



## CLOSED CASE SUMMARY

ISSUED DATE:     OCTOBER 14, 2019

CASE NUMBER:     2018OPA-0479

### 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	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)
# 3	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
# 4	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)

**Imposed Discipline**

**Written Reprimand**

**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:	Sustained
# 2	8.400-TSK-2 Use of Force –RESPONSIBILITIES OF THE SERGEANT DURING A TYPE I INVESTIGATION	Allegation Removed
# 3	8.400-TSK-6 Use of Force –RESPONSIBILITIES OF THE SERGEANT DURING A TYPE II INVESTIGATION	Allegation Removed

**Imposed Discipline**

**Oral Reprimand**

***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 Employee #1 failed to properly de-escalate this incident prior to using force and then subjected the Complainant to excessive and prohibited force. It was further alleged that Named Employee #1’s conduct during this case was unprofessional. Lastly, it was alleged that Named Employee #2, a Sergeant, failed to properly classify the force used by Named Employee #1 and did not cause it to be investigated.



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**SUMMARY OF INVESTIGATION:**

Officers, including Named Employee #1 (NE#1), responded to a call concerning an altercation between a male and security guards from a night club. The officers learned that the male, who was later identified as the Complainant, had been asked to leave the night club but refused to do so. The Complainant reportedly did not agree to leave the night club and a physical altercation ensued when the security guards attempted to physically remove him.

NE#1 generated a report as a result of the law enforcement action that he took towards the Complainant. He wrote that, when he first observed the Complainant, the Complainant had blood on his clothing and visible injuries. NE#1 also reported that the Complainant appeared to be extremely intoxicated. NE#1 wrote that the Complainant would not stop engaging with the security guards, who were being interviewed by another officer – referred to here as Witness Officer #1 (WO#1). The Complainant did not comply with NE#1's order that the Complainant come towards him. It was documented that one security guard stated that he punched the Complainant in the face when the Complainant attempted to fight him during the removal from the night club. NE#1 reported that the Complainant continued to refuse to leave the vicinity of the night club and that he told the officers to arrest him. NE#1 wrote that he arrested the Complainant for criminal trespass. Named Employee #2 (NE#2), who was NE#1's supervisor during the incident, screened the arrest. In the Arrest Screening Template that he generated, NE#2 indicated that the Complainant's injuries preexisted his interaction with officers and that no officer disclosed using reportable force on the Complainant. No use of force report was generated and NE#2 does not appear to have conducted any substantive force investigation.

This incident was captured on Body Worn Video (BWV). The video showed that the officers approached the Complainant, who was standing approximately 10-15 feet from the entrance to the night club. WO#1 asked the Complainant whether he was fighting anyone, and the Complainant responded: "Something like that." The officers asked the Complainant what the fight was about and he pointed towards the security guards. WO#1 walked towards the security guards and NE#1 walked to the left of the Complainant. NE#1 told the Complainant to come over to where he was standing multiple times, the last time raising his voice. The Complainant did not do so and stated "why" and "I'm not coming over there." NE#1 responded: "I'm not going to tell you again, get the fuck over here, now." The Complainant stated that he was not going to come over to NE#1 if he was "talking like that." NE#1 then said: "listen man, listen, [WO#1's] talking to [the security guard], come talk to me, I want to find out what going on, why's your lip all busted, come here." The Complainant responded: "Why the fuck are you talking like that?" NE#1 put on his gloves and again stated: "listen to me, come here." The Complainant then appeared to say "n----r" and "bitch" while looking in NE#1's direction. NE#1 responded: "What did you just say to me." The Complainant against said "bitch." NE#1 repeated "bitch" and further said: "is that a n----r I hear too?" NE#1 again told the Complainant: "come here and talk to me." The Complainant said no and turned to face away from NE#1. At the time, the Complainant had his arms behind his back with his hands clasped together. WO#1 stated to NE#1 that they "just had a trespass situation." NE#1 then said: "oh, that's it." The Complainant replied "yeah, that's it," while taking several steps towards NE#1. At that time, the Complainant still had his hands behind his back and was turned sideways. NE#1 said "I'd back up" and then, virtually immediately thereafter, forcefully pushed the Complainant. The Complainant moved backwards several feet and fell to the ground on his back. As the Complainant got up, NE#1 said: "Don't you approach me again like that." The Complainant asked NE#1 if he was allowed to do that and said that he would see him in court. The Complainant asked NE#1 for his name several times, getting angry when the information was not immediately provided. NE#1 gave the Complainant his name. The Complainant was informed that if he did not leave, he would be arrested for trespass.



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The Complainant and NE#1 continue to interact. At one point, the Complainant stated: “why the fuck did you push me like a fucking bitch...” NE#1 responded: “because you approached me with your...don’t step to me again, you’re going to get pushed again, I promise.” The Complainant retorted: “Alright then push me again.” NE#1 started laughing and stated: “don’t start with me.” The Complainant responded to NE#1’s laughing and said: “you think you’re funny because you’re police...” NE#1 replied: “I don’t at all, trust me. You don’t want to step to me again. I was nice the first time.”

WO#1 then took over the conversation with the Complainant. The Complainant continued to refuse to leave the vicinity of the night club. He grew agitated and ultimately told WO#1 that he wanted to be arrested and held out his arms. WO#1 continued to engage with him and did so calmly. WO#1 moved to take hold of the Complainant’s arm. At that same time, NE#1 grabbed the Complainant’s other arm and began to move it behind the Complainant’s back. WO#1 stated, in a measured fashion: “Nope, let’s just walk him off the property. That’s what we’re doing right now.” NE#1 eased his hold on the arm and both officers walked the Complainant around the corner and away from the night club. Eventually, after the Complainant continued to refuse to leave the vicinity and pursuant to his request that he be arrested, he was handcuffed and taken into custody. The handcuffing was uneventful, and he was placed into the rear of the patrol vehicle and was transported from the scene.

#### **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.*)

As discussed more fully below (*see* Named Employee #1, Allegation #3), I find that NE#1’s failure to de-escalate ultimately necessitated the need to use force. In this regard, I find that NE#1 violated policy during this incident. However, this does not necessarily yield the force, itself, as out of policy. OPA evaluates the force independently and when looking at the circumstances present at the moment in time at which the force was used.

When the push occurred, the Complainant had taken two steps towards NE#1 in a manner that could have been reasonably interpreted as aggressive. In addition, just prior to that, the Complainant had referred to NE#1 with racial and pejorative terms. Lastly, the Complainant was argumentative and intoxicated, which caused his behavior to be unpredictable. For these reasons, OPA finds that NE#1 reasonably believed that, at the moment he pushed the Complainant, the Complainant presented a potential threat of harm to his person. This is the case even if NE#1, by his conduct, caused that threat at least in part. As such, NE#1 was permitted to use force to move the Complainant back in the form of a push.



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From OPA's review of the video, it appears that NE#1 did not use undue force when he pushed the Complainant and that the Complainant's level of intoxication played a substantial role in him falling backwards and onto the ground. For these reasons, I find that the force was reasonably, necessary, and proportional, and I recommend that this allegation be Not Sustained – Lawful and Proper.

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

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

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

SPD Policy 8.200-POL-2 states that force is prohibited to "punish or retaliate" or "against individuals who only verbally confront them unless the vocalization impedes a legitimate law enforcement function."

Virtually immediately prior to the use of force, the Complainant used pejorative and racial terms towards NE#1 and repeatedly refused to comply with his orders. Based on this, it appeared possible that NE#1 may have used force in violation of this policy.

While, as discussed below, OPA has concerns regarding this incident, OPA ultimately finds the evidence insufficient to establish that NE#1 used prohibited force. As such, OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #1 - Allegation #3**

***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.*)



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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.

When the Named Employees first arrived at the scene, they were aware that an individual had been fighting with security guards. They quickly identified the Complainant as this individual and noted that he was injured. At the time he was initially contacted by the officers, the Complainant was not actively fighting with anyone and did not appear to pose an immediate risk of harm. While the Complainant initially refused to walk over to NE#1 after receiving the first orders that he do so, NE#1 virtually immediately raised his voice and told the Complainant to “get the fuck over here, now.” After that point, there was no further positive dialogue between NE#1 and the Complainant. The Complainant remained unhappy at NE#1’s tone and the way that NE#1 spoke to him. While NE#1 moderated his tone after swearing at the Complainant, it was too late at that point, as the Complainant’s anger had grown.

NE#1 appeared to further rile the Complainant when he stated “oh, that’s it,” in response to WO#1’s assertion that this was just a trespass situation. From OPA’s review of the video and given NE#1’s tone and inflection, it appears that this statement may have been made to antagonize the Complainant and, indeed, it served to do so. Immediately after that statement was uttered by NE#1, the Complainant approached NE#1 and was pushed to the ground.

NE#1 continued to agitate the Complainant after the force was used when he laughed while talking to the Complainant and when he told him: “You don’t want to step to me again. I was nice the first time.” Again, this further escalated the situation.



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Based on OPA's analysis of the evidence, NE#1 failed to comply with the Department's de-escalation policy. Upon contacting the Complainant, NE#1 did not apply the LEED model. Indeed, to the contrary, he virtually immediately escalated the situation by raising his voice at the Complainant and telling him to "get the fuck over here, now." NE#1 did not appear to meaningfully consider whether the Complainant's lack of compliance was based on his level of intoxication. Moreover, he failed to evaluate and apply other tactics that could have minimized the need to use force during this incident.

His non-compliance with this policy is even more clear when comparing his approach to that employed by WO#1. WO#1 remained calm with the Complainant even though the Complainant engaged in virtually the exact same behavior when interacting with WO#1. He was respectful of the Complainant even when the Complainant was being non-compliant, disrespectful, and difficult. WO#1 further ensured that, even when the decision was made to take the Complainant into custody, it was done gently and without the use of any reportable force.

Ultimately, the Department expects that officers will comply with the Department's de-escalation policy, especially in those cases where a subject may be impaired. NE#1 did not do so here and, as such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

#### **Named Employee #1 - Allegations #4**

##### ***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.*)

I find that NE#1 violated the Department's professionalism policy when he unnecessarily escalated this incident through his acts and statements. However, I find that this conduct is already captured by Allegation #3 and, as such, I decline to also issue a Sustained finding here. Instead, I recommend that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1's chain of command should counsel him concerning this incident and should discuss how he could have better handled his interaction with the Complainant. NE#1's chain of command should specifically cover NE#1's professionalism, his escalation of this incident, and his decision to use force. This counseling session should include watching the video of this incident. NE#1's chain of command should further provide NE#1 with whatever training it deems appropriate. This counseling and any associated retraining should be documented and this documentation should be maintained in an appropriate database.

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

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



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

Named Employee #2 (NE#2) was the supervisor who responded to the scene to screen the Complainant's arrest. NE#1 disclosed to NE#2 that, when the Complainant approached him and began "getting real close," he pushed the Complainant and he fell on his "butt" and got back up." NE#2 spoke to the Complainant who disclosed that he had been pushed by NE#1 and asked to file charges against NE#1. NE#2 asked the Complainant if he was injured and the Complainant said that he hurt his teeth, jaw, and his right elbow when he was pushed to the ground by NE#1. He stated that the Complainant used "all his force." After speaking with the Complainant, NE#2 again spoke to NE#1 and NE#1 confirmed, in response to NE#2's questions, that the Complainant fell on his "butt." NE#2 also spoke with one of the security guards who told him that the Complainant was pushed and then fell on his rear-end and side.

NE#2 did not instruct NE#1 to complete a use of force report and did not investigate the force. He told OPA that he did not do so because the officer did not use any force that caused an injury. He further asserted that, even though the Complainant may have initially stated that he was injured by the push, the Complainant later changed his story to say that he was "slammed" on his face. NE#2 contended that, as this did not occur, there was no force that needed to be documented and investigated. NE#2 ultimately made an OPA referral concerning this incident. However, he did not watch the video of this incident prior to making that referral or, for that matter, prior to making the determination that no reportable force had been used.

SPD Policy 8.400-POL-1(3) provides that, upon responding to a use of force, the Sergeant reviews the incident and classifies the force by type. The policy explains that force should be classified as Type I when it is "low level physical force" that "[c]auses transient pain or disorientation, but does not cause, and would not reasonably cause, injury or other require a Type II investigation." Force should be classified as Type II when it: "Causes physical injury greater than temporary pain"; or "Could be reasonably expected to cause such an injury"; or "Results in a complaint of such an injury, and does not rise to the level of a Type III investigation."

Here, NE#2 was aware that NE#1 used force to push the Complainant, causing the Complainant to fall to the ground. The Complainant told NE#2 that the fall caused him to injure his teeth, jaw, and right elbow. From OPA's review of the video, the Complainant did not tell NE#2 that he was "slammed" on his face. He consistently asserted that he was pushed down and that the push caused him to suffer injuries. NE#2 credited NE#1's account that the Complainant fell on his "butt" and, thus, concluded that the Complainant's alleged injuries could not have been caused by the force NE#1 used. However, NE#2 did not watch the video and had no conclusive evidence to establish that this was the case.

For the above reasons, NE#2 should have classified the force as, at the very least, Type 1. While NE#2 made an OPA referral, this does not excuse his failure to properly classify the force used by NE#1 and to ensure that it was investigated. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**



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

***8.400-TSK-2 Use of Force –RESPONSIBILITIES OF THE SERGEANT DURING A TYPE I INVESTIGATION***

As discussed above, the force used by NE#1 was, at a minimum, Type 1 force that needed to be reported and investigated and potentially rose to the level of Type 2 force. When NE#2 failed to do so, he violated both SPD Policy 8.400-POL-3, as well as the investigation tasks set forth in 8.400. However, given that NE#2's conduct is already fully addressed in the context of Allegation, I find that Allegations #2 and #3 are duplicative. As such, I recommend that Allegation #2 and Allegation #3 be removed.

Recommended Finding: **Allegation Removed**

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

***8.400-TSK-6 Use of Force –RESPONSIBILITIES OF THE SERGEANT DURING A TYPE II INVESTIGATION***

For the same reasons as stated above (see Named Employee #2, Allegation #2), I recommend that this allegation be removed.

Recommended Finding: **Allegation Removed**