



CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 25, 2021

FROM: DIRECTOR ANDREW MYERBERG
 OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0538

Allegations of Misconduct & Director’s Findings

Named Employee #1

| Allegation(s): | | Director’s Findings |
|----------------|--|-----------------------------------|
| # 1 | 8.400-POL-1 Use of Force Reporting and Investigation | Not Sustained (Training Referral) |

Named Employee #2

| 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 | 6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest | Not Sustained (Lawful and Proper) |

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 #2 may have used excessive and prohibited force when arresting the Complainant. It was further alleged that the arrest of the Complainant may not have been supported by probable cause. Lastly, it was alleged that Named Employee #1 failed to ensure that the use of force was properly investigated.

ADMINISTRATIVE NOTE:

This case has two different 180-day deadlines as the Named Employees belong to different bargaining units. This case is submitted prior to the expiration of the earlier deadline – January 28, 2021 – that governs the allegations against Named Employee #2.

SUMMARY OF INVESTIGATION:

On July 2, 2020, Named Employee #2 (NE#2) and Witness Officer #1 (WO#1) were assigned to prevent demonstrators from entering Cal Anderson Park. Pursuant to an Executive Order, the park had been closed. The order expressly directed that: “Persons who refuse or intentionally fail to obey this closure order to move and disperse from the area will be placed under arrest.” That day, multiple verbal orders were given to demonstrators not to enter the park. Officers set up police tape, and NE#2 and WO#1 stationed themselves in front of demonstrators. One demonstrator, who was specifically warned not to enter the park, did so anyway. Based on the demonstrator’s non-compliance with the order, the officers made the decision to together effectuate the



demonstrator's arrest. While doing so, another demonstrator – the Complainant – was recorded on video pushing NE#2 from behind. At that time, NE#2 believed that he had established probable cause to arrest the Complainant for felony assault. NE#2 observed the Complainant running away and chased after him. NE#2 caught up to the Complainant and grabbed him, tackling him to the pavement. NE#2 called out to another officer – Witness Officer #2 (WO#2) – and asked for his assistance in making the arrest.

The arrest of the Complainant was captured both on Body Worn Video (BWV) and third-party video. The collective video showed the Complainant faced forward on the ground and NE#2 above him and to the side. At one point, NE#2's knee/shin area appeared to make contact with the back of the Complainant's neck. The Complainant had his neck raised at that time and the contact appeared to last just over a second. NE#2 did not press down with his knee or appear to obstruct the Complainant's breathing in any respect. During the course of the arrest, both the Complainant and other individuals in the crowd told NE#2 to get his knee off of the Complainant's neck. However, the video evidence indicated that, aside from the roughly one second described above, NE#2's knee remained on the Complainant's upper back or on the ground. Based on a review of the video, NE#2 used no other force on the Complainant.

The Complainant and other community members later alleged that NE#2 subjected him to excessive force, including that NE#2 used an improper neck restraint. It was also alleged that the Complainant's arrest was not legally justified.

During its investigation, OPA determined that NE#2 did not complete a use of force report concerning his takedown and handcuffing of the Complainant. Based on a review of the BWV, OPA identified that NE#2 screened the force he used with both a Sergeant and a Lieutenant – Named Employee #1 (NE#1). The BWV indicated that NE#2 told the Sergeant that he "chased" the Complainant down. NE#2 stated to the Sergeant: "I don't know if it's a hard take down or not. I took him to the ground. I don't know if he has injuries or not." NE#1 walked over, and she was informed that the Complainant had pushed NE#2. She screened the Complainant's arrest for assault. She asked about the force used. He again stated that he chased the Complainant down. NE#1 asked NE#2 if there was a use of force and queried whether it was "just a take down." NE#2 replied: "I don't know if it was a hard take down, he's not injured."

As part of its investigation, OPA interviewed NE#1, she did not independently recall the incident. She stated that she was assigned as the Prisoner Processing Lieutenant. She said that her expectation was that the Sergeant would more fully flesh out the force used. She said that she was focused on the arrest and, after that, she moved on to other screenings. After watching the video, she agreed that the force used by NE#2 was at least Type I and should have been documented. She felt that the responsibility for ensuring that the force was documented was ultimately held by the Sergeant.

OPA also interviewed NE#2. He stated that, on the date in question, the exclusion order applied and that demonstrators were given multiple verbal directions not to enter the park. However, demonstrators tore down the police tape and acted in a manner that suggested to NE#2 their interest in sparking a conflict with the police. One demonstrator in particular, who had received a number of warnings not to enter the park, did so anyway. Based on this, the officers made the decision to arrest this demonstrator. While attempting to do so, NE#2 was pushed from behind by another individual. NE#2 identified the Complainant as the person who assaulted him. The Complainant ran away, and NE#2 chased him. NE#2 caught up to the Complainant and grabbed onto him. NE#2's momentum caused them both to fall down to the ground. NE#2 stated that the Complainant did not appear to be injured and did not complain of injury.



NE#2 said that, once the Complainant was on the ground, he called for WO#2 to assist him. NE#2 placed his knee at the top of the Complainant's back in order to keep him on the ground. NE#2 said that, for a brief instant, his knee inadvertently touched the back of the Complainant's neck. NE#2 said that he put no pressure on the Complainant's neck and that the Complainant's head was raised at the time. NE#2 denied that this constituted a neck restraint as contemplated by policy. NE#2 asserted that he had a lawful basis to arrest the Complainant for assault. He further believed that the force he used to take the Complainant into custody was appropriate under the circumstances.

OPA also interviewed WO#2. He observed NE#2 take the Complainant down to the ground. It did not look like a hard takedown to WO#2. He did not see NE#2 place his knee on the Complainant's neck; however, WO#2 did hear people in the crowd mentioning that. From what he saw, WO#2 felt the force used by NE#2 was consistent with policy.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.400-POL-1 Use of Force Reporting and Investigation

SPD Policy 8.400-POL-1 requires that officers report all uses of force except de minimis force. Inherent in this policy is the requirement that supervisors ensure that all reportable force – Type I through Type III – is properly classified, investigated, and documented.

As indicated above, NE#2's force was not ultimately investigated or documented in a use of force report. This was the case despite both a Sergeant and NE#1 being aware that NE#2 had taken the Complainant down to the concrete and even though NE#2 was equivocal as to whether or not it was a hard takedown. Based on a review of the video – and as NE#1 acknowledged at her OPA interview, the takedown was at least a Type I use of force. As such, it was required to be investigated.

The question for OPA is who ultimately bears responsibility for this failure. At the end of the day, SPD policy requires that the Sergeant make the initial determination as to the level of force. The Sergeant is also required to ensure that the force is investigated and documented. Here the Sergeant did not do so.

In OPA's estimation, NE#1's questioning of NE#2 concerning the level of force used may have confused the Sergeant into thinking that she reached an affirmative decision that no investigation was required. However, NE#1, as the Prisoner Processing Lieutenant, was not responsible for making this call – the Sergeant was. That being said, OPA believes that NE#1 could have and should have followed up with the Sergeant to ensure that the force was reported. OPA finds that her failure to do so warrants retraining.

- **Training Referral:** NE#1's chain of command should debrief this incident with her and should specifically discuss her failure to verify with the Sergeant that the force was properly classified, investigated, and documented. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #2 - Allegation #1



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

The Complainant alleged that NE#2 subjected him to excessive force.

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.*)

In the context of this allegation, OPA evaluates the takedown and the placement of the knee on the Complainant’s upper back during the arrest. The knee contact with the Complainant’s neck is discussed in Allegation #2, below.

The video indicated that the Complainant pushed NE#2 as he was performing his law enforcement duties. As noted in Allegation #3, this established probable cause to arrest the Complainant. When NE#2 turned to locate the Complainant, the Complainant ran away. NE#2 chased him, grabbed onto him, and caused them to jointly fall forward onto the ground. Once on the ground, NE#2 positioned his knee on the Complainant’s upper back and used it to hold the Complainant down and to keep him in place. NE#2 then handcuffed the Complainant, stood him up, and walked him away from the scene.

With regard to the takedown, it was reasonable and necessary to effectuate the Complainant’s arrest. Again, at the time, the Complainant was running away and NE#2’s force options, other than a takedown, were limited. From OPA’s perspective, it is clear from the video that the takedown was largely the result of NE#2’s momentum when he lunged for the Complainant. OPA finds that this force was also proportional under the circumstances. While injury could have resulted from the takedown (it did not), the Complainant had already assaulted NE#2 and there was a law enforcement interest in taking him into custody.

OPA similarly finds that the low-level force used to control the Complainant while he was on the ground was also consistent with policy. Notably, NE#2 placed little weight on the Complainant, as was exemplified by the Complainant’s ability to lift his head completely off the ground and look around. In addition, once the Complainant was handcuffed, NE#2 lifted his knee off of him altogether and used no other physical force.

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

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

Named Employee #2 - Allegation #2

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

SPD Policy 8.200-POL-2 defines prohibited force. This allegation was classified for investigation based on the possibility that NE#2 engaged in a neck restraint with his knee.



OPA's review of the video conclusively indicated that the knee contact with the Complainant's neck was both de minimis and incidental. First, the contact consisted of NE#2's knee brushing the Complainant's neck for approximately one second. NE#2 did not place any weight on the Complainant's neck, as the Complainant held it up and off the ground at that time. There was no indication from the video that the momentary contact impacted the Complainant's breathing in any respect or placed him in any physical danger. Second, it is evident that the contact was inadvertent and unintentional. When coupled with the duration, this informs OPA's decision that it did not violate this policy.

In reaching this finding, it is instructive to compare this case to 2020OPA-0324, where OPA did find neck contact with a knee to violate policy. In that case, the officer pressed his knee against the side of an arrestee's neck and left it there for 13 seconds. The surrounding circumstances and duration of the neck contact in 2020OPA-0324 yielded the conclusion that it was inconsistent with policy. These same facts are not present here.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #3

6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed.

As discussed above, both the BWV and the third-party video conclusively established that, while NE#2 was trying to arrest a demonstrator, he was pushed by the Complainant. When the Complainant engaged in this behavior, he committed an assault. Accordingly, NE#2 had probable cause to take him into custody.

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

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