



## ***CLOSED CASE SUMMARY***

ISSUED DATE: JANUARY 22, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0489

### **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	8.200 - Using Force 1. Use of Force: When Authorized	Sustained
# 1	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	Not Sustained (Inconclusive)
# 3	8.400 - Use of Force Reporting an Investigation 3. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Following Any Use of Reportable Force, As Soon As Feasible	Sustained
# 4	8.400 – Use of Force Reporting an Investigation 1. Officer Shall Document in a Use of Force Report All Uses of force Except De Minimis Force	Sustained
# 5	15.180 - Primary Investigations 9. Involved Officers Shall Complete Statements for Felony Arrests	Not Sustained (Unfounded)
# 6	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Sustained

#### **Imposed Discipline**

Discipline Pending
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#### **Named Employee #3**

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 1	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	Not Sustained (Lawful and Proper)
# 3	8.400 - Use of Force Reporting an Investigation 3. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Following Any Use of Reportable Force, As Soon As Feasible	Not Sustained (Unfounded)
# 4	8.400 – Use of Force Reporting an Investigation 1. Officer Shall Document in a Use of Force Report All Uses of force Except De Minimis Force	Not Sustained (Unfounded)
# 5	15.180 - Primary Investigations 9. Involved Officers Shall Complete Statements for Felony Arrests	Not Sustained (Unfounded)



**Named Employee #4**

Allegation(s):		Director's Findings
# 1	6.010 - Arrests 6.010-TSK-1 Sergeant Screening and Approving An Arrest 3. Completes a Sergeant Arrest Screening Supplement	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:**

The Complainant alleged that he was subjected to excessive force by Named Employee #1, Named Employee #2, and Named Employee #3, and that these officers failed to de-escalate. OPA further alleged that Named Employee #2 and Named Employee #3 failed to report and document force and failed to complete a felony statement, as well as that Named Employee #2 made unprofessional statements. Lastly, OPA alleged that Named Employee #4 may have failed to complete a required report.

**SUMMARY OF INVESTIGATION:**

Officers, including the Named Employees, were in the confines of the East Precinct responding to ongoing demonstration activity. The officers formed a line across the street and were faced by a large number of demonstrators. At one point, an order was given to the officers by a supervisor to move the demonstrators back. The officers stepped forward with their batons extended, while stating: "move back." The officers approached the demonstrators, who remained where they were standing. The officers moved directly up to the demonstrators, extended their batons, and pushed the demonstrators back. The officers continued to repeat this.

A review of Body Worn Video (BWV) and third-party video posted on Twitter indicated that, while this was occurring, a physical altercation broke out on the line. It centered around two individuals who had bicycles, one of whom is the Complainant in this case. The video showed an unidentified officer – referred to here as Unidentified Officer #1 (UO#1) – move the other bicyclist – who was to the Complainant's right – back. Officers, including Named Employee #3 (NE#3), simultaneously pushed the Complainant back. UO#1's shield made contact with the other bicyclist and he pushed back against it. The other bicyclist moved back temporarily and then advanced towards the line and quickly moved his body in the direction of the officer who had pushed him. While doing so, the Complainant gesticulated with his left hand, which was raised in the air. He was holding his bicycle with his left hand. The Complainant, who remained to the right of the other bicyclist, also waved his left hand while holding onto his bicycle with his right hand. The other bicyclist's actions caused UO#1 to recoil. UO#1 pushed forward towards the other bicyclist with a shield raised. Other officers, including Named Employee #1 (NE#1), Named Employee #2 (NE#2), and NE#3 converged on both the other bicyclist and the Complainant, eventually pulling both to the ground.

NE#1 and NE#2 both used force on the Complainant while he was on the ground. Neither officers' BWV showed the extent and nature of their force given the close range. BWV from a witness officer showed portions of the force, including NE#2 striking the Complainant's leg area multiple times. From OPA's perspective, NE#1's force was not fully shown on the video, though it appeared that he did strike the Complainant at least once. The witness officer's BWV showed the Complainant physically resisting, but his exact actions were unclear given the distance and the positioning of NE#1 and NE#2, which partially blocked the view of the Complainant.



NE#1 later reported striking the Complainant once in the back with a closed fist after observing the Complainant repeatedly kicking at officers in an apparent attempt to cause injury. NE#2 did not initially report using force but later acknowledged to OPA that he struck the Complainant's legs several times while the Complainant was on the ground. NE#2 stated that he did so based on the Complainant's refusal to turn onto his stomach.

The Complainant was ultimately arrested for assaulting a police officer. NE#1 wrote the report and documented seeing the Complainant strike an unidentified officer with his bicycle, causing that officer to move backwards. Neither NE#2 nor NE#3 wrote reports concerning the arrest. From a review of the BWV, OPA could not find any indication that the Complainant struck an officer with his bicycle. However, OPA also could not foreclose that NE#1 perceived this to be the case from his vantage point. As indicated above, UO#1 was not identified and did not provide a statement concerning this incident. Given the lack of a victim statement and clear video evidence of the alleged assault, this charge was later dismissed against the Complainant.

The Complainant filed this OPA complaint. He alleged that he was subjected to excessive force by NE#1 and NE#2 while on the ground. He also asserted that NE#3 pushed him back for no reason. He additionally contended that all of the officers failed to de-escalate. After reviewing the BWV, OPA added additional incident and force reporting allegations against NE#2 and NE#3, as well as a professionalism allegation against NE#2. Lastly, OPA alleged that a supervisor, Named Employee #4 (NE#4), failed to complete a Sergeant's Arrest Screening Report.

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

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

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

As indicated above, NE#1 asserted that he moved to take the Complainant into custody because he observed the Complainant assault another officer. He stated that he took the Complainant down to the ground and attempted to control his body and place him into handcuffs. NE#1 reported that the Complainant was physically resistive and started kicking at officers. NE#1 reported that he struck the Complainant once in the back area to prevent him from continuing to resist and kick. NE#1 said that, given the Complainant's behavior, the force he used was reasonable, necessary, and proportional. The Complainant, for his part, alleged that the force was excessive and that he was not engaged in behavior that would have warranted NE#1 punching him.

As a threshold matter and as discussed above, OPA could not determine whether the Complainant did, in fact, assault UO#1. If the Complainant did not do so and NE#1 was aware of this, his arrest would have been improper, and any force used to take him into custody would have been excessive. Unfortunately, this issue is inconclusive, primarily due to the fact that UO#1 was not identified and NE#1 was no longer employed by SPD at the time of this investigation and declined to be interviewed.

In addition, based on a review of the various video, the Complainant was clearly moving his body and, at one point, appeared to raise his leg. However, OPA could not clearly discern whether, at the time NE#1 struck him, the Complainant was actively kicking at officers. If he was, and presupposing that there was probable cause to arrest him in the first place, a punch to prevent that behavior would have been consistent with policy and with NE#1's training. On the other hand, if, as the Complainant asserted, he was not actively posing a threat to officers, the force would almost certainly have been improper.



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Ultimately, given the outstanding questions of fact outlined above, OPA concludes that whether NE#1 used excessive force is inconclusive and recommends that this allegation be Not Sustained.

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

**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 by repeatedly hitting him.

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 indicated above, NE#2 did not contemporaneously report the force he used. This prevented OPA from obtaining a clear perspective as to the facts NE#2 relied upon to justify the level and extent of force applied. When later interviewed by OPA, NE#2 provided the following description of the ongoing circumstances at the time force was used:

[A]nd so at that point in time, um, as far as I could remember, I was just trying to hold his legs down, hold the gentleman’s legs to the ground, and control his lower body so that other officers could place him into handcuffs, and like I said, as he was lying on his side, I was trying to—yell at him to get onto his stomach so that we could put him into handcuffs. So, and eventually he went to his side. Um, it was my—it was my thought that I pushed him to the ground with my right hand, so I reached around and grabbed onto his like uh, upper right thigh a couple of times. Uh, his jeans were extremely tight, and so I was just trying to grab ahold with my glove, which was slippery, and uh, trying to get ahold of his jeans, and then eventually he—he pushed over, face-down.

OPA asked NE#1 why he felt his force was warranted given the above and he stated: “Those strikes were to get him under control, and to get him onto his stomach...” Notably, NE#2 did not indicate that the Complainant was kicking him or presenting any threat of physical harm at the time of the force. Indeed, while the video is imperfect, OPA saw no clear evidence of such a threat.

SPD provides training to officers on the use of intermediate force – such as strikes – on a prone individual. The Department instructs officers that, depending on the individual’s conduct and the threat level posed – a higher amount of force may be appropriate. The training provides the examples of an individual trying to get up off of the ground, turning towards an officer, or grabbing hold of an officer as where intermediate force can be used. Inherent in all of those situations is a heightened risk of harm to an officer. Such a risk is not as evident where an individual is “turtled” or where an individual may be refusing to immediately roll over onto the stomach without presenting



other indicators of an intent to cause harm. Moreover, even where intermediate force is warranted, that force must still be reasonable, necessary, and proportional, and the officer needs to modulate force where appropriate.

Here, OPA finds that, even under NE#2's recitation of the facts and even assuming that there was a valid basis to arrest the Complainant, his force was inconsistent with his training and with policy. First, NE#2 did not recount that the Complainant posed an active threat of harm and solely pointed to his desire to get the Complainant to roll over. While physical force was permitted to effectuate this, an appropriate level of force would have been control holds, body weight and positioning, and/or a cross-face, not repeated strikes. Second, even if force was reasonable and necessary under the circumstances, OPA finds that the extent of force used – multiple strikes to the lower body of the Complainant – was not proportional given the lack of a clear threat of harm.

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

Recommended Finding: **Sustained**

**Named Employee #2 - 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.*)

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.

In evaluating whether NE#2 appropriately de-escalated prior to using force, OPA is stymied by its inability to conclusively determine whether the Complainant was actively engaged in assaultive behavior at the time. If he was, de-escalation would not have been required and NE#2 would have been permitted to immediately act. If he was not, there would not have been a legitimate basis to go hands-on with the Complainant absent first complying with the de-escalation policy.

Given the limitations of the video and this outstanding question, OPA recommends that this allegation be Not Sustained – Inconclusive.



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

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

***8.400 - Use of Force Reporting an Investigation 3. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Following Any Use of Reportable Force, As Soon As Feasible***

SPD Policy 8.400-POL-3 requires that officers who use reportable force – Type I through Type III – verbally notify a supervisor as soon as feasible. SPD Policy 8.400-POL-1 additionally requires that officers subsequently document that force in a use of force report.

NE#2 admittedly did not notify his supervisor of the force he used, which was clearly Type II and needed to be reported. He also did not document this force in a use of force report and, again, was required to have done so. NE#2 did not have an excuse for these failures, explaining that it was simply an oversight.

These policies are in place to ensure the thorough and critical review of force, which is a mandate under the Consent Decree, and which is essential to ensuring community trust and confidence in the Department. Not complying with these policies is simply unacceptable and not tolerated within the Department.

Accordingly, OPA recommends that this allegation and Allegation #4 both be Sustained.

Recommended Finding: **Sustained**

**Named Employee #2 - Allegation #4**

***8.400 – Use of Force Reporting an Investigation 1. Officer Shall Document in a Use of Force Report All Uses of force Except De Minimis Force***

For the same reasons as stated above (see Named Employee #2 – Allegation #3), OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

**Named Employee #2 - Allegation #5**

***15.180 - Primary Investigations 9. Involved Officers Shall Complete Statements for Felony Arrests***

SPD Policy 15.180-POL-9 requires that officers complete statements for felony arrests.

Both NE#2 and NE#3 stated that they did not initially generate statements because they did not know that the Complainant had been arrested for a felony. The officers indicated that they were not informed that evening by a supervisor that a statement was required. NE#3 told OPA that he was later asked by his supervisor to complete a statement and, even though he did not believe that he was involved in the arrest, he did so.

Ultimately, OPA does not believe that the officers violated policy by initially failing to complete statements. OPA finds it reasonable under the circumstances that they did not know that they were required to do so. Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against both NE#2 and NE#3.



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

**Named Employee #2 - Allegation #6**

***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 video of this incident captured NE#2 making the following statements during his interaction with the Complainant:

- Referring to the Complainant as: “You piece of shit” and “you little fuck.”
- Stating to the Complainant: “Get on your stomach...you motherfucker.”
- Telling the Complainant, after a question about the status of the Complainant’s bicycle: “Nobody gives a shit...you gave up that bicycle when you fucked with us!”

These comments were clearly unprofessionally as they included profanity directed as an insult, as well as were derogatory, disrespectful, and contemptuous. Regardless of the situation, these types of statements are impermissible and warranting of discipline. Accordingly, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

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

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

Based on a review of the BWV, NE#3’s force consisted of pushing the line of demonstrators, including the Complainant, back. At the time he did so, NE#3 was acting pursuant to direction from his chain of command to move the demonstrators.

OPA finds that NE#3’s force was not excessive and was permissible to further his stated law enforcement objective. NE#3 did not use any strikes or anything other than the low-level force needed to move the crowd back.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

**Named Employee #3 - 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***





Prior to the crowd being pushed away, multiple orders were given to demonstrators to move back. The front line of demonstrators did not comply with those directions and stood their ground. Given this, NE#3 was not required to engage in any additional de-escalation prior to moving forward and pushing demonstrators back with his baton.

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

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

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

***8.400 - Use of Force Reporting an Investigation 3. Officers, Including Witness Officers, Will Verbally Notify a Supervisor Following Any Use of Reportable Force, As Soon As Feasible***

Unlike NE#2, NE#3 did not use reportable force. His force consisted of pushing demonstrators back. In the protest context, such force is considered de minimis and is not required to be reported unless a demonstrator complains of injury or it appeared likely that the force could have caused injury.

As such, NE#3 did not violate policy when he failed to notify a supervisor of his force and when he did not document it in a use of force report. Accordingly, OPA recommends that this allegation and Allegation #4 be Not Sustained – Unfounded as against NE#3.

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

**Named Employee #3 - Allegation #4**

***8.400 – Use of Force Reporting an Investigation 1. Officer Shall Document in a Use of Force Report All Uses of force Except De Minimis Force***

For the same reasons as stated above (see Named Employee #3 – Allegation #3), OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #3 - Allegation #5**

***15.180 - Primary Investigations 9. Involved Officers Shall Complete Statements for Felony Arrests***

For the same reasons as stated above (see Named Employee #2 – Allegation #5), OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #4 - Allegation #1**

***6.010 - Arrests 6.010-TSK-1 Sergeant Screening and Approving An Arrest 3. Completes a Sergeant Arrest Screening Supplement***

SPD Policy 6.010-TSK-1(3) requires that a Sergeant who screens and approves an arrest completes a Sergeant Arrest Screening Supplement.





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OPA added this allegation against NE#4 because it did not initially appear that he completed an Arrest Screening Supplement for the Complainant's arrest. However, based on further information provided to OPA by NE#4, OPA was able to confirm that he did, in fact, do so. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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