement was not made in the direct presence of the witness, it was clearly captured on Department video and is, thus, publicly available. Again, as with the profanity discussed above, this statement was inappropriate and impermissible.

Third, NE#1 acted unprofessionally when he threw his Taser across the street in the direction of the fleeing Subject. As a starting point, this could have damaged Department equipment. Moreover, it suggested that NE#1 lost control of his emotions at that time and acted purely out of anger and frustration towards the escaping Subject. This is simply inconsistent with the standard of conduct expected from SPD officers.

For the above reasons, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegations #4

8.300 - Use of Force Tools 4. Officers Shall Only Deploy CEW When Objectively Reasonable. See Section 8.000

SPD Policy 8.300-POL-4 governs when the use of a Taser is objectively reasonable. The policy provides two possible scenarios: “when a subject causes an immediate threat of harm to any person”; or “when public safety interests dictate that a subject needs to be taken into custody and the level of resistance presented by the subject is (1) likely to cause injury to the officer; or (2) if hands-on control tactics or other force options would be likely to cause greater injury to the subject than the use of CEW.”

As discussed above, I have concerns with the Taser application in this case; however, I find that it was consistent with Department policy and training. This is primarily due to the fact that the second prong of the above policy is so broad that it functionally results in virtually any Taser application being deemed objectively reasonable. This concern has informed Management Action Recommendations in several other OPA investigations. OPA renews those Management Action Recommendations here and again urges the Department to revisit this policy.

- **Management Action Recommendation:** OPA renews the Management Action Recommendations set forth in OPA cases 2017OPA-0318, 2018OPA-0061, and 2018OPA-0872. OPA again requests that the Department



consider revising SPD Policy 8.300-POL-4 and, specifically, the second prong of the policy concerning when a Taser application is objectively reasonable.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #1 - Allegation #5

5.001 - Standards and Duties 11. Employees Shall Be Truthful and Complete in All Communication

SPD Policy 5.001-POL-11 requires Department employees to be truthful and complete in all communications.

OPA's investigation yielded the conclusion that NE#1's account of this incident was inaccurate in multiple respects. Most notably, the video did not support his assertion that, at the time of the second Taser application, the Subject was running towards the open trunk of the Infiniti. To the contrary, not only was the trunk not visible from where NE#1 was positioned, but also the trunk was not open at that time. At best, this is simply a significant inaccuracy due to the high-stress nature of the incident. At worst, NE#1 fabricated this information to create a justification for why his Taser application to the fleeing Subject was appropriate. As another example, when his supervisor asked him whether there were any other witnesses to the incident, NE#1 appeared to respond in the negative. However, just moments before, he referenced a civilian witness, who he referred to as "this bitch." Again, while potentially innocent, this omission also could have plausibly constituted deliberate dishonesty.

Moreover, OPA had significant concerns with one specific aspect of NE#1's account. The video established that, at the time the Subject fled from NE#1, NE#1 threw his Taser into the street and in the Subject's general direction. However, when screening this incident with his supervisor, NE#1 stated that, when his Taser was no longer operative, he threw it down and started chasing the Subject. NE#1 mentioned his Taser two additional times. He stated that he "dumped" it and then that he dropped the Taser in the street prior to giving chase to the Subject. He never told his supervisor that he threw the Taser. Moreover, in his report, he again reported that he "dropped" his Taser.

NE#1 repeated and then modified this account at his OPA interview. He told OPA that he was engaging in "athletic maneuvers" and that the Taser dropped from his hand. Presumably, this means that the Taser then flew approximately 10-20 feet all on its own power. NE#1 then stated that he may have unintentionally thrown his Taser. NE#1 ultimately could not explain this discrepancy and stated that he wrote the report from memory without the benefit of first watching his BWV.

I find that NE#1's accounts are implausible and are clearly inaccurate. I note that, in the initial DCM for this case, OPA found that NE#1 was deliberately and materially dishonest and recommended that this allegation be Sustained. In this respect, OPA wrote the following: "I further find that NE#1 fabricated this account in order to avoid responsibility for throwing his Department Taser, apparently in anger, across the street. This dishonesty was material as it went directly to NE#1 professionalism or lack thereof during this incident."

However, at the discipline meeting in this matter, the chain of command disagreed with this finding and contended that the available evidence was insufficient to establish that NE#1 was intentionally and materially dishonest. While I maintain significant concerns regarding NE#1's truthfulness, I agree with the chain of command's assertions and supporting reasoning, which are detailed more fully above. Given this, I change my finding on this allegation from Sustained to Not Sustained – Inconclusive.



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

Named Employee #1 - Allegation #6

8.200 - Using Force 8. Consistent With the Timelines in Section 8.400, Officers and Supervisors Shall Ensure That the Incident Is Accurately and Properly Reported, Documented, and Investigated

SPD Policy 8.200-POL-8 requires that officers and supervisors ensure that a force incident is accurately and properly reported, documented and investigated. It was alleged that NE#1 violated this policy when he inaccurately reported multiple aspects of the facts and circumstances surrounding the force that he used.

As discussed above, I find that NE#1's reporting of this incident was inaccurate in a number of respects. First, there was insufficient evidence to establish that the Subject was swinging his arms and elbows back at the time or before NE#1 struck him. Notably, at the time of the punch, the Subject's arms appeared to be spread with his hands on the ground. Second, the BWV undercuts NE#1's contention that he saw the Subject running towards the open trunk of the Infiniti. As a starting point, the Infiniti could not even be clearly seen from NE#1's vantage point at the time of the tasing. Moreover, the trunk was not open. As articulated by the Lieutenant, NE#1's account in this regard was clearly inaccurate. Third, NE#1 did not "drop" his Taser, as he claimed in his report. To the contrary, he threw it across the street. This was also clearly inaccurate.

NE#1 has the obligation to accurately report his force. This is particularly the case when he used the high level of force he applied here. His failure to do so constituted a violation of policy and I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #2 - Allegations #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation

SPD Policy 5.002-POL-5 requires supervisors who become aware of a potential policy violation to investigate or refer the allegations depending on their severity. Minor allegations of misconduct may be investigated by a supervisor, while allegations of serious misconduct – such as the use of excessive force – must be referred to OPA. (SPD Policy 5.002-POL-5.)

In evaluating this case, OPA believed that the question of whether the force NE#1 used was consistent with policy was a close call. However, and primarily due to the breadth and permissiveness of SPD Policy 8.300-POL-4, OPA ultimately found that the force was reasonable, necessary, and proportional. As such, OPA does not believe that NE#2 and NE#3 violated policy when they failed to refer NE#1's force to OPA.

OPA's decision in this regard should not be construed to be, in any way, critical of the Lieutenant's decision to refer this matter to OPA. The issues she identified, as well as the discrepancies in NE#1's statements, were legitimate. Her review was thorough, critical, and exactly what OPA and the Department expects from supervisors.



That being said, for the above reasons, I recommend that this allegation be Not Sustained – Lawful and Proper as against NE#2 and NE#3.

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

Named Employee #2 - Allegation #2

5.001 - Standards and Duties 6. Employees May Use Discretion

As indicated in SPD Policy 5.001-POL-6, “[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment.” This policy further states that “[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed.” (SPD Policy 5.001-POL-6.)

As discussed above, I conclude that a reasonable supervisor could have found the force used by NE#1 to be consistent with policy. Accordingly, NE#2 and NE#3 did not abuse their discretion when they did not refer this matter to OPA. For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper as against both NE#2 and NE#3.

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

Named Employee #3 - Allegations #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation

For the same reasons as stated above (see Named Employee #2, Allegation #1), I recommend that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #2

5.001 - Standards and Duties 6. Employees May Use Discretion

For the same reasons as stated above (see Named Employee #2, Allegation #2), I recommend that this allegation be Not Sustained – Lawful and Proper.

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