



## ***CLOSED CASE SUMMARY***

ISSUED DATE: OCTOBER 7, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0082

### **Allegations of Misconduct & Director's Findings**

Named Employee #1

Allegation(s):		Director's Findings
# 1	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	Not Sustained (Unfounded)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 3	8.200 - Using Force 5. Deadly Force May Be Used to Prevent the Escape of a Fleeing Suspect Only When an Objectively Reasonable Officer Would Believe That it Is Necessary and [...]	Not Sustained (Management Action)

***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:**

Complainants alleged that the Named Employee failed to de-escalate and improperly used force when he rammed a subject fleeing on foot with his vehicle, causing injury.

### **ADMINISTRATIVE NOTE:**

As explained more fully below, OPA changed its finding for Allegation #2 from Sustained to Not Sustained – Lawful and Proper based on information provided by the Named Employee at his Loudermill and a re-review of the casefile. OPA also administratively changed the finding for Allegation #1 from Unfounded to Lawful and Proper, as the latter finding was more appropriate in OPA's re-assessment.

### **SUMMARY OF INCIDENT:**

On January 31, 2020, Named Employee #1 (NE#1), a sergeant with the SPD Gang Unit, was participating in a joint operation with federal law enforcement in Burien. At the time, NE#1 was in plain clothes and driving an unmarked vehicle loaned to him by federal authorities. Consequently, NE#1 was not equipped with either Body-Worn Video (BWV) or In-Car Video (ICV) during the incident, although many aspects of the incident were captured on the BWV of a patrol officer who was on the scene.



Late that evening, NE#1's unit received information about a suspect who had been involved in recent bank robberies. The information indicated that this individual, who is the Subject in this case, was believed to be in the Rainier Valley area driving a red Honda. The information that NE#1's unit received also indicated that the Subject was planning to rob another bank in the area. NE#1 and his team responded to the Rainier Valley area and quickly located a red Honda with a license plate matching the description they received in a Safeway parking lot. The officers observed the Subject exit the Honda and go inside the Safeway and subsequently, inside the attached Chase bank. When they saw the Subject enter the building, they called for uniformed Patrol officers to respond to the scene.

NE#1 arrived at the Safeway parking lot in his vehicle and parked in the northeast part of the parking lot. While he was arriving, he was updated over the radio that the Subject had contacted a bank teller inside the Chase and that the bank teller ran away from the Subject. This indicated to NE#1 and the team that the Subject was attempting a robbery. Shortly after, NE#1 saw an individual matching the Subject's wanted bulletin leave the building at a fast walk. The Subject had arrest warrants for armed robbery and unlawful possession of a firearm. NE#1, who was already familiar with the Subject from prior robberies, was aware based on those robberies as well as based on the bulletin and other investigations by the Gang Unit that the Subject was associated with weapons and had used weapons in prior robberies. However, NE#1 did not see the Subject carrying a weapon in the parking lot.

NE#1 observed the Subject jog out of the parking lot to the north. NE#1 followed in his unmarked vehicle, and observed the Subject run off of the street and between two nearby buildings. NE#1 continued to drive and turned north onto 34th Street, where he theorized the Subject would appear. At this time, an SPD patrol vehicle with lights and sirens activated passed NE#1's vehicle, and other patrol officers began to arrive in the area.

NE#1 observed the Subject emerge onto 34th Street. The Subject was running and wearing a white t-shirt. He also observed a uniformed patrol officer chasing the Subject on foot. At this time, NE#1 made the decision to use force to prevent the Subject from escaping. NE#1 accelerated his vehicle, striking the Subject with it and causing the Subject to roll up onto the hood and windshield of the vehicle before falling to the ground. After hitting the ground, the Subject attempted to stand and crawled to the side of the road. The uniformed officer and a member of NE#1's unit in plain clothes approached from the north and south and arrested the Subject. The uniformed officer's BWV recorded the incident from the time immediately before NE#1 struck the Subject with his vehicle, and the time that the officers arrested the Subject. No firearm was recovered when the Subject was arrested. Medics responded to provide first aid to the Subject and reported lacerations on the Subject's forehead.

Medics transported the Subject to Harborview Medical Center. His medical report stated that he had a forehead laceration which required stitches, as well as minor bruising to the brain which was expected to heal without further issues. The Subject reported "minimal" shoulder, back, and forehead pain. He was given ibuprofen and acetaminophen (non-prescription painkillers) and released for booking to King County Jail. The Subject was ultimately provided with counsel and, on advice of counsel, declined to speak to OPA. This complaint was filed by the Subject's brother and a member of the public.

SPD's Force Investigation Team (FIT) investigated the incident. FIT interviewed NE#1, during which NE#1 admitted that he intentionally rammed the Subject with his vehicle. He stated that he made the decision to use his vehicle as a ram based on the following information: NE#1's knowledge that the Subject committed recent bank robberies; his knowledge that the Subject was associated with a street gang; the ongoing retaliatory violence between that gang and another; NE#1's belief that the Subject may have been involved in gang shootings in addition to the bank robbery;



and his belief that the Subject had just committed a bank robbery, was likely armed, and was fleeing arrest. NE#1 stated that he knew the Subject had previously been arrested with a gun, leading him to believe that the Subject was also armed during this incident. NE#1 noted that, had he gotten out of his van to use his firearm, he would have risked shooting in the direction of the uniformed officer chasing the Subject as well as killing the Subject himself. FIT also examined the vehicle NE#1 was driving. The vehicle sustained minor cosmetic damage consistent with striking a person. The vehicle's onboard data recorder did not register the speed NE#1 was driving when he struck the Subject.

OPA interviewed NE#1. NE#1 is a sergeant in the Gang Unit with approximately 34 years of experience. NE#1 described the incident consistent with the facts described above. He stated that after arriving at the Safeway parking lot, he observed the Subject leaving the building at a jog and recognized him as the individual suspected of robbing banks. Because NE#1 was in plain clothes and alone, he did not think it prudent to get out of his vehicle and try to physically detain the Subject. NE#1 explained that SPD training dictates that felony stops of this type should be made by multiple uniformed officers to ensure safety and control of the scene. He said that, because he believed the Subject to be armed, he did not believe it safe to contact the Subject alone.

NE#1 described his decision-making prior to ramming the Subject with his vehicle. He stated that he first became aware that the Subject was being chased by Patrol when he saw the Subject run onto 34th Street, pursued by a uniformed officer. NE#1 said that he made the decision to use force when he saw the Subject running away from the officer. He said that he assumed, based on information about the Subject's prior bank robberies during which he had a weapon, that the Subject was armed during this robbery as well. As a result, NE#1 believed that allowing the Subject to escape would create a threat to the public.

When asked directly whether he intended to hit the Subject, NE#1 said that he did. He stated that he intended to hit the Subject with his vehicle to stop him from escaping, and that he did not intend to kill the Subject. NE#1 said that he used his vehicle as an improvised weapon consistent with SPD policies. OPA notes that SPD Policy 8.300-POL-6(1) governs the use of a vehicle as a ram, while SPD Policy 8.300(1) governs improvised weapons. Neither policy expressly authorizes use of a vehicle in this manner, but both policies imply that use of a vehicle in the manner NE#1 did is not a trained tactic and is permitted only in exigent circumstances. During his interview, NE#1 stated that he believed exigency existed in this incident due to the risk that the Subject presented a risk to the public given his prior acts.

NE#1 said that he did not try to speak to the Subject prior to using his vehicle to ram him, either to warn the Subject or to tell him to stop. He believed, but was not certain, that the uniformed officer chasing the Subject told the Subject to stop and identified himself as an officer. NE#1 said that at the time, there was no practical way for him to speak to the Subject or otherwise signal for him to stop. The vehicle he was driving lacked lights, sirens, or a public address system of the type present in SPD patrol vehicles, and given the incident occurred during the hours of darkness he could not signal using gestures. NE#1 said that he could have honked his horn, but that he did not believe that honking would have clearly communicated anything to de-escalate the situation and that based on his experience, an individual fleeing a felony would not likely respond to a honked car horn. As such, NE#1 did not believe that he had any opportunity to de-escalate the situation without using force.

NE#1 stated that he did not believe it would have been safe to try to go hands-on with the Subject for many of the same reasons it would not have been practical to do so in the Safeway parking lot. Similarly, because he was in plain clothes, NE#1 said that exiting his vehicle and using his firearm would not have been safe or prudent. NE#1 explained that uniformed SPD officers including the one chasing the Subject would have been in his line of fire, and would not



have had any way to immediately identify him (NE#1) as a law enforcement officer since he was not wearing a uniform. Using his firearm thus risked creating a situation where officers began firing at each other with the Subject between them. Consequently, NE#1 believed that he did not have any force tools available to him besides using his vehicle to strike the Subject.

In describing the force he used, NE#1 said that he accelerated from a near-stop until he struck the Subject with his vehicle, at which point he braked. After he struck the Subject NE#1 used no more force. NE#1 estimated that he was traveling approximately 5 miles-per-hour prior to accelerating. Neither NE#1 nor the FIT investigation were able to determine the speed of NE#1's vehicle at the moment of impact. NE#1 did not recall the Subject becoming airborne because of the impact and said that the Subject rolled onto his hood before falling to the ground. NE#1 stated that he saw the Subject attempting to stand and move, so he exited his vehicle with his firearm. At that point, the other officers took the Subject into custody. The BWV of the arresting officer confirms that NE#1 struck the Subject with his vehicle but does not clearly show how far the Subject traveled before falling to the ground. BWV also shows that the Subject appeared stunned but mobile after being struck. The Subject was taken into custody without incident.

NE#1 stated that the amount of force he used, as well as his decision to use his vehicle as a weapon, created the potential that the Subject would be killed and thus rose to the level of deadly force. NE#1 described his understanding of SPD's deadly force policy to permit deadly force where he had probable cause to believe a crime was being committed which created a risk of death or substantial bodily harm, or where the Subject's escape would cause "extreme risk" to the public. NE#1 stated that he believed the force he used to be reasonable, necessary, and proportional under the circumstances.

When asked whether he could have held back and allowed uniformed patrol or other resources to apprehend the Subject instead of using his vehicle, NE#1 said that in his opinion, the Subject posed an imminent threat to the public necessitating police action. NE#1 theorized that had he allowed the Subject to continue fleeing, the Subject might have taken a member of the public hostage or otherwise created an imminent danger. NE#1 also explained that based on his experience in the Gang Unit, he was familiar with the Subject as well as the gang the Subject was believed to be associated with. The gang was engaged in ongoing retaliatory violence (a "gang war") with another in the South Seattle area. The Gang Unit had responded to prior incidents from which "hundreds" of shell casings were recovered. NE#1 stated that these incidents formed part of the basis for his belief that the Subject could pose an imminent danger if allowed to escape.

Follow up investigation revealed that the Subject was not armed during the incident. While he appeared to imply to the bank teller that he was armed when he passed the teller a note, he did not display a firearm in the bank. As discussed below, OPA later determined that NE#1 was, in fact, monitoring the radio at the time and that he would have heard the radio transmission concerning the Subject implying a weapon while engaged in the robbery.

#### **ANALYSIS AND CONCLUSIONS:**

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

***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)

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.” (SPD Policy 8.100-POL-1) 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.

(*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.

OPA finds that NE#1 did not violate the de-escalation policy. Under the circumstances, attempts to communicate with the Subject were clearly impractical, and using time, distance, and shielding would not have served to reduce the need for force while still accomplishing the law-enforcement objective of arresting the Subject.

OPA has some concerns with NE#1 not appearing to fully evaluate whether by standing off and allowing uniformed officers to arrest the Subject would have led to the same result with less force. Arguably, the significant and growing SPD presence at the scene of the incident would have allowed for patrol officers to use less-lethal tools to achieve the same result that NE#1 did through the application of potentially deadly force.

However, the de-escalation policy expressly states that it is not a bar to enforcing the law. When looking at this incident in its totality, OPA finds that NE#1 evaluated a variety of de-escalation tactics and determined that they were not practical based on the circumstances. While the ultimate use of a vehicle as a force tool may not necessarily have



been ideal, this does not cause his de-escalation to be infirm. For these reasons, OPA recommends 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 1. Use of Force: When Authorized**

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary, and proportional. Officers shall only use “objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective.” 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 8.050.) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative to the use of force appeared to exist” and “the amount of force used was reasonable to effect the lawful purpose intended.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

In the initial DCM for this case, OPA found that NE#1’s use of force to apprehend the subject was unreasonable because, in OPA’s opinion, “he lacked a basis to believe that the Subject was in fact armed or posed an imminent threat to any person.” OPA reasoned that, “while significant evidence existed that the Subject had previously engaged in violent acts while armed, during the incident in question, NE#1 would have had no way of knowing whether the Subject did or did not possess a weapon.”

In reaching this finding and particularly the determination that NE#1 did not know whether the Subject was armed at that time, OPA relied heavily on NE#1’s OPA interview in which he referenced monitoring the radio but did not detail hearing ongoing and contemporaneous updates concerning the Subject having a weapon – implied or actual. OPA notes that NE#1 was similarly not explicit at his FIT interview concerning whether he heard over the radio the information about the Subject “implying” that he was armed doing the bank robbery.

As such, OPA recommended that the allegation be Sustained, and the case proceeded before the Chief of Police at a Loudermill hearing. At that hearing, NE#1 expressly informed the Chief of Police, OPA, and his chain of command that he was actively monitoring radio and that he was aware of all of the ongoing updates, including the information about the Subject implying that he had a weapon during the robbery. He said that this, coupled with the other information known about the Subject (his prior possession of firearms, prior similar crimes, and gang affiliation) led him to believe that it was very likely that the Subject was armed. This collectively informed his decision to use force. He opined that the force was, thus, reasonable, necessary, and proportional under the circumstances. At the conclusion of the Loudermill, the Chief, OPA, and the Chain of Command agreed that OPA should re-review the case given the fuller information provided by NE#1.

OPA again examined the FIT file and other documentation to assess the credibility of NE#1’s Loudermill statement. From reviewing various information (most notably a report generated by a Detective, the FIT report, and NE#1’s FIT interview), it is clear that there were radio transmissions concerning the Subject’s conduct and the likelihood that he was armed. There is also evidence indicating that NE#1 was, in fact, monitoring the radio – even if he did not clarify during his interviews that he heard the specific transmission concerning a possible weapon. However, that he had his





radio on and was actively monitoring what was happening indicates, in OPA's perspective, that he would have heard the transmission concerning the firearm. This, coupled with the statement given by NE#1 at his Loudermill – which OPA deemed credible – convinces OPA that he had this information when he decided to use force.

With that conclusion being reached, OPA believes it appropriate to reconsider the initial finding that NE#1 violated SPD policy. As discussed above, as he knew that the Subject was potentially armed and because he reasonably believed based on his knowledge of the Subject that the weapon could be a firearm, he appropriately determined that the Subject posed an imminent threat. As such, the use of force – even deadly force – to stop that threat would have been justified under policy.

For these reasons, OPA now recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

***8.200 - Using Force 5. Deadly Force May Be Used to Prevent the Escape of a Fleeing Suspect Only When an Objectively Reasonable Officer Would Believe That it Is Necessary and [...]***

SPD Policy 8.200-POL-5 concerns the use of deadly force on a fleeing suspect. The policy states the following: “Deadly force may be used to prevent the escape of a fleeing suspect only when an objectively reasonable officer would believe that it is necessary and that there is probable cause” to meet three elements: (1) “The suspect has committed or is in the process of committing a felony involving the infliction or threatened infliction of serious physical injury or death”; (2) “The escape of the suspect would pose an imminent danger of death or serious physical injury to the officer or another person unless the suspect is apprehended without delay”; and (3) “The officer has given a verbal warning to the suspect, if time, safety, and circumstances permit.”

While OPA concludes that NE#1's use of force did not violate policy, OPA remains concerned with the use of a vehicle as an impact weapon and the lack of clear policies governing this. Specifically, OPA finds that SPD policies are unclear as to whether use of a vehicle as an impact weapon against a suspect fleeing on foot is permissible, and if so, what circumstances would support that use. As a result, OPA believes that a Management Action Recommendation is appropriate to clarify the applicable policies.

SPD Policy 8.300-POL-6 governs vehicle-related force tactics. That policy appears to contemplate the use of a vehicle as a weapon against other vehicles, not against suspects fleeing on foot. While SPD Policy 8.300-POL-6(1) states that “ramming is an untrained tactic permitted only in exigent circumstances,” this statement occurs in the context of a broader policy related to PIT maneuvers and stop sticks, which are both used to end vehicle pursuits. Read in the context of the whole policy, the reference to ramming clearly reflects a policy judgment that ramming techniques other than the PIT maneuver, when used to end vehicle pursuits, must be supported by some exigency.

Likewise, OPA finds that SPD Policy 8.300-POL-6(2) provides little useful information as to when use of a vehicle as a force tool rises to the level of deadly force. That policy states only that some vehicle applications may constitute deadly force and incorporates 8.200-POL-5. 8.200-POL-5 does not reference use of vehicles as force tools against a person's body.



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OPA finds that use of a vehicle on a person's body as an impact weapon is materially different than using a vehicle as an impact weapon against another vehicle. However, as written, policy does not so differentiate. As a result, OPA makes the following Management Action Recommendation.

- **Management Action:** OPA recommends that SPD clarify the application of SPD Policy 8.300-POL-6 to use of a vehicle as an impact weapon against a person's body. In so doing, SPD should also ensure that SPD Policy 8.200-POL-5, governing deadly force against fleeing suspects, is consistent with the new policy 8.300-POL-6. SPD should update relevant trainings to ensure that officers are familiar with the new policies. While ultimately within the Department's prerogative, OPA suggests that SPD consider completely prohibiting the use of a vehicle in this manner.

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