



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 11, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0917

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Sustained
# 2	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Sustained
# 3	8.200 - Using Force 2. Use of Force: When Prohibited	Not Sustained (Training Referral)

Imposed Discipline

Two Day Suspension

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 engaged in unprofessional behavior towards the Complainant, that he failed to de-escalate the incident, and that he used prohibited force.

ADMINISTRATIVE NOTE:

In its initial draft of this DCM, OPA recommended that Allegation #3, which concerned the potential use of prohibited force, be Sustained. At the discipline meeting, OPA discussed this finding with the chain of command and together the decision was made that this determination be reversed. OPA now instead recommends that this allegation be Not Sustained – Training Referral.

SUMMARY OF INVESTIGATION:

Officers, including Named Employee #1 (NE#1) were investigating a report of a metal pipe that was thrown at a vehicle. While doing so, they contacted the Complainant and a female who were sitting in an alcove. The Complainant and the other individual provided their names and other identifying information. While there was insufficient evidence to determine whether the Complainant was the suspect they were seeking, the officers determined that he had an open warrant. He was placed under arrest. The Complainant was walked to the front of a patrol vehicle where he was searched incident to arrest. The Complainant later alleged that he was subjected to excessive force when he was pushed by NE#1 and "slammed" against the patrol vehicle. NE#1's supervisor screened this incident with OPA and, as part of that screening review, OPA watched the Body Worn Video (BWV) for this incident. OPA identified several



potential violations of policy, including unprofessional behavior on NE#1's part, as well as the potential failure to de-escalate and the use of prohibited force. This investigation ensued.

As part of its investigation, OPA reviewed the BWV and the In-Car Video (ICV), which captured the entirety of NE#1's contact with the Complainant. OPA further interviewed NE#1. OPA tried to interview the Complainant; however, the Complainant did not respond to OPA's attempts to contact him.

During his OPA interview, NE#1 was shown the video of his interaction with the Complainant. He acknowledged that he engaged in unprofessional behavior. NE#1 explained that he was annoyed with the Complainant and responded to him accordingly. NE#1 said that he should not have told the Complainant what he thought of him and should have stayed quiet. NE#1 asserted that he did not escalate the Complainant but that he also did not de-escalate the situation. NE#1 denied using force to punish or retaliate against the Complainant. He stated that the force he used was not in response to the Complainant's statement but was due to the resistance the Complainant posed.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

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.*)

The BWV and ICV conclusively establish that NE#1 violated the Department's professionalism policy in multiple respects.

First, NE#1 made a number of statements that were derogatory, disrespectful, and contemptuous towards the Complainant. These statements included, but were not limited to, the following:

- In response to the Complainant telling the officers that he did not trust them with his things, sarcastically stating that the officers did not want any of the Complainant's "fine valuable merchandise."
- In response to the Complainant stating that he did not understand his Miranda warning, remarking: "I wouldn't think you would. It requires an IQ over two."
- Telling the Complainant to come up with his best insult and, after the Complainant called him a "faggot," stating: "Now you're projecting your inner feelings."
- Repeating the above statement at a later point of the interaction.
- Mocking the Complainant's statement that the officers could not charge him with a crime using a high-pitched voice.
- Mimicking the Complainant calling out for his girlfriend by stating: "Don't leave me."
- Repeating the Complainant's statement to the officers to not touch him while using a high-pitched, mocking voice.



Second, NE#1's statements resulted in improperly escalating the interaction between him and the Complainant and, as discussed below, directly contributed to the ultimate need to use force.

Third, NE#1's conduct, demeanor, and statements served to undermine public trust and confidence in himself, other officers, and the Department as a whole. His comments served no legitimate law enforcement purpose and, to the contrary, were petty and inappropriate. NE#1 fell well below the Department's and the community's expectations for his conduct as a public servant.

For these reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #2

8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

"De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance." (SPD Policy 8.100-POL-1.)

The policy further instructs that: "When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution." (*Id.*) Officers are also required, "when time and circumstances permit," to "consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors" such as "mental impairment...drug interaction...[and/or] behavioral crisis." (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident "when deciding which tactical options are the most appropriate to bring the situation to a safe resolution." (*Id.*)

The policy gives several examples of de-escalation, which include: mitigating the immediacy of the threat to give officers time to use extra resources and to call more officers or specialty units; and increasing the number of officers on scene to thus increase the ability to use less force. (*Id.*) Other examples of de-escalation include, but are not limited to:

- Placing barriers between an uncooperative subject and officers;
- Containing the threat;
- Decreasing exposure to the potential threat by using distance, cover and concealment;
- Avoidance of physical confrontation unless immediately necessary to protect someone or stop dangerous behavior;
- Using verbal techniques, such as "Listen and Explain with Equity and Dignity" (LEED) to calm an agitated subject and promote rational decision making;
- Calling extra resources, including CIT officers and officers equipped with less-lethal tools; and
- Using "any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject."



(*Id.*) De-escalation is inarguably a crucial component of the Department's obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department's policy and expectations.

Based on a review of the video, OPA concludes that NE#1 failed to comply with the Department's de-escalation policy. His repeated inappropriate statements, mocking tone, and rudeness caused the Complainant to react increasingly negatively. His conduct heightened tensions during the incident and he took no steps to slow the situation down or to minimize the eventuality that force would be used. To the contrary, his conduct increased the need to use force and, indeed, was the ultimate cause of force being used.

Given the above, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

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

The Complainant alleged that NE#1 subjected him to excessive force when he was slammed into the patrol vehicle. OPA further alleged that NE#1 may have used force on the Complainant while in front of the patrol vehicle that was purposed to punish or retaliate against him.

From OPA's review, there is insufficient evidence to establish that NE#1 purposefully pushed the Complainant into the patrol vehicle. The BWV and ICV indicated that, at the moment NE#1 was attempting to seat the Complainant into the rear seat, the Complainant began to push back against him and engaged in active physical resistance. NE#1 then moved him forward and down into the seat. The Complainant's momentum, which was mostly self-imposed, caused his head to make contact with the plastic divider. Notably, he continued to strike his own head on the divider during his time in custody. Given this, there is no basis to conclude that NE#1's actions in placing the Complainant into the rear of the patrol vehicle constituted force purposed to punish or retaliate against him.

Whether or not NE#1 used retaliatory force when standing in front of the patrol vehicle with the Complainant is a closer call for OPA. In the initial DCM for this case, OPA determined that the force was retaliatory. In reaching this finding, OPA noted that the force was used directly after the Complainant pushed back against NE#1 and that the Complainant's pushing back against NE#1 was based on NE#1 mocking him. OPA further found the ICV to be significant and, specifically, that it captured NE#1 glaring at the Complainant, biting down on his lip, and then pushing the Complainant.

At the discipline meeting, the chain of command raised the fact that, throughout the encounter, the Complainant repeatedly moved around and pushed back against NE#1. The chain of command further noted that the force used was directly responsive to the Complainant was not simply a push unrelated to any conduct on the Complainant's part or premised simply on statements the Complainant was making. In this respect, the chain of command did not feel that the conduct was provably retaliatory. While OPA continues to have concerns about NE#1's conduct and the force he used and maintains that he was unprofessional and failed to de-escalate, OPA finds that chain of command's position on this allegation to be convincing.



Accordingly, OPA reverses its conclusion that NE#1 engaged in force when prohibited and instead issues him the below Training Referral.

- **Training Referral:** NE#1's chain of command should review the video of this incident with him, explain why his conduct was wholly inappropriate, and inform him that whether or not he used retaliatory force was an extraordinarily close call. NE#1 should be told to avoid engaging in similar conduct in the future and that any such cases will be closely scrutinized by OPA. Lastly, NE#1 should receive training and further counseling deemed appropriate by his chain of command. The training and counseling should be documented, and this documentation should be maintained in an appropriate database.

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