



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 2, 2018

CASE NUMBER: 2017OPA-0999

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 (Inconclusive)

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	Sustained

Imposed Discipline

Written Reprimand

Named Employee #3

Allegation(s):		Director’s Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations	Not Sustained (Training Referral)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

It was alleged that the Named Employee #1 used excessive force, and that Named Employee #2 and Named Employee #3 failed to report the excessive force allegation as required by policy.

ADMINISTRATIVE NOTE:

I initially recommended that the allegation that Named Employee #3 (NE#3) failed to report a complaint of misconduct be sustained. Specifically, I found that NE#3, who was an acting sergeant on that date, received information that, in the totality of the circumstances, indicated that the Complainant was making an excessive force complaint. Relevant to my initial finding was the interview of the Complainant that N#3 conducted and that was captured on his Body Worn Video (BWV). In sustaining the allegation, my reasoning was as follows:

With regard to this allegation, the question before me is whether a reasonable officer in NE#3’s place should have known that the Complainant was making an allegation of excessive force that NE#3 was required to report. At his OPA interview, NE#3 stated that the Complainant’s description of the incident and associated statements did not, in NE#3’s mind, “trigger” an excessive force complaint. (*Id.*) Based on my review of the record, and applying a preponderance of the evidence standard, I find that a reasonable



officer would have interpreted the Complainant as making an allegation of excessive force and would have reported that allegation to a supervisor and/or OPA. As such, I find that NE#3 was obligated to report or, at the very least, document, the Complainant's statements. This was the case even if he believed the force was not excessive. However, I note that NE#3 did not witness the force used by NE#1 (see NE#3 Statement, General Offense Report), and it is unclear what basis he could have for such a belief.

At the discipline meeting in this matter, NE#3's chain of command expressed their disagreement with my recommendation concerning this allegation. Specifically, the chain of command did not believe that the allegation of excessive force was clearly stated, pointed to the fact that the Complainant backed off his account on several occasions, and identified that NE#3 was a fairly inexperienced acting sergeant at the time. The chain of command contended that re-training and counseling, rather than a sustained finding and discipline, was the more appropriate result for this matter, which they perceived to be a mistake rather than misconduct. The chain of command did not object to my recommendation concerning the other sustained allegation in this matter against Named Employee #2 (NE#2).

After consideration, I agree with the chain of command's position and reverse my initial recommended finding. I now recommend, as detailed more fully below, that NE#3 instead receive a training referral. This Amended DCM is accordingly issued.

Lastly, while not necessarily germane to any of my findings in this case, I note that I was somewhat concerned by interactions that a witness officer in this case had with the Complainant. At one point when the Complainant was speaking to NE#3, the witness officer approached him and engaged him in conversation, which was captured on BWV. The witness officer, who was holding a baggie of narcotics in his hand, told the Complainant that they had taken the drugs off of the Complainant and minimized the force used (even though that officer later told OPA that he did not actually witness the force). This, in my opinion, later influenced the substance of the Complainant's interview with NE#3. I suggest that the witness officer's chain of command address this issue, perhaps in a roll call, as such conduct can improperly sway witnesses and affect the quality of and community trust in Department use of force investigations.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.200 - Using Force 1. Use of Force: When Authorized

Named Employee #1 (NE#1) was part of a team conducting a narcotics operation in the vicinity of Third Avenue and Pike Street. The officers observed what appeared to be a narcotics sale engaged in by the subject. NE#1 and the witness officer made contact with the subject and attempted to place him under arrest. The officers reported that the Complainant resisted their attempts to do so.

The witness officer recalled struggling with the subject and being unable to control his body or to handcuff him. The witness officer stated that he, the subject and NE#1 fell to the ground. The witness officer indicated that he and NE#1 were ultimately able control and handcuff the subject after dealing with significant resistance. The witness officer did not report seeing NE#1 strike the subject.



NE#1 similarly stated that he was involved in a prolonged altercation with the subject during which the subject was actively resisting. NE#1 indicated that, at one point, he had head control of the subject, but that he lost that control and that the subject wrapped his arms around NE#1's waist, just under NE#1's duty belt. NE#1 reported being afraid that the subject was going to push him backwards onto the pavement and was concerned that the subject's hand was near NE#1's gun belt. NE#1 also stated that his leg was in pain from being pushed back into the pavement. NE#1 indicated that he then "hammer punched" the subject three times in the head with a closed fist. After that force, he and the witness officer were able to gain control of the subject. NE#1 reported that he never saw the subject lose consciousness until Named Employee #2 (NE#2) arrived on the scene.

The subject never made any statements concerning this incident, even though SPD's Force Investigation Team attempted to interview him twice. The force was witnessed by the Complainant who made a statement to both NE#2 and Named Employee #3 (NE#3). The substance of that statement is discussed more fully below but, as a general matter, the gravamen was that the subject appeared to be compliant and the force was excessive.

While the struggle between the officers and the subject was recorded on Body Worn Video (BWV), the strikes were not captured. Similarly, while much of the altercation was recorded on private party video, the video is of a low quality and I could not discern the moment when the strikes occurred.

NE#1 argued that the strikes were justified on the basis that he felt that he was in physical danger based on the subject's resistance. As stated below, however, the Complainant asserted that the subject appeared to be complying from his perspective and that he further believed the force to be "excessive" and not "deserved." The witness officer did not observe the force and, thus, could not opine one way or the other. While the video clearly does not support the contention that the subject was compliant, it does not provide me with sufficient evidence to determine whether, at the time the strikes were utilized, the force was reasonable, necessary and proportional under the circumstances.

As such, while the subject was actively resisting arrest and while the officers were absolutely having difficulty getting the subject under control, I cannot conclusively say whether the three "hammer" strikes to the head were consistent with policy. Even though I tend to believe that the force was within policy, I cannot make this determination when applying a preponderance of the evidence standard. Accordingly, I recommend that this allegation be Not Sustained – Inconclusive.

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

Named Employee #2 - Allegation #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

The Complainant observed the force utilized against the subject. He was accordingly interviewed by both NE#2 and NE#3. During his interview with NE#2, the Complainant alleged that the force was "excessive." This comment was captured by NE#2's ICV. (See NE#2 ICV, at 22:06:56; see also Administrative Lieutenant Video Review, at p. 3; Administrative Lieutenant Use of Force Review, at pp. 5, 8.)

SPD Policy 5.001-POL-5 requires supervisors to report complaints of serious misconduct to OPA. Included in the



category of serious misconduct is an allegation of excessive force. This is literally the exact allegation that was made to NE#2. However, NE#2 did not note this in either his force review, which would have been reviewed and approved by his chain of command, or report this allegation to OPA. He was required to do so and this failure was in violation of policy.

As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #3 - Allegation #1

5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations

As detailed above, NE#3, who was assigned as an acting sergeant during this incident, also interviewed the Complainant. During his interview with the Complainant, the Complainant recounted the force he had observed. On two at least two separate occasions during the interview, the Complainant stated that it appeared to him that the subject was complying. The Complainant then described, on several occasions, that an officer struck the subject three times in the head. The Complainant lastly asserted, with regard to the strikes, that he did not “think that was deserved.” The entirety of this interview was recorded on NE#3’s BWV.

SPD Policy 5.002-POL-6 requires that SPD employees report alleged violations of misconduct, which include allegations of excessive force. Under a technical reading of the policy, such allegations must be reported to both a supervisor and OPA. However, the Department trains employees that they only need to report to a supervisor or OPA.

While, I believe it to be clear that the Complainant was making an allegation of excessive force, NE#3 and his chain of command believed it to be less so. Even if I disagree, I understand their position in this regard. As such, and for the reasons detailed above, I recommend that NE#3 receive a training referral.

- **Training Referral:** NE#3 should receive additional training concerning his obligation to report allegations of misconduct. NE#3 should be instructed to err on the side of caution and report complaints similar to what the Complainant alleged in this case. Notably, I believe that a reasonable officer, such as NE#3, should have known that when a person states that force appeared to not have been “deserved,” this claim should be reported as an allegation of excessive force. Lastly, I found NE#3’s interview of the Complainant to have been less than optimal. NE#3 repeatedly interrupted the Complainant and asked leading questions. NE#3, instead, should have allowed the Complainant to fully state what he observed and then asked non-leading follow-up questions. It is unclear to me whether sergeants are trained by the Department concerning how to interview witnesses to force. If not, they should be. Either way, NE#3 should be counseled by his chain of command regarding his interview of the Complainant and given tips and advice on how to conduct less leading and more productive interviews in the future. This re-training and associated counseling should be memorialized in a PAS entry.

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