Office of Police Ombudsman Commission

Special Meeting Agenda
June 14, 2022
5:30PM – 7:30PM
In-Person & Virtual WebEx Meeting

TIMES GIVEN ARE AN ESTIMATE AND ARE SUBJECT TO CHANGE

Commission Briefing Session:

5:30 – 5:35pm	1) Welcome to public	Commissioner Jasmin
	2) Agenda approval	Commissioner Jasmin
	3) Approve April 19th minutes	Commissioner Jasmin

Items:

5:36 – 6:15pm	1) Public forum	Citizens Signed Up to Speak
	2) OPO Monthly Reports for April & May 2022	Bart Logue
	3) OPO Closing Report	Bart Logue / Luvimae Omana

Commission Business:

6:16 – 7:30pm	1) Vote on Closing Report Recommendations	Commissioner Jasmin
	2) OPO Decline to Certify C21-070 / OPO 21-33 Discussion	Commissioner Jasmin
	3) OPOC Retreat Update	Commissioner Jasmin
	4) Commissioner Terms Expiring	Commissioner Jasmin
	5) NACOLE Annual Conference / Unity in the Community	Commissioners
	6) July OPOC Meeting Date Discussion	Commissioners
	7) Commissioner Speak Out	Commissioners

Adjournment:

The next Ombudsman Commission meeting will be held on July 19th, 2022.

Join by WebEx:
Meeting link: https://spokanecity.webex.com/spokanecity/j.php?MTID=me2a3468dc9af628377a32cee57d8363b
Meeting number: 2486 135 8521
Password: pPijkp8MS83
Join by phone: +1-408-418-9388 United States Toll
Access code: 2486 135 8521

AMERICANS WITH DISABILITIES ACT (ADA) INFORMATION: *The City of Spokane is committed to providing equal access to its facilities, programs, and services for persons with disabilities. The Council Chambers and the Council Briefing Center in the lower level of Spokane City Hall, 808 W. Spokane Falls Blvd., are both wheelchair accessible. The Council Briefing Center is equipped with an audio loop system for persons with hearing loss. The Council Chambers currently has an infrared system and headsets may be checked out by contacting the meeting organizer. Individuals requesting reasonable accommodations or further information may call, write, or email Human Resources at (509) 625-6363, 808 W. Spokane Falls Blvd, Spokane, WA, 99201; or* msteinolfson@spokanecity.org. *Persons who are deaf or hard of hearing may contact Human Resources through the Washington Relay Service at 7-1-1. Please contact us forty-eight (48) hours before the meeting date.*

Office of Police Ombudsman Commission Minutes

April 19, 2022

Meeting Minutes: 1:34
Meeting called to order at: 5:33 pm

Attendance

- OPOC Commissioners present: Jenny Rose, Luc Jasmin, Ladd Smith, Lili Navarrete
- OPOC Commissioners absent: James Wilburn
- Legal Counsel: Tim Szambelan
- OPO staff members present: Bart Logue, Luvimae Omana, Christina Coty

Briefing Session

- Agenda – Approved
- March 15th minutes – Approved

Items Session

- Public Forum: Anwar Peace
    - Believes that police reform activists are being targeted by SPD
    - Many people are afraid to raise their voices because of potential repercussions
- Guest Speaker: Detective Dunkin
    - Spoke about the past friction that have been associated with the OPO/OPOC and the Police Guild. He believes that this was unnecessary and is working towards fixing the relationships.
    - Talked about May 31, 2020, Protest/Unrest and the Police Guild grievance
        - City never scheduled follow up meetings to discuss the concerns of the Guild
        - Discussion ensued on ways to move transparency forward in the future
- OPO Monthly Report March 2022:
    - Contacts – 141, Community Meetings – 7, Complaints – Referrals – 4, Cases Certified – 5, Special Cases – 16, Review Boards – 3
    - Meghann Steinolfson reached out for OPO input for police guild negotiations regarding the mediation closing reports
    - Luvimae Omana briefed a complaint that the OPO has declined to certify
    - Bart discussed potential pros and cons about regarding a potential independent investigation
    - The OPO has requested case files from SPD for the OPOC to review

Commissioners' Business

- Decline to Certify C21-070 / OPO 21-33:
    - Luvimae presented a brief on the case.
    - This case will be discussed further during an upcoming OPOC Meeting
- OPOC Retreat:
    - Official date of meeting is scheduled for May 21st at 9am
    - Bart mentioned an opportunity for a group training with the Spokane Human Rights Commission shoot / don't shoot simulation at SPD Training academy

        - The Commissioners would like to wait on the training so that they can solely focus on the retreat.
        - Christina will reach out to the Human Rights Commission to schedule the joint training
- Community Stakeholder Meeting:
    - Commissioner Rose informed the Commission that there have been approximately 3 meetings in a 2-year span. She believes this to be a waste of time and is planning to resign from it.
    - Commissioner Rose will be sending a letter of resignation from the Community Stakeholder Meetings to Christina
- Commissioner Speak Out:
    - None

Motion Passes or Fails: 2
Meeting Adjourned at: 7:07
Note: Minutes are summarized by staff. A video recording of the meeting is on file - Spokane Office of Police Ombudsman Commission

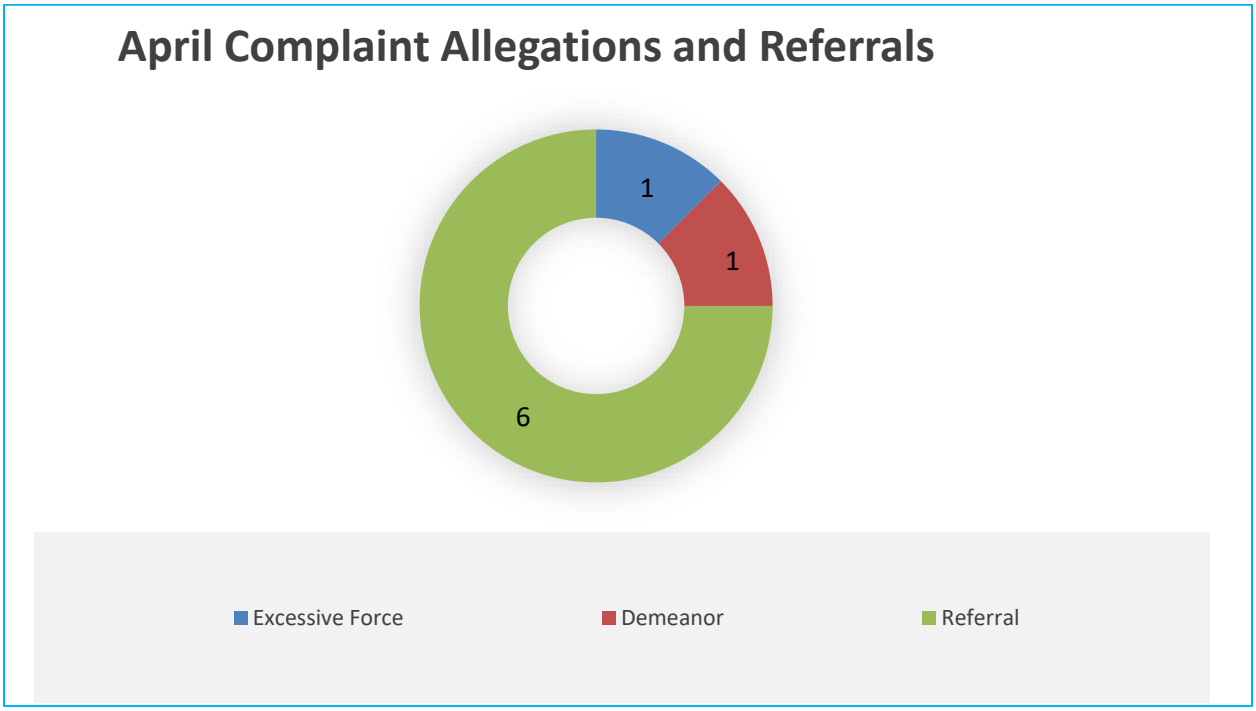
https://my.spokanecity.org/bcc/commissions/ombudsman-commission/

Office of the Police Ombudsman

Public Safety & Community Health Committee Report

Reporting Period: April 1-30, 2022

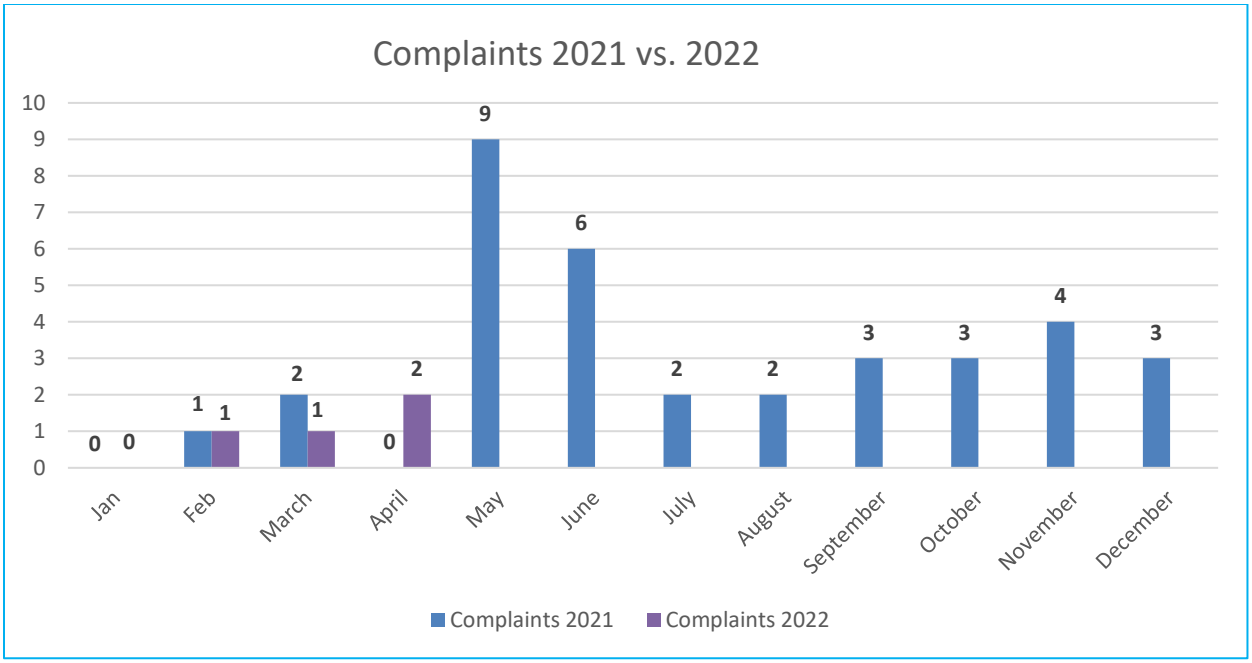
Complaints/Referrals/Contacts



Highlights:

In April, the Office of the Police Ombudsman (OPO) submitted 2 Complaints to Internal Affairs and 6 Referrals to various agencies. Highlights include:

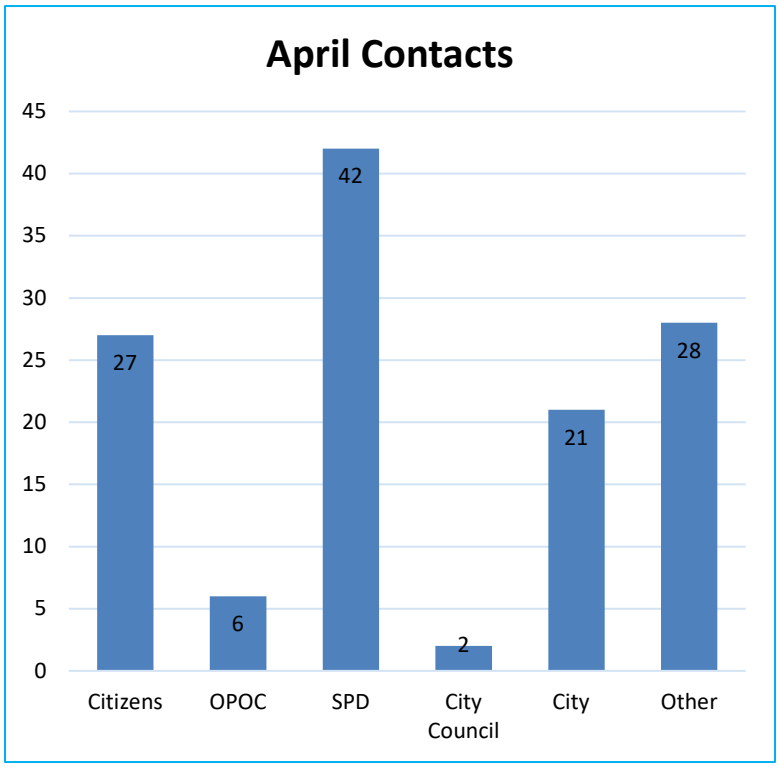
- OPO 22-05: A community member alleged that when they called SPD for assistance the responding officers ended up using unnecessary force on them.
- OPO 22-06: A community member was frustrated by the demeanor of an officer.
- IR 22-11: A community member has been unable to get assistance regarding their case; this was referred to SPD/IA.
- ER 22-12: A community member had concerns regarding a Deputy's use of force on a protester; this was referred to SCSO.
- IR 22-13: A community member had questions about traffic laws pertaining to police officers; this was referred to SPD/IA.



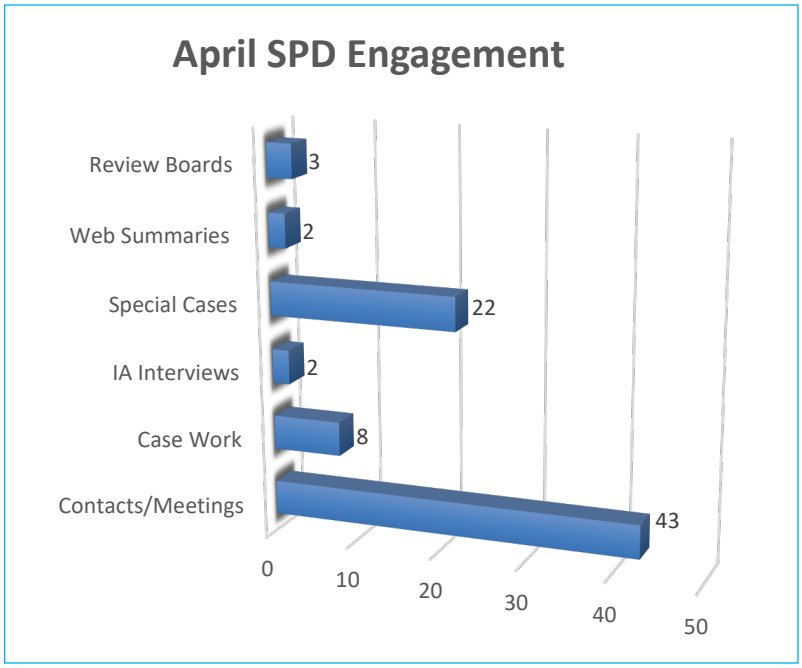
Contacts/Oversight:

Contacts/Oversight

- 124 total contacts
- 27 community member contacts
- 2 citizen interviews were conducted
- 2 officer interviews in IA
- 42 total SPD contacts
- 22 IA contacts



Oversight Activities

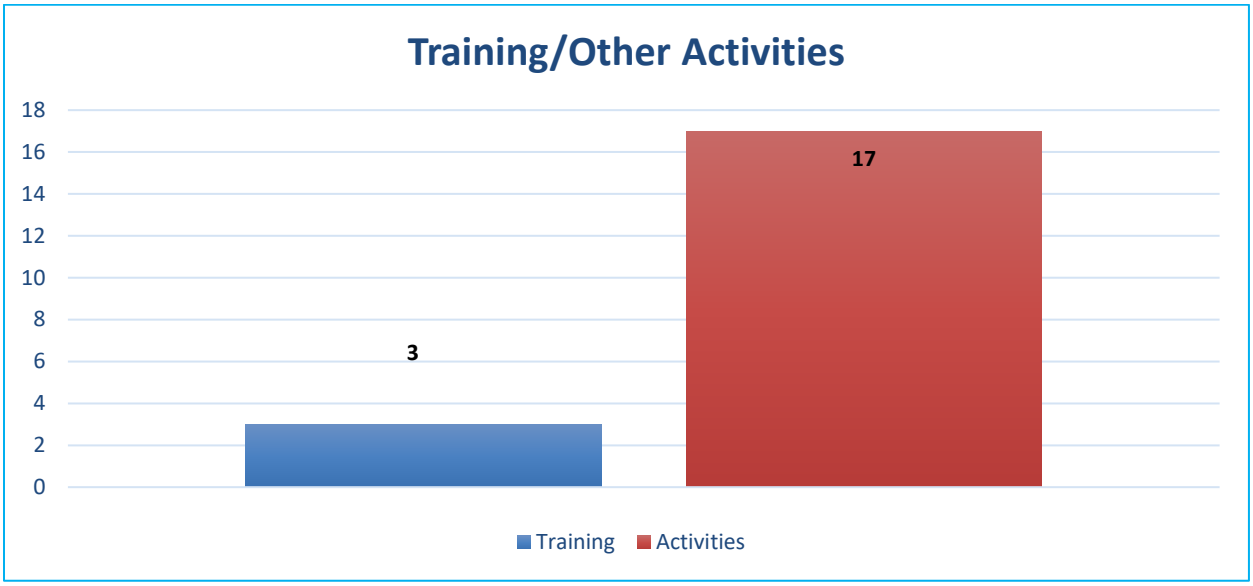


Case Work
6 – Cases certified
1 – Case returned for further investigation
1 – Case declined to certify

Special Cases
7 – Use of Force
3 – K9
8 – Collision
4 - Pursuit

Review Boards / ARP
1 – UOF
1 – Collision/Pursuit
1 - DFRB

Training/Other Activities



Highlights:

- Training – SPD In Service, Public Records Act Training, IACP Law Officer Section Spring Training
- Oversight – IA Bi-Weekly Meeting, April COPS Board Meeting, WSCJTC Meeting, Use of Force Review Board, Collision/Pursuit Review Board, Deadly Force Review Board
- Other Community Meetings – OPOC Meeting, Leadership 2022, Celebrate Recovery Events, Leadership Spokane Program Committee Meeting, Leadership Spokane Executive Board Meeting
- Oversight/Outreach – Washington Coalition for Police Accountability Meeting

Upcoming:

- WSCJTC Meetings
- IACP Spring Legal Officer Training
- Declined Case Submission to OPOC
- OPOC Spring Retreat
- Ombudsman Presentation to Washington Association of Sheriffs and Police Chiefs Conference

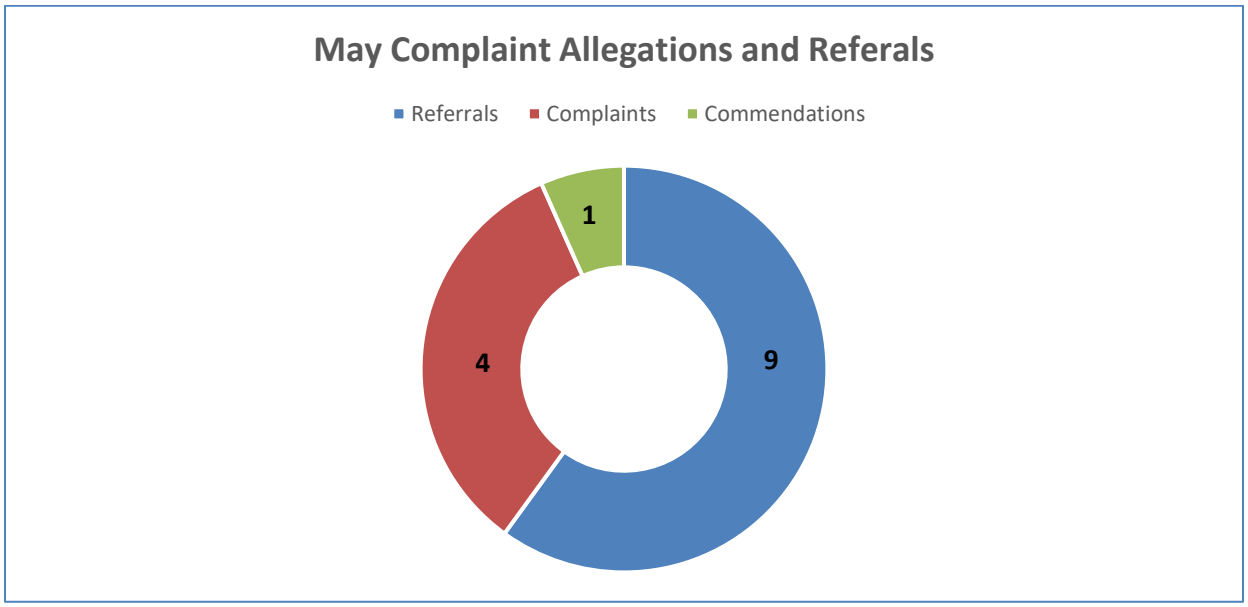
Office of the Police Ombudsman Commission Meeting:
Held virtually, the 3rd Tuesday of every month at 5:30pm
Agendas and meeting recordings can be found at:
https://my.spokanecity.org/bcc/commissions/ombudsman-commission/

Office of the Police Ombudsman

Public Safety & Community Health Committee Report

Reporting Period: May 1-31, 2022

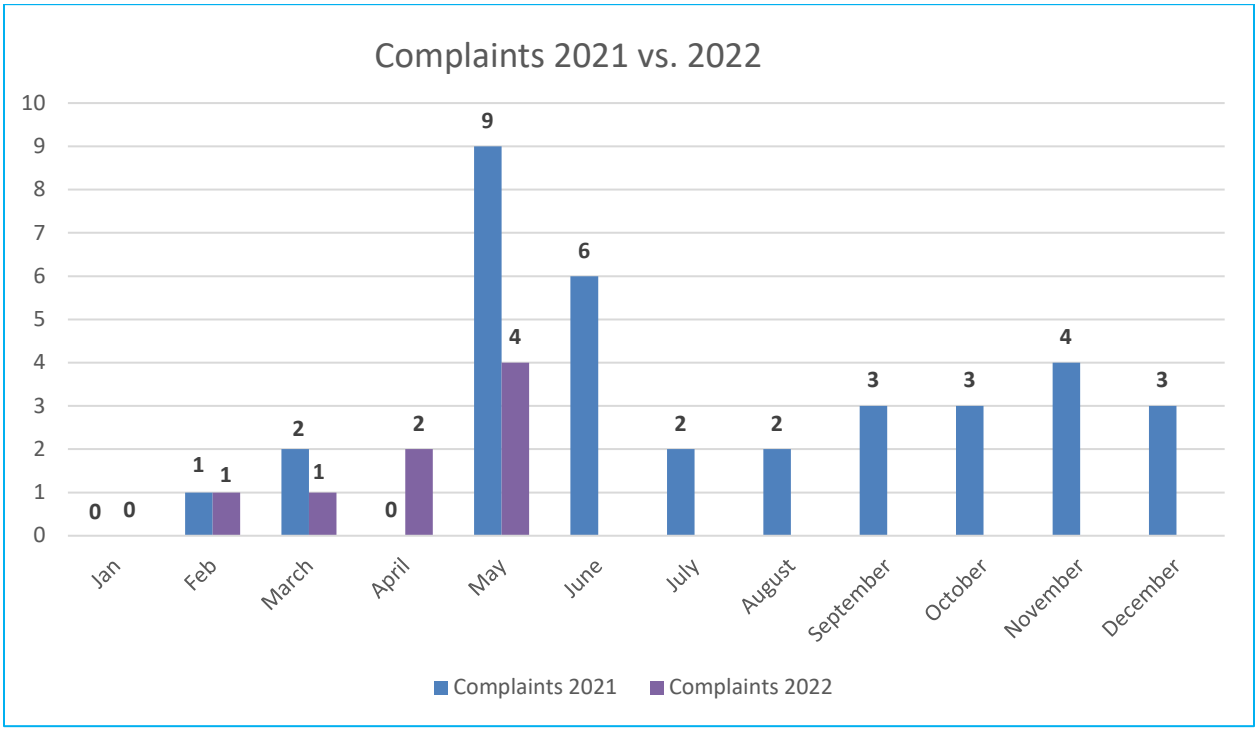
Complaints/Referrals/Contacts



Highlights:

In April, the Office of the Police Ombudsman (OPO) submitted 5 Complaints to Internal Affairs, 9 Referrals to various agencies and 1 Commendation. Highlights include:

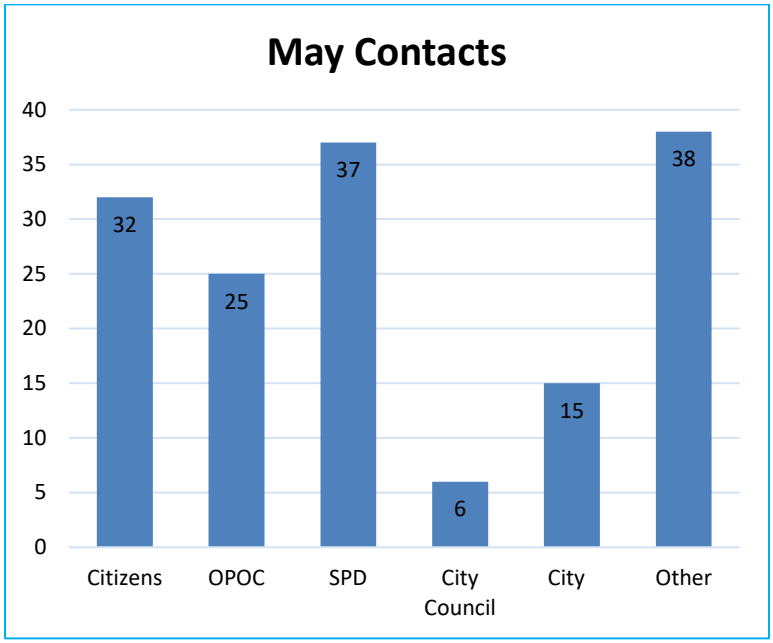
- OPO 22-07: A community member alleged that when they called SPD for assistance with a landlord issue, the responding officer allegedly wasn't willing to help the community member.
- OPO 22-08: A community member is frustrated by the activities of their neighbor. They have been trying to get assistance from SPD with little help.
- OPO 22-09: A community member was concerned for community safety during excessive flooding on the south hill. The responding officer was dismissive and told them they could be on their way.
- OPO 22-10: A community member had concerns with their tenant damaging their property, responding officers explained that the tenant was able to damage the property with no repercussions
- OPO 22-11: A community member wanted to thank the SPD for all the work they did to locate their stollen vehicle.



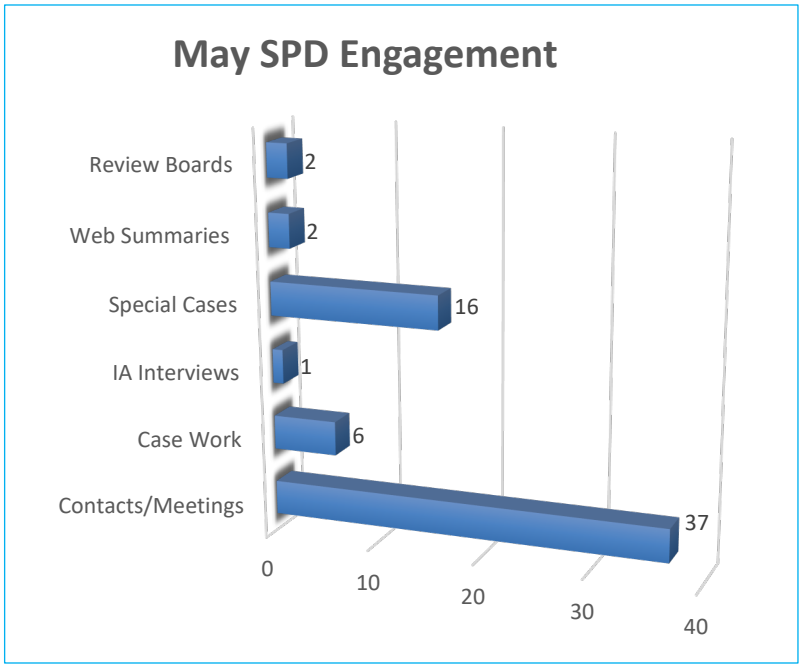
Contacts/Oversight:

Contacts/Oversight

- 153 total contacts
- 32 community member contacts
- 7 citizen interviews were conducted
- 1 interview in IA
- 37 total SPD contacts
- 20 IA contacts



Oversight Activities

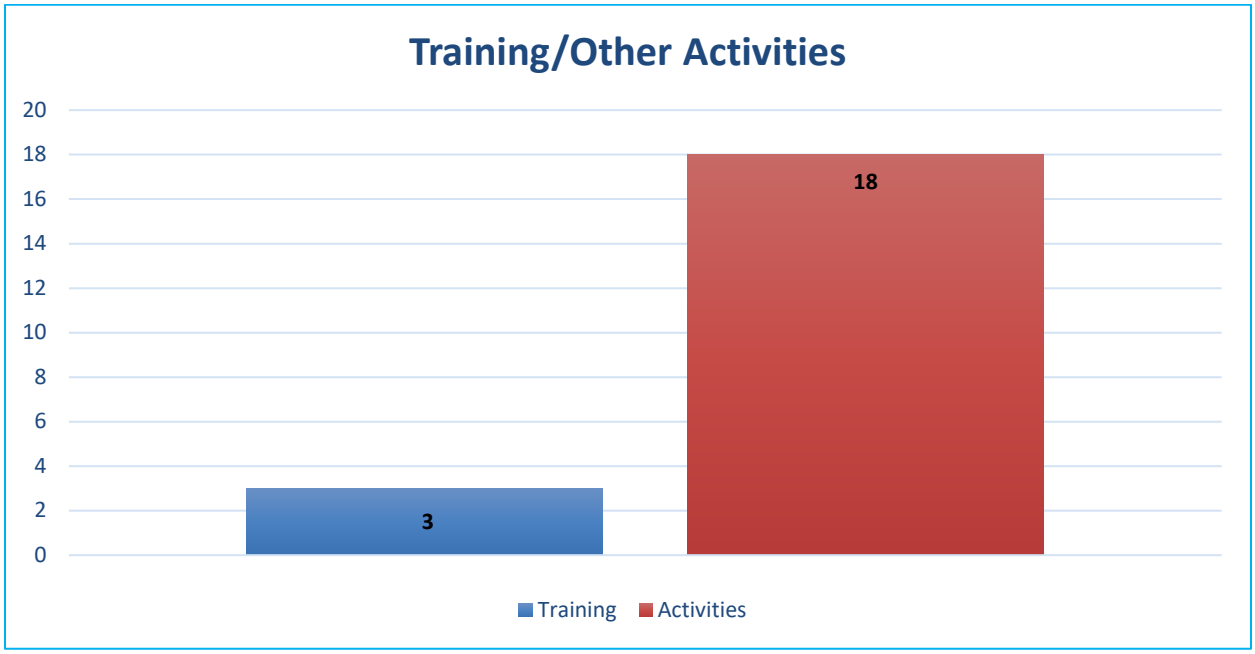


Case Work
4 – Cases certified
2 – Case returned for further investigation

Special Cases
4 – Use of Force
0 – K9
10 – Collision
2 - Pursuit

Review Boards / ARP
1 – UOF
1 – Collision/Pursuit

Training/Other Activities



Highlights:

- Training – SPD In Service, IACP Law Officer Section Spring Training, Accounting Operating Module Session 2
- Oversight – IA Bi-Weekly Meeting, WSCJTC Meeting, Use of Force Review Board, Collision/Pursuit Review Board, WASPC Conference
- Other Community Meetings – OPOC Meeting, Leadership 2022, Celebrate Recovery Events, Leadership Spokane Program Committee Meeting, Leadership Spokane Executive Board Meeting
- Oversight/Outreach – Washington Coalition for Police Accountability Meeting

Upcoming:

- WSCJTC Meetings
- Declined Case Submission to OPOC
- OPO Retreat
- International Association of Chiefs of Police (IACP) Annual Conference
- United States Ombudsman Association (USOA) Annual Conference
- National Association for Civilians Oversight of Law Enforcement (NACOLE) Annual Conference

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Policy and Procedures Report and Recommendations

C19-082 / F19-056

OFFICE OF THE POLICE OMBUDSMAN

BART LOGUE | POLICE OMBUDSMAN, *AUTHOR*
LUVIMAE OMANA | DEPUTY POLICE OMBUDSMAN, *CO-AUTHOR*

Table of Contents

Mission Statement

The Office of Police Ombudsman exists to promote public confidence in the professionalism and accountability of the members of the Spokane Police Department by providing independent review of police actions, thoughtful policy recommendations, and ongoing community outreach.

Staff Information

Bart Logue, *Police Ombudsman*
Bart Logue began serving in this capacity in September 2016, after serving as the Interim Police Ombudsman. Bart also serves as a Commissioner on the Washington State Criminal Justice Training Commission. Bart is a Certified Practitioner of Oversight through the National Association for Civilian Oversight of Law Enforcement (NACOLE). Bart has a Master of Forensic Sciences from National University and a Master of National Security Affairs from the Naval Postgraduate School. Bart is a graduate of the Federal Bureau of Investigation National Academy, Session 239, and is also a certified Advanced Force Science Specialist.

Luvimae Omana, *Deputy Police Ombudsman*
Luvimae Omana has dual degrees in Business Administration and Political Science from the University of California, Riverside and a Juris Doctorate from Gonzaga University School of Law. Luvimae is licensed to practice law in Washington. Luvimae is a Certified Practitioner of Oversight through NACOLE. Luvimae is also a certified Advanced Force Science Specialist.

Christina Coty, *Administrative Specialist*
Christina began working at the City of Spokane in 2015 for the ITSD department in contract procurement and joined the Office of the Police Ombudsman in 2018. Christina is a Certified Practitioner of Oversight through NACOLE. Prior to her work at the City of Spokane she worked for Sony Electronics as a Regional Sales Manager managing the retail store operations in Southern California.

Tim Szambelan, *OPO Attorney*
Tim works in the Civil Division of the City Attorney's Office and currently represents the Ombudsman Office and other departments within the City of Spokane. Tim is licensed to practice law in Washington and Arizona.

This document was reviewed by the City Attorney's Office as to form prior to submission for review by the Spokane Police Guild pursuant to the requirements provided in Article 27 of the Agreement between the City of Spokane and the Spokane Police Guild (2017-2021).

Authority and Purpose

The mission of the Office of the Police Ombudsman (OPO) is to promote confidence and accountability in the members of the Spokane Police Department (SPD). The OPO does so through providing independent and thorough oversight of matters that impact the community and the department. We desire to help bridge the gap between the community and the SPD by writing closing reports in cases that are of public concern to increase accountability and transparency into the matter as well as closing reports that may lead to recommendations for improving police policies or practices. By insisting on transparency, our goal is to help eliminate similar incidents in the future and ensure that the practices contained herein are limited and/or never happen again. It is also our intent to highlight effective police practices to give the community a better understanding as to why those practices were utilized, although this is limited by provisions within the 2017-2021 Collective Bargaining Agreement (CBA).

Spokane Municipal Code (SMC) §04.32.030 and the CBA provide authority for the OPO to publish closing reports on a case once it has been certified by the Police Ombudsman and the Chief of Police has made a final determination in the matter. The OPO can also publish policy and procedure reports regarding cases the OPO reviews during a review board process. The OPO's recommendations will not concern discipline in specific cases or officers and shall not be used in disciplinary proceedings of bargaining unit employees. Reports are solely meant to further discussion on aspects of incidents that may be improved upon.

Reports also provide opportunities for policy and procedure recommendations that can result in improved police performance through their eventual implementation. Writing a report allows us to provide a more thorough review of what occurred in an incident to offer recommendations for improving the quality of police investigations and practices, including the Internal Affairs (IA) investigative process, policies, and training or any other related matter.

The OPO may also recommend mediation to the Chief of Police at any time prior to certifying a case. Should all parties agree and the officer(s) participate in good faith, the OPO must publish a report following a mediation including any agreements reached between parties. Mediations are governed by the Revised Code of Washington (RCW) 7.07. The content of the mediation may not be used by the City or any other party in any criminal or disciplinary process.

Required Disclosures

Under Article 27 of the current CBA between the City of Spokane and the Spokane Police Guild, this report must provide the following disclosures:

1. Any closing report from an IA investigation shall clearly state the information expressed within the report is the perspective of the OPO, that the OPO does not speak for the City on the matter, and the report is not an official determination of what occurred;
2. The report will include the current policy practice, policy, and/or training as applicable and shall expressly state the policy recommendations that follow reflects the OPO's opinion on modifications that may assist the department in reducing the likelihood of harm in the future; they do not reflect an opinion on individual job performance under the current policy, practice, or training;
3. A report shall not comment on discipline of an officer(s). This prohibition includes a prohibition on writing in a report whether the OPO or OPOC agrees with or differs from the Chief's findings,

whether the officer acted properly, whether the officer's actions were acceptable, or whether the officer's actions were in compliance with training or policy. Additionally, no report will criticize an officer or witness or include a statement on the OPO or OPOC's opinion on the veracity or credibility of an officer or witness.

4. The OPO's closing report shall not be used by the City as a basis to open or re-open complaints against any bargaining unit employees, or to reconsider any decision(s) previously made concerning discipline.
5. The report may not be used in disciplinary proceedings or other tangible adverse employment actions against bargaining unit employees, but not limited to decisions regarding defense and indemnification of an officer; and
6. The names of officers or witnesses may not be disclosed.[1]

Additional information and records regarding this matter are available through the City Clerk's Office by Public Records Requests.

Summary

Procedural History

The incident occurred on July 12, 2019. Upon initial review of the use of force by IA, the case was referred to the Spokane County Sheriff's Office (SCSO) alleging that during the incident, Spokane Police Officer A committed the crime of Assault in the 4th degree during the arrest of the subject. This administrative portion of the case was internally generated on September 19, 2019 and assigned to an IA investigator. This occurred after the Spokane County Sheriff's Office conducted a criminal investigation and the Spokane County Prosecutor declined to prosecute the case on September 18, 2019. The Police Ombudsman certified the IA investigation on November 25, 2019 and the case was sent to an Administrative Review Panel (ARP) for a chain of command review on November 27, 2019. The ARP met on December 19, 2019, January 6, 2020, and January 14, 2020 to discuss this case and completed its review on January 16, 2020.

The case was then routed to the Chief and findings were made on January 16, 2020. The case was submitted for arbitration between the City of Spokane the Spokane Police Guild on April 29, 2020. The arbitration process included in-person hearings on November 11 & 12, 2021, remote hearings on Zoom on December 1, 2021, and closing briefs were submitted and the record was closed on December 22, 2021. The arbitrator's decision was issued on January 3, 2022.

Under SPD Policy Manual 302 and following the chain of command review and findings but before the arbitration process was complete, the Use of Force Review Board (UOFRB) reviewed the case in February 2021. The UOFRB reviews applications of non-deadly force after disciplinary decisions are final to evaluate training, equipment needs, and policy and standard operating procedures in place or practiced department wide.

The OPO's summary of facts are based upon a careful review of reports, BWC footage; the chain of command review; the UOFRB minutes; the ARP findings; documents generated in the discipline and arbitration process; and first-hand knowledge from OPO participation during the investigation and the

[1] In addition to not mentioning officer or witness names, every effort was made to remove identifying pronouns throughout this report. The same standard was used for the complainant and involved persons.

UOFRB. This closing report provides an analysis of issues identified through a use of force review process and certification of an internal complaint, which allows for a policy and procedures report.

OPO Summary of Facts

On July 19, 2019 at approximately 9:45pm, Officers B and C tried to initiate a traffic stop after they encountered the subject for suspected reckless driving. The subject continued to drive and finally stopped at their place of residence. The subject left the vehicle, went inside their house, and locked the front security door. The security door looks like a screen door where officers could still see the subject but the door has a reinforced security insert.

Officers communicated with the subject through the security door. Officers informed them they were under arrest several times and ordered them to exit their house. The subject punched the metal security door and used aggressive language, saying something about having a gun. There were two other adult females, a small child, and an aggressive dog inside the house at the location. The subject's partner was extremely upset by the situation and informed officers in a loud and shrill voice that their child was in the house and they were concerned for the child's safety. The partner positioned themselves at the top of the stairs by the locked security door and begged the subject to come out of the house saying they were only making things worse.

Officers described the subject as in their early 20s, between 5'11" and 6'0", and approximately 250 to 300 pounds. Officers further described the subject as very strong and athletic, although the arbitrator later refers to the subject as obese, instead of fit and powerful.

As Officers had not yet gained control of the scene, they requested additional backup. In response to demands by officers and pleas of their partner, the subject unlocked the door and stepped outside. The subject exited the house smoking a cigarette as they stepped down the front stair before submitting to arrest. Officers directed the subject into the prone cuffing position. The subject passed the cigarette to the partner and complied. This occurred in the front yard of the house where there were numerous objects scattered on the lawn. Officers also reported a dusty effect that illuminated the yard.

When Officer A arrived, they approached the partner and told them to get back. Immediately after that command was given, the partner yelled, "Don't push me!" Officer A was then directed by Officer B to place the partner in handcuffs as they were beginning to interfere with the control of the scene. As the partner protested, Office A took them to the ground using an arm bar and push to an area around the back of the neck. The subject's partner continued to yell that they had done nothing wrong, they were severely disabled, and needed medical attention. Once the partner was on the ground but before they were handcuffed, Officer A asked another officer to deal with the partner and turned their attention back towards the subject, the child, and the dog.[2]

At this point, the scene was very chaotic. There were at least six officers in the immediate area. The partner was loudly protesting and their child, who appeared to be about 4 years old, had come out onto the porch screaming, seemingly traumatized by what was going on around them. The child kept asking, "Are we going to get arrested?" The dog had also come out of the house and was running around the yard.[3] Officer A asked the child to get back inside but the child continued to ask if they were going to get arrested. Officer A then asked the child to put the dog inside, and the child responds, "okay" and then asks again, "Are you going to arrest them?" Officer A replied, "Yep, they are going to go to jail,

[2] The subject's partner was later charged with obstructing.

[3] Officer A later reported being bitten by the dog when they turned their attention away from the partner.

they made bad decisions," after which the child started screaming, "No!" Officer H and Sergeant B picked up the screaming child to console them and brought them away from the scene to another adult who identified as a family member.

Officer A then turned their attention back to the subject and approached them. At this point the subject had been placed in handcuffs and was standing with an officer on both sides of them with control of each arm of the subject. There was also another officer standing directly behind the subject. Officer A was positioned a few feet in front and facing the subject's right side. Officer B was also standing in front and facing the subject's left side. According to police reports, the subject had allegedly kicked an officer while on the ground during the handcuffing process. Multiple officers are heard saying, "Stop resisting," on the BWC video.

Officers described the subject in their reports as difficult to control due to their size and strength. Once handcuffed, the subject struggled to get up when asked and officers attempted to assist them up off the ground. Officers verbally warned the subject to stop kicking at officers and they made a second attempt to stand up the subject. When standing, the officers reported that the subject began shifting their upper body, flexing arms, and pushing against the handcuffs.[4] Officer A also reported that the subject resisted and was shifting their legs around kicking toward officers. BWC video does not clearly show whether the subject was kicking at an officer, whether their feet or leg contacted an officer, or whether the subject was trying to get up from an awkward position while being handcuffed and presumably intoxicated.

As the subject was raised from the ground, they were supported by two officers on either side. There were approximately six officers nearby who were assisting with the arrest. There were three officers behind and beside the subject controlling them as they stood up. Two of the Officers were controlling each arm with one of the officers also controlling the subject's head.[5] As the subject was stood up, Officer A kicked the handcuffed subject in the groin. Immediately after delivering the kick, Officer A stated, "There you go motherfucker!" Officer A reported that they believed the subject had kicked an officer and the officers on scene were in danger of being assaulted or injured by the handcuffed subject. Officer A reported delivering a "Thai kick" to the subject's groin after the subject tried to "donkey kick" an officer when they were trying to gain control of the subject.

Officers placed the subject back on the ground in a prone position and applied a leg restraint before transporting the subject to a police vehicle. When the subject was on the ground, they complained they could not breathe. Officer A responded, "You can breathe if you're being an asshole like this."[6] When officers were discussing how to move the subject into a police vehicle, Officer A said, "We'll drag him if we have to. He's not earned any love here."[7] Officer A continued a dialogue with the subject as they were being moved. The subject complained they were being hurt and Officer A said it was supposed to hurt.

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[4] Some officers say the subject is intoxicated. The arbitrator says there was no proof the subject was intoxicated, however, if they were intoxicated, it "may explain why the suspect was having a hard time getting [their] balance as the restraining [o]fficers raised [them] to [their] feet immediately before the grievant kicked [them]." (Grievance Arbitration Opinion and Award, 23)

[5] The arbitrator stated in their decision, "The suspect may have kicked one of the officers before [they] were brought to [their] feet. If, in fact, [they] did kick a restraining officer, the blow did not cause significant pain or harm. The critical point is that immediately before [Officer A] kicked the handcuffed subject, there was no serious threat posed by the handcuffed suspect." (*Id.* at 22)

[6] *See* Officer A's BWC at 4:31.

[7] *Id*. at 5:31.

After the subject was moved to the patrol vehicle, Officer A self-reported a use of force and told Lieutenant A that they had kicked the subject in the "nut sack." However, in Officer A's report, this would be later referred to as a "Thai kick."

The degree of the subject's resistance is not discernable on video. According to the arbitrator, "At least six body worn cameras were at the scene, but no video captured a kick. Similarly, none of the Officers at the scene actually saw the suspect kick the Officer, including the kicked Officer."[8] Also, the alleged resistance or kicks the subject gave while on the ground that caused officers to put weight on the subject's legs are not visible on camera.

Officer safety

Multiple officers reported concerns the subject could have been armed with a firearm as no one conducted a pat down of the subject or discussed whether a gun was present. Officer A reported entering the front yard of the house as the suspect was walking down the steps of the front door. Officer A reported hearing a report on the radio that "someone fled on foot and claimed they had a gun." Officer C heard the subject say several times that they had a gun and would go get it. Officer C said they along with Officer B thought this was a credible threat.[9] Officer B made similar statements in their report.

In this case, several officers were required to contain the subject and were in proximity to the subject. . The subject was handcuffed in the prone position while being controlled by several officers. However, the subject was not searched immediately after handcuffing and a gun was never seen or found.

De-escalation

The arbitrator says, "There is no indication on any video or in any report of any attempt by any officer to utilize de-escalation techniques with either the [subject] or the [partner], both of whom were arrested and charged."[10] SPD defines de-escalation as "tactics and techniques are actions used by officers, when safe to do so, that seek to minimize the likelihood of the need to use force or reduce the level of necessary force during an incident and increase the likelihood of voluntary compliance." Officer A said they explained to the partner to back away before going hands on and did not use any with the subject but they did hear other officers tell the subject they did not want to use force.[11] Officer B said they did not use de-escalation techniques outside of telling the subject numerous times they were under arrest and to come out and surrender.[12] The OPO also notes officers used verbal commands, officers separated the male and female subjects, and Officers B and C attempted to gain compliance from the subject when they were inside the home.

De-escalation is an essential part of policing. Washington State Legislature recently passed SHB 1735 which modified the standard for use of force by peace officers. This included defining de-escalation tactics and clarifying when de-escalation tactics and less lethal alternatives must be used by a peace officer.

[8] Grievance Arbitration Opinion and Award at 24-25.
[9] *See* Officer C's Field Report, 2.
[10] *See supra* note 6 at 5.
[11] *See supra* note 20 at 9.
[12] *Id.* at 13.

Investigation and Department Findings Summary

Pertinent policies

1. **Spokane Police Department Policy Manual 340.3.5(X) – Criminal Conduct.** Violating any felony statute or any misdemeanor statute where such a violation may materially affect the employee's ability to perform official duties or may be indicative of unfitness for his/her position.
2. **SPD Policy 340.3.2(K) – Demeanor.** Discourteous or disrespectful treatment of members of the public or this department or another law enforcement agency.
3. **SPD Standard 2.1 – Excessive Force.** Officers of the SPD shall be aware of their lawful authority to use that force reasonably necessary in securing compliance with their lawful enforcement duties.
4. **SPD Policy 340.3.5(A)(C) – Conduct Unbecoming.** No member shall conduct themselves in a disorderly manner at any time, either on or off duty, or conduct himself/herself in a manner unbecoming the conduct of a member of the City of Spokane Police Department.
5. **SPD Policy 340.3.5(P) – Making a False or Misleading Statement.** Failure to disclose material facts or the making of any false or misleading statement on any application, examination form or other official document, report, form, or during the course of any work-related investigation.
6. **SPD Policy 340.3.9(A)&(B) – Supervision Responsibility.** The following actions are misconduct:
    - Failure of a supervisor to take appropriate action to ensure that employees adhere to the policies and procedures of this department and the actions of all personnel comply with all laws.
    - Failure of a supervisor to appropriately report known misconduct of an employee to his/her immediate supervisor or to document such misconduct as required by policy.
7. **SPD Policy 340.3.5(Q) – Inadequate Response.** Failure to take reasonable action while on-duty and when required by law, statute, resolution, or approved department practices or procedures. This is not intended to interfere with the officers' reasonable use of discretion in the enforcement of the law.

Chain of command review

After the completion of the SCSO investigation and the IA investigation, the case was sent up through the Officer A's chain of command for review and recommended findings.

The officer's supervisor recommended a finding of "In Policy" for a Level II strike. The strike listed is a front kick, which is considered an exceptional technique. The sergeant noted the following details in their analysis:

- The subject appeared to be compliant at first but became resistant and started tensing their arms to resist handcuffing.
- It took numerous officers to finally get the subject in cuffs due to size and strength.
- The subject started kicking their legs at the officers.
- The subject ended up "donkey kicking" Officer D in the leg as officers were attempting to escort the subject to a police vehicle.
- Officer A saw that the other officers needed help to take the subject to the ground.
- Officer A attempted a front kick to the subject's abdomen to double them over, but inadvertently struck them in the groin area.
- Officer A delivered a Level II strike, an exceptional technique due to [the subject] being handcuffed.

- "Officer A's 'front kick' was the safest, quickest, and best choice of 'force' to be executed with the given circumstances."
- "After conferring with an Expert Defensive Tactics Instructor and reviewing the potential other 'force' options that were available; LVNR, OC spray, drive stuns, mastoid hold etc., it was agreed the Level II strike was indeed the best choice."
- The strike was effective in ending the assaultive behavior of the subject. It moved the subject's center of gravity which enabled a relatively gentle takedown to apply leg restraints.
- The amount of force used appeared reasonable under the totality of the circumstances. It quickly controlled a combative subject while minimizing injuries.

The administrative investigation was also sent to an ARP for their analysis. The ARP's recommended findings were:

1. Criminal Conduct – "Exonerated"
2. Demeanor – "Sustained"
3. Excessive Force – "Not Sustained"
4. Conduct Unbecoming – "Sustained"
5. Failure to Properly Supervise – "Sustained"
6. Inadequate Response – "Sustained"

The ARP consisted of two captains and three lieutenants. The ARP's analysis was recorded in a memorandum. The ARP noted the following details in their analysis:

- There was inconsistency between the use of force Officer A reported to Lieutenant A versus what was documented in the report.
- The subject's alleged kick of Officer D was not visible on video. However, Officers A, B, D, and F witnessed it.[13]
- SPD policy authorizes Level II strikes, which includes kicks, in response to an assaultive suspect. While it is unusual to strike handcuffed suspects, the policy does not delineate between a handcuffed suspect and a non-handcuffed suspect.
- Rather than remain with the uncooperative and still unhandcuffed partner, Officer A merely told Officer D to take over while they left to engage with the subject leaving Officer D to get the partner handcuffed alone.
- Officer A encountered the couple's young child who was clearly traumatized by witnessing the altercation involving their parents. The child asks Officer A if their parents are going to jail. Rather than taking the opportunity to comfort and de-escalate the child, Officer A exacerbates the trauma by callously stating, "Yes, they made bad decisions."
- Officer A is seen kicking the subject almost immediately after they get up.
- Immediately after the kick, Officer A says, "There you go motherfucker."
- Later, Officer A tells Lieutenant A, "I have a use of force; I kicked [them] in the [groin]."
- Officer A consulted with Corporal A, a Master Use of Force Instructor, prior to writing their police report for advice on Graham factors.
- Officer A says in their report they applied a Thai kick with the intent to strike the subject's inner right thigh to knock them off balance to be taken to the ground. However, due to the subject's movement, the kick struck the groin area. This was listed in the report as an exceptional technique. However, in an additional statement submitted to IA on 8/9/19, Officer A notes the

[13] *See contra* note 6 at 26.

kick itself was not exceptional since this technique was taught at the WSBLEA in 2014 while previously employed in Lakewood Police Department and during SPD defensive tactics training.

- SPD's DT manual doesn't instruct officers to target kicks to the inner thigh area.
- An SPD lieutenant who is an expert in defensive tactics was brought in to help analyze the case. The lieutenant consulted with both WSCJTC and Lakewood PD's head defensive tactics instructor regarding Thai kicks. Neither entity trains officers to target kicks to the inner thigh.
- When the subject complained they couldn't breathe, Officer A responded with "You can breathe if you're being an asshole like this!" He also states, "We'll drag him if we have to. He's not earned any love here." As the officers take the subject to the car, Officer A engages in nonproductive, inflammatory, and argumentative back and forth with the subject.
- Officer A was not in control of their emotions and did nothing to de-escalate the encounter.
- The expletive, "there you go motherfucker," immediately after kicking the subject in the groin could connote a punitive intent. However, since other officers on scene said the use of force was appropriate and effective in addition to Officer A's denials, there is insufficient evidence to find the kick was punitive.
- Sergeant A, Officer A's supervisor, described the use of force very differently from Officer A. Sergeant A reviewed the use of force as a front kick when Officer A listed the same kick as a Thai kick. Sergeant A describes the kick to the subject to "double [them] over, but inadvertently struck the groin area." While Officer A said the goal of using a Thai kick on the subject's inner thigh was meant to make the subject lose balance.
- Sergeant A concludes the use of force was the "safest, quickest, and best choice of force given the circumstance" after consulting with the Master Use of Force instructor.
- Sergeant A chose not to address Officer A's cursing because, "I hear it all the time unfortunately."
- When Sergeant A was asked by the IA investigator if they had any concerns that would prompt them to make further inquiry, Sergeant A said they didn't talk to anyone about the incident and they assumed with other supervisors on scene, if there was an issue, someone would speak up.
- As Officer A's supervisor, it is incumbent they thoroughly and completely investigate.
- Sergeant A's investigation was not thorough, the analysis was flawed, and Sergeant A failed to contact their lieutenant over this case.
- Corporal A did not write a report on this case but was clearly influential in the fact they are a Master Defensive Tactics Instructor. Corporal A and another corporal only completed a report on this incident after requested by an SCSO detective.

The ARP findings were routed directly to the Chief who made a determination based on the information provided.[14]

The UOFRB reviewed this case and noted the following items:

- Subject Matter Expert (SME) Consultation – SMEs can weigh in, but it needs to be clear that the supervisor ultimately owns their decision. It is ideal to add documentation about the consultation.
- Consider training on officers stepping in to relieve an officer – How can we empower patrol officers to tell a fellow officer to leave a scene when it is clear they have lost emotional control?

[14] Per the agreement between the City and the Police Guild in the current CBA, the OPO is prohibited from mentioning whether or not the officer(s) acted properly, whether the officer's actions were acceptable, or whether or not the officer's actions were in compliance with training or policy. As such, the final determination by the chain of command cannot be mentioned.

One of the tenets of the Patrol Tactics model is emotional intelligence. The Training Center will look at adding a scenario where one of their peers is emotionally invested in an incident to help develop a schema to step in. The training can also focus on expanding "tunnel vision" to make sure they know what is happening. The training will refer back to the Duty to Intercede clause in policy.

Policy Recommendations

Applicable Current Policy Practice, Policy, and/or Training[15]

1. **Spokane Police Department Policy 300.3 – Use of Force.**[16] Any force used by an officer must be objectively reasonable based on the totality of the facts and circumstances known to the officer at the time the force is used. The "reasonableness" of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force used that reasonably appears necessary in a particular situation, with limited information and in circumstances that are often tense, uncertain, and rapidly evolving.
2. **Defensive Tactics Manual – Kicking Techniques – Assaultive.** Strike variations:
    a. Leg Kicks
        i. Ideally used to close space and obtain side control.
        ii. Step forward with your plant or inside leg pointing your toes in the direction of the strike.
        iii. Deliver the strike to the outside meaty portion of the subject's thigh using the bony part of your shin as the impact tool.
        iv. Plant the striking foot near the impact area and obtain upper torso or arm control.
    b. Stop Kicks
        i. Ideally used to stop the momentum of a forward aggressing subject.
        ii. Plant your rear foot firmly on the ground.
        iii. Using the bottom heel and pad portions of your foot, target the pelvic area of the aggressive subject. Cant the foot slightly to increase surface area and limit possible deflection of the strike.
        iv. After the strike assess choose next control technique.
    c. Safety Concerns
        i. Use verbal direction during the application of this technique advising him/her what they need to do.
        ii. Be prepared to use a follow up technique after the applied strike taking advantage of the subject's temporary disruption in his/her physical mental process.
        iii. Utilize only the power, body weight, and speed needed to achieve control and to avoid unintentional injury to yourself or the subject.
3. **Defensive Tactics Manual Introduction – Exceptional Techniques.** Any use of force techniques and fundamentals that are applied or deployed by an officer of the Spokane Police Department which is not described in this manual will be deemed as exceptional techniques. The

[15] Current policies must be listed under the CBA to make a policy recommendation. Unless otherwise noted, policies listed do not necessarily reflect the policy in place at the time.
[16] Version updated February 9, 2016.

reasonableness of exceptional techniques will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain, and rapidly evolving. All exceptional techniques must be documented in great detail due to the fact that they cannot be referred to in this manual.

4. **SPD Policy 300.1 – Purpose and Scope.** The Department is committed to accomplishing this mission with respect and a minimal reliance on the use of force by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force, when circumstances permit.
5. **SPD Policy 300.2** – **De-escalation.** De-escalation tactics and techniques are actions used by officers, when safe to do so, that seek to minimize the likelihood of the need to use force or reduce the level of necessary force during an incident and increase the likelihood of voluntary compliance.
6. **SPD Policy 301.3 – All force must be in Accordance with Washington Law and SPD Policy.** Under *Graham v. Connor*, 490 U.S. 386 (1989), force is adjudged by balancing of the "nature and quality of the intrusion" on an individual's "Fourth Amendment interests," considering the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; whether he is actively resisting arrest or attempting to evade arrest by flight; and the totality of the circumstances.
7. **SPD Policy 340.3.5(F) – Performance**. Knowingly making false or misleading statements that are reasonably calculated to harm or destroy the reputation, authority, or official standing of the department, or members thereof.
8. **SPD Policy 301.2 – Definition of Imminent Threat**. The present and apparent ability, ability, opportunity, and intent to immediately cause harm to the peace officer or another person.
9. **SPD Policy 301.10(1) – Duty to Intervene and Report.** When officers witness violations of law and/or department policies, regardless of their rank they are required to report. Any on-duty SPD officer who witnesses another peace officer engaging or attempting to engage in the use of excessive force against another person shall intervene when in a position to do so to the end the use of excessive force or attempted use of excessive force, or to prevent the further use of excessive force. A peace officer shall also render aid at the earliest safe opportunity in accordance with RCW 36.28A.445, to any person injured as a result of the use of force.
10. **SPD Policy 301.2(B) – Assaultive**. Noncompliance perceived as, or resulting in, an actual assault on a subject or officer. The scope and severity of the attack would likely not result in serious bodily injury or death.

Recommendations to Policy and/or Training

Consultation with subject matter experts

Subject matter experts are specially designated members of the police department who receive special training from the Washington State Criminal Justice Training Commission, instruct others, and advise on their area of specialty.[17] It is not surprising if officers and their supervisors might seek guidance from an expert who happens to be on scene. Corporal A is referred to as both a master in Defensive Tactics and Use of Force instructor by the chain of command. Corporal A said consulting with a defensive tactics instructor is common and typical. Sergeants seek input of a defensive tactics instructor to get their take

[17] https://www.cjtc.wa.gov/training-education/defensive-tactics/master-instructor (Accessed on April 24, 2022).

on a situation solely on their area of knowledge – the application of force, how it is employed, and when it is used.[18]

Sergeant A consulted with Corporal A to assist in the review of Officer A's kick to the subject's groin. Sergeant A also relied, at least partially, on Corporal A's analysis in forming their "In policy" recommendation. Corporal A said it was their opinion the force in this instance was necessary because the subject continued to resist arrest even after they were handcuffed and that there were no other reasonable alternatives. Also, the subject was still capable due to their size to injure officers and referenced Officer D getting kicked in the leg. Due to the subject's size and motivation, other less intrusive techniques were less capable of neutralizing an assault. Corporal A even said that the kick to the groin was effective at safely facilitating the subject to the ground since the kick caused the subject to double over, bringing them closer to the ground, which allowed for a smooth takedown.

Corporal A first considered the alternative of the control tactic hair pull or mastoid takedown. However, while a lesser level of force, it was ruled out because the subject would have landed on their face since they were handcuffed. Corporal A stated, "In comparison to the force that was used, I think a strong argument could be made that the mastoid takedown was more likely to cause injury to the suspect than a Level II strike."[19] Arm takedowns, whether it be arm pull, bent arm bar, straight arm bar also would not work. Due to the subject's size and positioning, the arm bars wouldn't work. Additionally, using an arm bar creates the same concern that the subject will fall on their face. Oleo capsicum (OC) is not reasonable because of cross contamination. This would likely not be effective because this is a pain compliance device. The subject has already demonstrated they are motivated and likely intoxicated.[20] TASER in dart mode has all the same previous issues but is a higher level of intrusion, so TASER was not an option.

Despite providing assurances to Sergeant A and Officer A on the use of force and them relying on Corporal A's analysis, the casefile does not have any further record of Corporal A's participation in the incident. Corporal A did not write a supplemental report at the time of this incident. Corporal A did not document their analysis of the incident he provided to Officer A and Sergeant A for the record. Corporal A only wrote a supplemental report after the fact when prompted by an outside investigator. When the IA investigator asked Corporal A whether Sergeant A seemed concerned over the use of force, they said, they just wanted to make sure to get the full picture of what happened, because it's not normal for somebody in handcuffs to have force used against them. Corporal A said that they had only helped Officer A properly format their *Graham* statement.

It is unclear what other areas the department expects the master instructor to weigh in, such as crafting statements in reports and helping determine whether force is reasonable. An officer must be able to attest to their own perceptions as it pertains to a *Graham* statement, as it is that officer's perception that matters most to an assessment of whether the force was objectively reasonable. Should a supervisor desire clarification, the addition of the SME is helpful, but should be documented.

[18] *See* Corporal A's IA Recorded Interview at 19:41.
[19] *Id.* at 25:45.
[20] *Id.* at 26:32.

***RECOMMENDATION R22-01**: SUBJECT MATTER EXPERTS SHOULD BE REQUIRED TO DOCUMENT ANY ASSESSMENT AND ANALYSIS THEY PROVIDE AND RECOMMENDATIONS AS A MATTER OF POLICY. THIS WILL SUPPORT ANY OFFICER OR SUPERVISOR THAT RELIES ON THIS ASSESSMENT AND ADDS A LEVEL OF ACCOUNTABILITY TO THE SME'S EVALUATIONS.*

In the UOFRB's review of this case, it identified that when consulting with a SME, it would be ideal for the SME to document their recommendations. It is imperative that if a supervisor relies on a SME's expertise, that the SME should formally document their assessment. In this case, the master instructor's opinion, and subsequent supervisor's opinion, and the ARP's opinion in this case differed from the arbitrator's analysis. A thorough analysis and evaluation, in a perfect world, would have included assessments from both viewpoint.

The Arbitrator's analysis in this case was authored by an individual who was fluent with police training, tactics, and the law. However, while the Arbitrator's decision was aimed particularly at the Police Guild's request, it also contradicts the opinions formed by the officer's supervisor, the ARP, and the UOFRB. The department must be able to maintain credibility when it is called upon to review matters of public concern. Because the arbitrator was able to arrive at different conclusions than the supervisor and the ARP, the department should raise the level of analysis required of supervisors and reviewing panels and boards.

***RECOMMENDATION R22-02**: TO IMPROVE FUTURE ANALYSIS, I RECOMMEND SPD USE THE REASONING IN THIS CASE AS A CASE STUDY TO DETERMINE THE TYPE OF ANALYSIS THAT SUPERVISORS, ADMINISTRATIVE REVIEW PANELS AND REVIEW BOARDS ARE EXPECTED TO CONDUCT.*

Reliance on disputed facts

Officers made differing statements on whether they witnessed the subject being assaultive, whether the subject kicked Officer A, whether the subject was intoxicated, and the subject's body type. These are all factors in determining whether Officer A's use of force was reasonable or excessive. Below is a review of the interviewed officers' statements from their IA interview and/or incident reports.

	Source	Whether the Subject Kicked Officer D
ARP	ARP Memorandum 1/16/20	"Several officers then indicated [the subject] kicked back at [Officer D] with [their] leg, kicking [Officer D]'s leg. (p.3)
	ARP Memorandum 1/16/20	"[Corporal A], [Officer A], [Officer B], and [Officer D] each witnessed [the subject] kick [Officer D] immediately preceding [Officer A]'s use of force." (p.4)

	ARP Memorandum 1/16/20	"[The subject]'s assault of [Officer D] was not visible on BWC, but as noted above several officers witnessed [them] kick [Officer D]." (p.5)
Corporal A	Field Report 7/12/19	"As leg restraints were being applied, I was informed that the subject had kicked an officer which had precipitated the level 2 strike by [Officer A]." (p.2)
Officer A	Field Report 7/12/19	"[The subject] kicked [Officer D] in the leg, using a 'donkey' type kick with [their] right leg, committing the crime of Assault 3rd Degree against a law enforcement officer." (p.3)
	IA Summary	"He said [Officer D] had been assaulted, '[Officer D] were you assaulted?' 'Yes, I got assaulted. The [subject] kicked me in the leg." (p.15)
Officer B	Field Report 7/12/19	"I turned my attention to [the partner], to confirm [they] were secured, and out of the corner of my eye observed some kind of commotion with [the subject] again, as [they] began thrashing back and forth, and observed [them] kick directly rearward and impact [Officer D], thus committing the crime of 3rd Degree Assault." (p.9)
	IA Summary	"Officer B could not remember which of [the subject]'s legs or if [they] were wearing shoes. I asked if [they] saw a reaction from [Officer D] and [they] could not recall that." (p.13)
Officer C	Field Report 7/12/19	"[The subject] became combative and kicked at officers." (p. 3)
	IA Summary	"[Officer C] then described how [they] believed [the subject] used [their] right leg to kick the officer to [their] right, however [they] did not actually see [them] do it or where it landed. This opinion was formed based on the torque and movement of [the subject]'s body. In addition to this, [Officer C] said [they] heard the officer to [their] right say 'ow' and later during a conversation with officers [their] opinion was validated when [they] heard an officer was kicked [by the subject]." (p.6)
Officer D	Field Report 7/12/19	"At one point [the subject] kicked me and struck me in the shins." (p.2)
	IA Summary	"[Officer D] explained that [they] saw [the subject] attempt at least three times to kick [Officer D] but did not connect. [They] were not sure if another officer was struck though." (p.4)
	IA Summary	"[Officer D] then felt on his left leg 'the kick,' but wasn't looking down and did not see which leg or foot [the subject] struck [them]. All [they] noticed was the 'pain' and was certain it was not the loose dog that had bit [them]." (p.5)
Officer E	IA Summary	"[The subject] then began stomping with [their] foot, but [Officer E] wasn't sure if [they] were trying to do a foot stomp, shin rake, or a kick but [they] were doing something on that other foot." (p.7)
Officer F	IA Summary	"At one point [Officer F] heard comments to the effect that [the subject] was kicking at officers but [they] said [they] didn't see it happen."

	Source	Statements on whether the subject and their partner were intoxicated or under the influence
	Blue Team entry, Use of Force Details	Citizen Influence Assessment: Mental Health Issues + Drugs/Alcohol
Officer A	Field Report 7/12/19	"In this instance [the subject]'s extreme size and athleticism, couple with [their] heightened state and intoxication meant that even with [their] arms partially immobilized [they] were still physically able and was attempting to seriously injure officers nearby." (p.4)
	Field Report 7/12/19	"The way that [the subject] was acting it appeared as if [they] were under some sort of illegal narcotic. [They] were sweating profusely and showing no regard for the lawful orders from officers on scene." (p.4)
Officer B	IA Summary	"I asked [them] if [they] thought [the subject] or [the partner] were under the influence and [they] did not think so." (p.13)
Corporal A	Field Report 7/12/19	"The subject was very agitated, and [their] erratic behavior led me to believe [they] were likely intoxicated. The subject also displayed slurred speech."

	Source	Statements on the subject's physical appearance
Sergeant A	Use of Force Supervisor Review	"The driver, and only occupant, of the vehicle as a dark-skinned [person], very large build (5'10" 270 lbs)." (p.1)
Corporal A	IA Interview Audio	"Large in stature. Fairly young and in good shape. Age in early 20s probably. Physically able, large, and powerfully built." (12:25)
Officer A	Field Report 7/12/19	"In this instance [the subject]'s extreme size and athleticism, couple with [their] heightened state and intoxication meant that even with [their] arms partially immobilized [they] were still physically able, and was attempting to seriously injure officers nearby." (p.4)
Officer B	Field Report 7/12/19	"[The subject] was a very large [person], appearing to be about 5'10 and close to 300 pounds. [They] were wearing a tank top and shorts, offering [them] more mobility than that of [Officer C] and I in our full police uniforms." (p.5)
Officer E	Field Report 7/12/19	"[The subject] was of a large stature…[and] [their] arms were thick…Due to [the subject]'s large stature [they] were able to gain a slight position of advantage." (p.2)

	Source	Statements on the subject's assaultive nature
ARP	ARP Memorandum 1/16/20	"Rather than leg restrain [the subject] who was described as assaultive but on the ground and handcuffed, officers elected to stand [them] up." (p.5)
Sergeant A	Use of Force Supervisor Review	"At first the [subject] appeared compliant; however, while attempting to handcuff the [subject], [they] became resistant and started tensing [their] arms in an effort not to be handcuffed." (p.1)

	Use of Force Supervisor Review	"…other officers were still dealing with [the subject] who was completely uncooperative and kicking at officers. [The subject] ended up "donkey kicking" [Officer D] in the leg." (p.1)
Sergeant B	Field Report 7/12/19	"There were officers dealing with two uncooperative individuals in the front yard of the residence and a dog running around which appeared aggressive." (p.2)
Corporal A	IA Summary	"[Corporal A] explained that it was also [their] opinion that [the subject]'s size and motivation had made other less intrusive techniques less capable of neutralizing an assault in that instant." (p.4)
Officer A	IA Summary	"[Officer A] also explained that [they] knew a Thai kick was a level 2 strike that was justified when a subject displayed assaultive resistance." (p.10)
	Statement dated 3/12/20	"[The subject] was not under control and was continuing to act in an assaultive manner." (p.3)
Officer B	Field Report 7/12/19	"I turned my attention to [the partner], to confirm [they] were secured, and out of the corner of my eye observed some kind of commotion with [the subject] again, as [they] began thrashing back and forth, and observed [them] kick directly rearward and impact [Officer D], thus committing the crime of 3rd Degree Assault." (p.9)
Officer C	IA Summary	"Officer C said in the same moment [they] felt [the subject] became 'non-compliant' and 'resisting arrest' and moving [their] arms. [Officer C] also said [the subject] was kicking [their] legs then stopped… [Officer C] said [the subject] was 'wiggling' [their] legs and 'somewhat' kicking so [they] were put back onto [their] chest." (p.6)
Officer D	Field Report 7/12/19	"[The subject] was actively resisting law commands and arrest. Throughout the process of placing [the subject] in handcuffs [they] began pulling away, kicking, and turning over. After finally getting handcuffs placed on [the subject] [they] were asked to stand up and walk to the patrol vehicle. [The subject] stood up, but then became combative again and started pulling and kicking." (p.2)
Officer E	IA Summary	"It appeared they had enough officers to control him as they stood [the subject] up, but as soon as they stood [them] up [Officer E] said [the subject] began 'fighting' again." (p.7)
	Field Report 7/12/19	"[The subject]'s actions and demeanor demonstrated that if this was attempted [they] would only try to assault officers and continue with [their] non-compliant and assaultive behavior." (p.2)
Officer F	IA Summary	"At one point [Officer F] heard comments to the effect that [the subject] was kicking at officers, but [Officer F] said [they] didn't see it happen." (p.8)
Officer H	Field Report 7/12/19	"I could see the male was still acting aggressive and had to be leg restrained." (p.2)

Making assertions without providing evidence to support those assertions allow for speculation to be interpreted as fact. Officer A relied on the subject kicking Officer D as justification for striking the subject. Officer A and the SME referenced the subject's build and intoxicated state as part of why kicking the subject's groin was the "best" course of action. The record is absent of any examination performed on the subject or the partner to determine if they were in fact under the influence of alcohol or other substances.

The subject is described on various reports as weighing between 270-300 pounds and around 5'10" to 6'0." The other officers who reference the subject's height, weight, and build are similar. Officer A is the only person to describe the subject as "athletic."

The ARP's analysis on whether Officer A's kick to the subject's groin was reasonable or excessive cites the opinion of officers on scene who said the use of the kick was reasonable and effective. However, the ARP relies on the disputed fact the subject kicked Officer D and Officer A only responded to prevent continued assault and was not punitive in nature. However, based on the review of officer statements, it was only Officer A who clearly saw the subject kick Officer D. While Officer D wrote in their report the subject kicked them, when Officer D spoke with IA, they said they felt a pain and were only certain it wasn't the dog that bit them. The other officers heard about the kick, heard a reaction, or saw the subject generally kicking at officers. It is also significant that the ARP notes in their analysis that the alleged kick was not captured on any of the officers' video.

In the ARP's analysis on whether Officer A's use of force was excessive, they said that "given the totality of the circumstances, to include [Officer A]'s denial that the kick was punitive and multiple officers on scene who stated the use of force was appropriate and effective, there is insufficient evidence to find that [Officer A]'s kick was punitive. As a result, we conclude the use of force was objectively reasonable."[21]

The Arbitrator's decision also provides an analysis yet arrives at different conclusions. The analysis does not try to explain away inconvenient facts, it simply addresses them and does not allow them to be parsed out of their opinion.

The OPO previously recommended that disputed facts become a regular part of IA investigations and strongly feel that should be expanded to both supervisory and ARP reviews.

Analyzing disputed facts

Making false or misleading statements can be damaging to the reputation of officers and the department. Considering E2SSB 5051, officers face mandatory revocation or denial of certification if the Washington State Criminal Justice Training Commission determines an officer has been "terminated by the employing agency or otherwise separated from employment after knowingly making…misleading, deceptive, untrue, or fraudulent representations in the practice of being a peace officer/corrections officer."[22]

There is a difference between disputed facts and statements that rise to the level of deception. Human factors can impact how different officers might process the same situation or information differently. However, not addressing the issue at all opens the department to criticism by outside entities like the

[21] *See* ARP Memorandum, January 16, 2020 pp.6.

[22] https://www.cjtc.wa.gov/docs/default-source/certification/cjtc-cert-revocation-spreadsheet_7-7-21.pdf?sfvrsn=63a197b4_2 (Accessed April 24, 2022).

arbitrator in this case or the WSCJTC. The arbitrator identified several issues where Officer A's statements did not line up with the evidence. The ARP did not identify these discrepancies. The Chief was the first and only person in the chain of command to identify such discrepancies. This includes statements on whether Officer A's statements were accurate; the subject kicked an Officer precipitating Officer A kicking the subject; and whether the subject was assaultive.

Whether Officer A's statements were accurate regarding the threat and type of kick employed

There was a lot of discussion and statements made on the type of kick Officer A delivered, whether the kick was a "Thai kick," a donkey kick, or some other type of kick, and the intended target of the kick. The ARP notes that Officer A "described [their] kick as a Thai kick aimed at the [the subject]'s inner right thigh with the intention of knocking [them] off balance so that [the subject] could be taken back to the ground."[23] The ARP notes that Officer A submitted an additional statement to IA where they defend the kick as not exceptional on its own and that the technique was taught.[24] On the other hand, the arbitrator found "[Officer A]'s reports and statements were inaccurate and misleading in defending the kick."[25] The arbitrator cited that the handcuffed [subject] did not present a significant threat to officers, Officer A describing the subject as assaultive rather than uncooperative is inaccurate, and additionally cited that there was no presence or indication of a weapon prior to kicking the subject.[26]

Whether the subject kicked an officer

The ARP took statements directly from officer reports in their analysis without addressing conflicting statements and whether the reports lined up with body camera footage. In the ARP's analysis, it said, "Corporal A and Officers [A, E, G, D and C] all described the [subject's] resistance level as assaultive. Corporal A and Officer [A], Officer B and D each witnessed [the subject] kick [Officer D] immediately preceding Officer [A]'s use of force. Corporal [A] and Officers [A, E, and D] all noted that the use of force was effective in that it immediately took the fight out of [the subject] causing [them] to bend forward and off balance at which point officers were able to return [them] to a prone position on the ground."[27]

In the arbitrator's decision, they say, "Other than [Officer A's] self-serving statement, there is no corroboration that immediately prior to [Officer A's] kick, the handcuffed [subject] posed a threat by way of kicking [Officer A] or another [o]fficer at the scene."[28] The arbitrator goes on to say, "[Officer A] justifies [their] kick by claiming that the handcuffed [subject] was a large [person], assaultive, and kicking at other [o]fficers. Therefore, endangered the other [o]fficers. However, the video from body worn cameras does not show a kick by the handcuffed [subject] immediately before [Officer A] delivered [their] kick to the handcuffed [subject's] groin. [Officer A] did not demonstrate that [they] were responding to an 'immediate threat.' [Officer A's] explanation is unsupported by the video evidence and is inconsistent."[29]

Whether the subject was assaultive

"Assault" and "assaultive" behavior was liberally used in this incident. In its simplest form, an assault (referred to in other jurisdictions as battery) under criminal law is "a physical act that results in harmful

[23] *See supra* note 13 at 5.
[24] *Id.*
[25] *See supra* note 6 at 29.
[26] *Id.* at 28.
[27] *See supra* note 13 at 4.
[28] *See supra* note 6 at 25-26.
[29] *Id.* at 14.

or offensive contact with another person without that person's consent."[30] The term "assaultive resistance" was used by officers; however, it is not clearly defined in SPD policy. In fact, assaultive resistance would indicate some sort of harmful or offensive contact in an effort to evade arrest or resist lawful commands given by officers. By SPD's definition, being "assaultive" is non-compliance that is perceived as or results in an assault that does not require physical contact. Resistance is generally described as a lack of voluntary compliance, but there are many types of active resistance which would not be considered assaultive.

In this case, assaultive was used to describe everything from the subject's reluctance to comply with officer commands by refusing to come out of the house and acting aggressively but not necessarily causing a harmful or offensive contact.

Almost every officer on scene who described the subject's behavior leading up to Officer A kicking them in the groin as "assaultive." The ARP adopted the use of "assaultive" to describe the subject. However, upon review of officers' statements, not every officer described the subject's behavior as assaultive. It is noted that not every officer was close enough to see the subject's actions or their attention could have been directed elsewhere. Further, it is unclear whether each officer operated under the same definition of "assaultive."

Sergeant A describes the subject as "resistant" and tensing their arms. Officer C describes the subject as "wiggling" their legs and "somewhat" kicking. Officer E describes the subject as 'fighting' officers and this demeanor demonstrates non-compliance and assaultive behavior. Sergeant B describes the subject and the partner as "uncooperative," while Officer H describes them as "aggressive."

Officer B describes the subject as displaying "assaultive resistance." In reference to the subject's reluctance to come out of the house despite officer commands and the aggressive language used, "[The subject] was absolutely non-compliant and displaying assaultive resistance toward us."[31] Officer B goes on to say, At that point, [the subject] had been displaying assaultive resistance for the duration of the contact, and I firmly believe that anything short of compliance at that point would conversely be an assault by [the subject] against [Officer C] or I. I made the decision that should [the subject] display anything but compliance at that point, I would deploy my TASER to subdue [them]."[32]

The arbitrator's review of the evidence led them to a different conclusion. They found that the subject's walking down the front stairs of their home to have a smoke, "directly contradicts the allegations that the [subject] was 'assaultive,'…the only evidence that the [subject] may have been assaultive are representations by one [o]fficer that [they] were kicked."[33] The arbitrator says that there were at least six body worn cameras on scene and no video captured a kick and that none of the officers on scene actually saw the suspect kick the officer, including the officer who was kicked. They go on to say that at no point does refusing to come out of the house constitute an offensive touching without consent under the simple definition of assault. Further, being uncooperative, resistant, wiggling arms and somewhat kicking, or pulling away, kicking, and turning over on its own does not constitute assault.

[30] https://www.law.cornell.edu/wex/battery (Accessed April 24, 2022).
[31] *See* Officer B's Field Report pp. 7.
[32] *Id.* at 8.
[33] *See supra* note 6 at 24.

A thorough analysis should address conflicting statements and whether those statements rise to the level of deception. The department should be the most critical of its own actions, it should not take an arbitrator to call out deception. A thorough and critical analysis reassures the public that the department is safeguarding the community's safety whenever it uses force against a community member. It shows that the department aims to minimally rely on force if it holds its officers to the standard set forth in its policy. The department's thorough and critical evaluation of officer actions will also hopefully deter and safeguard officers from conduct that ends up before the WSCJTC.

***RECOMMENDATION R22-03**: THE OPO RECOMMENDS THAT THE ARP OR IA IDENTIFY DISPUTED FACTS AND INCORPORATE DISPUTED FACTS AS PART OF THEIR ANALYSIS. THE OPO PREVIOUSLY RECOMMENDED TO SPD IN C19-040, RECOMMENDATION #1 THAT IA INVESTIGATORS SHOULD IDENTIFY DISPUTED FACTS AND PROVIDE AVAILABLE EVIDENCE FOR BOTH SIDES OF THE DISPUTE, DOCUMENT THEM CLEARLY SO THE DESIGNATED PERSON CAN MAKE FULLY INFORMED DETERMINATIONS ON HOW TO VIEW THE FACTS.*

Analysis of excessive force as punitive force

The ARP found the allegation of Excessive Force on Officer A as "Not Sustained." The ARP reasoned that other officers on scene said the use of force was appropriate and effective in addition to Officer A's denials. Therefore, there was insufficient evidence for the ARP to find the kick was punitive. Further, the ARP did not question whether Officer's A's denials that the kick was punitive were reasonable based on consistent with evidence or merely self-serving. There was also not an argument made regarding how effective force can still be excessive nor was there any clear argument describing the number of other officers on the scene and the positive control two, if not three, of the other officers already had on the subject leading up to and at the moment of the use of force mitigating the necessity of the force used, nor the proportionality of it being used upon a handcuffed subject.

The ARP noted several statements that could indicate Officer A's actions were punitive and support the allegation of excessive force, but they did not take the analysis further than mentioning the statement. The ARP specifically quotes Officer A when they say to the subject, "there you go mother fucker" and to Sergeant A, "I have a use of force; I kicked [them] in the [groin]…we had [them] in handcuffs and [they] started kicking everybody, so I kicked [them] in the groin."[34] The ARP also referenced when Officer A responds to the subject when they complained they couldn't breathe with, "You can breathe if you're being an asshole like this!" and "We'll drag him if we have to. He's not earned any love here."[35] This is indicative that Officer A was not in control of their emotions and escalated the encounter. They go so far as to say, "[Officer A]'s expletive 'there you go mother fucker,' immediately after kicking [the subject] in the groin could be interpreted as connoting punitive intent." However, they stop short of finding punitive intent due to statements from officers who did not see the force occur and Officer A's denial.

The arbitrator viewed Officer A's use of force as punitive. The arbitrator cited the same fact pattern as the ARP but came to the different conclusion. The arbitrator found Officer A's denial of punitive intent "self-serving" and there was "no other reasonable explanation" for Officer A's profanity immediately

[34] *See supra* note 13 at 5.
[35] *See* IA Summary, pp. 17.

following the use of force, ongoing verbal engagement with the subject as they were taken to the police vehicle, and abandoning the task of handcuffing the partner to refocus on the subject.[36]

The public policy against the excessive use of force in policing

The ARP also argued to the Chief that Officer A's intent, whether punitive or not, is irrelevant under the reasonableness analysis in *Graham*. The ARP cited to half of a sentence from a Third Circuit case*, Estate of Smith v. Marasco*, 318 F.3d 497 (2003) that drew upon the well-established principles under *Graham*. The complete sentence provides, "if a use of force is objectively unreasonable, an officer's good faith is irrelevant; likewise if a use of force is objectively reasonable, any bad faith motivation on the officer's part is immaterial."[37] *Graham* provides, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; *nor will an officer's good intentions make an objectively unreasonable use of force constitutional.*"[38] The analysis in this case focuses on the force used. As such, in arriving at their conclusion, focused on the objective reasonableness of Officer A kicking a handcuffed subject in the groin while they were being controlled by other officers. They analyzed the punitive nature separately. The arbitrator, however, included the punitive intent from their analysis on the appropriateness of force.

Upon closer examination of this case, the facts of the *Smith* case are not on point with the instant case. The *Smith* case is a §1983 civil rights violation claim brought by survivors who allegedly suffered a fatal heart attack due to the stress of an incident involving state troopers who responded to the plaintiff's residence. The plaintiff alleges the troopers violated their constitutional rights. While this is persuasive, it is not binding on the Ninth Circuit.

There is a Ninth Circuit case with a very similar fact pattern and deals with administrative issues like the instant case.[39] The inciting incident for the Shepherd case occurred in 2014. Shepherd responded to a call involving domestic violence. During the exchanges between Shepherd and the suspect, Shepherd told the suspect to calm down at least three times and that she was 'out of control.' While Shepherd tried to de-escalate the other party, the suspect made personally insulting remarks to Shepherd. He responded, "My patience is done. It's over. So somebody's going to go to jail. Who's it going to be?"[40] After another verbal exchange, Shepherd decided to arrest the suspect. The suspect was generally uncooperative and refused to get into the car. As Shepherd tried to get the suspect into the car, she spun around, fell or sat backward onto her back on the seat, and kicked Officer Shepherd in the face. He exclaimed, "she kicked me." Two seconds later he is seen on in-car video punching the handcuffed suspect in the face causing an orbital fracture despite him having time to consider and execute alternative means.

The police department had a clear and specific policy in place that the officers were trained on. The policy required officers to only use force that is reasonable, necessary, and proportional. A review board within the police department found the seriousness of Shepherd's offense was mitigated because the force could have been reflexive after the woman kicked him two seconds earlier causing stinging pain and that the woman was trying Shepherd's patience. The review board observed that Shepherd

[36] *See supra* note 6 at 28.
[37] *Estate of Smith v. Marasco*, 318 F.3d 497, 515 (2003).
[38] *Graham v. Connor,* 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).
[39] *City of Seattle, Seattle Police Department v. Seattle Police Officer's Guild*, 17 Wash.App.2d, 21 (2021) [hereinafter the Shepherd case].
[40] *Id.* at 27.

was insistent he did nothing wrong, and several co-workers agreed with him. The board reinstated Shepherd with a 15-day suspension with some duty modifications.

The court held that the review board's decision to reinstate was so lenient that it "violates the explicit, well-defined, and dominant public policy against the excessive use of force in policing."[41] The court reasoned that the review board's decision wrongly sends a message to officers that a clear violation of policy is not that serious if an officer is dealing with a difficult subject, losing patience, or passionate in believing that he or she did nothing wrong. This type of messaging is irreconcilable with the public policy against excessive force in policing.

In the instant case, the public policy against excessive force in policing is relevant at the administrative level. As discussed previously, Officer A kicked a handcuffed subject in the groin while calling them a "motherfucker." The act of striking a sensitive region of a person's body offends the senses of an average person or shocks the conscience.[42] The act of calling them a "motherfucker" while delivering that strike increases the relevance.

***RECOMMENDATION R22-04**: THE OPO RECOMMENDS SPD CAREFULLY CONSIDER AN OFFICER'S INTENT WHEN EVALUATING ANY USE OF FORCE INCIDENT.*

Dissenting opinion

The US Supreme Court issues dissenting opinions when a justice in the minority wishes to write a separate opinion. This is not a universal practice in the legal system around the world. Typically, when Court decisions are announced, it only summarizes the majority opinion. Dissenting opinions are only noted. The current Chief Justice John Roberts intimated in his confirmation hearings that the US Supreme Court may attract greater deference and provide clearer guidance when it speaks with one voice.[43] However, dissenting opinions have both internal and external utility.

Internally, an impressive dissent can lead the author of the majority opinion to refine and clarify their initial draft opinion.[44] Sometimes a dissent is written and then buried by its author.[45] Justice Louis Dembitz Brandeis would suppress his dissent if the majority modified its opinion or if he thought the Court's opinion was of limited application and unlikely to cause real harm in future cases.[46] A few times in a term, a dissent will be so persuasive that it attracts the votes necessary to become the majority opinion of the Court.[47]

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[41] *Id.* at 25; Const. art 1, § 2 (the right to be free from excessive force is enshrined in the US Constitution, which Washington's constitution recognizes as the "supreme law of the land"); 42 U.S.C. §1983 (Congress has taken affirmative steps to ensure the right can be vindicated by providing a broad remedy for violations of federally protected civil rights); 34 U.S.C. §12601 (provides a remedy for violations of federal civil rights, specifically for violations that are systematically perpetrated by local police departments).

[42] https://www.law.cornell.edu/wex/shocks_the_conscience (Accessed April 25, 2022).

[43] Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 428 Minn L. Rev. 1 (2010).

[44] *Id.* at 3.

[45] *Id.*

[46] *Id.* at 3 (quoting Alexander Bickel, The Unpublished Opinions of Mr. Justice Brandeis, (1957)).

[47] *Id*. at 4.

Externally, "A dissent in a Court of last resort is an appeal…to the intelligence of a future day, when a later decision may possibly correct the error to which the dissenting judge believes the court to have been betrayed."[48] Dissenting opinions also "augment rather than diminish the prestige of the Court."[49] When history shows a Court's decision has been a mistake, it is comforting to look back and see at least some of the Justices saw the danger and warned of their concern. Dissents also have the power to attract immediate public attention that can propel immediate legislative change.[50]

Here, Lieutenant B was a member of the ARP pod that reviewed this case. They wrote their thoughts in an informal note with their concerns regarding the incident for internal discussion with the ARP. Lieutenant B later clarified that it was not a dissent but written to generate conversation during the ARP's discussions. Lieutenant B also clarified that they agreed with the ARP's final decision. However, substantively the memo represents a dissent on the ARP's opinion, and it was preserved. Lieutenant B's note says they had concerns considering the discussions around this case. Lieutenant B says some concerns were partially alleviated, but they continued to have concerns that were not addressed in the IA investigation. Lieutenant B's concerns included: (1) an officer's subjective intent in the context of an administrative investigation; (2) the ARP should consider the statements Officer A made on scene and compare it to the "seemingly incongruent written documentation later on."

1. *Considering subjective intent in punitive force*

Lieutenant B cited the department's policy in place at the time of the incident required the objectively reasonable standard when assessing force.[51] However, Lieutenant B believed an officer's subjective intent is, "of utmost importance in preserving the integrity and legitimacy of our organization."[52] While Lieutenant B agreed the use of force can be objectively reasonable, they believed Officer A's subjective intent should be considered when determining if their actions were punitive. Lieutenant B cited the following reasons:

- Officer A pawned off dealing with the partner to Officer D to get in the mix with the subject. This is problematic because Officer A passed off [the partner] unrestrained to another single officer. "[T]he reasoning given to IA is ridiculous…because [they] wanted to get to [the subject] quickly and [Officer A] did not want to have to explain to Officer D what was happening."[53]
- While officers were trying to handcuff the subject, an officer warned the subject they would potentially tase the subject. "[Officer A] immediately piped up[,] 'I'll do it.'"[54]
- The subject was immediately kicked in the groin right after they were stood up and was immediately followed by, "there you go motherfucker." Lieutenant B says they reviewed this portion of the video approximately 15 times and Officer A's tone suggests retaliating toward the subject for kicking at officers.[55]

Lieutenant B raised concerns in their notes that would benefit the department and the public. Internally, Lieutenant B wrestled with whether the force Officer A used was excessive. While the objectively reasonable standard follows the minimum requirement set forth in civil liability cases, it is

[48] *Id., quoted in* Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 144 (1990) (quoting Charles Hughes, The Supreme Court of the United States 68 (1936)).
[49] *Id.* at 5 (quoting Antonin Scalia, Dissents, 13 OAH Mag. History 18, 22 (1998)).
[50] *Id.* at 6.
[51] *See* SPD Use of Force Policy pp. 11.
[52] *See* Lieutenant B's memo
[53] *Id.*
[54] *Id.*
[55] *Id.*

not required that administrative policies adhere to the minimum standard. As Lieutenant B suggests, an administrative investigation is concerned with preserving the department's integrity and legitimacy, which the objectively reasonable standard does not account for. Lieutenant B was thinking beyond policy restrictions of the department and was interested in preserving the reputation of policing in Spokane, benefitting both the department and the public.

2. *Officer A's incongruent language used on scene versus reports written about the incident*

Lieutenant B is the only ARP member we have recorded who identified several significant "seemingly incongruent" statements Officer A made during the incident compared to the written statements on the incident that cast doubt on the veracity of the statements later written about the incident. Lieutenant B provides Officer A's statements after viewing their video:

- 4:13 of Officer A's video, Officer A says they used force by kicking the subject in the groin
- 9:25 – Officer A told a group of officers, "I have a use of force, I have a use of force. I kicked [the subject] in the nutsack."
- 11:00 – Officer A told Lieutenant A the subject was "kicking and flailing around and [they] kicked [Officer D] so I kicked him in the groin area to get [them] to stop."
- 13:15 – Officer A told Sergeant B, "[the subject] was kicking around…we had [them] in handcuffs and [they] started kicking everybody, so I kicked [them] in the groin."
- At the jail, Officer A tells Sergeant A that they kicked the subject "right in the balls."
- However, "it was not until the written report after consulting Corporal A for *Graham* advice, that the kick was ever described as a 'Thai kick' to the inner thigh that missed its intended target."[56]

The ARP's final report could have been much stronger had it included Lieutenant B's notes and commented about the depth of discussion it generated. At the same time, the ARP could have ameliorated its opinion to address Lieutenant B's concerns.

***RECOMMENDATION R22-05**: THE OPO RECOMMENDS ANY DEPARTMENT REVIEW INCLUDE A DISSENTING OPINION IF A REVIEWER FEELS LIKE THEIR OPINION OR CONCERNS HAVE NOT BEEN ADDRESSED BY THE MAJORITY. FURTHER, IF A MEMBER OF THE ARP OR CHAIN OF COMMAND REVIEW FEELS THE IA INVESTIGATION DID NOT ADDRESS AN ISSUE IN ITS INVESTIGATION, THE ARP OR REVIEWER SHOULD SEND THE ISSUE BACK TO IA FOR FURTHER INVESTIGATION.*

Striking a suspect in handcuffs

In the ARP's discussion on Officer A's Level II strike, they make the distinction that SPD policy authorizes an officer to kick a handcuffed suspect who is assaultive because it is not expressly prohibited. Corporal A, a use of force subject matter expert, said striking a handcuffed subject in the groin is unusual but felt this use of force passed muster. The ARP noted that striking a handcuffed subject is unusual but not

[56] *Id.*

prohibited. The arbitrator contends the subject was not assaultive at any point but was only reluctant to surrender.[57]

The ARP review of striking a handcuffed subject stopped at the policy. It did not analyze whether in this case striking a handcuffed subject was reasonable under the public policy against excessive force by law enforcement. The ARP did not weigh the veracity of Officer A's statements. The ARP's memo also failed to consider alternatives. It summarized Sergeant A's review of the incident, "Sergeant [A] further noted that after conferring with Corporal [A] regarding other force options they agreed that the Level II strike was the 'best choice.'"[58] The ARP then went on to evaluate Sergeant A's supervision of the incident and did not discuss possible alternatives to the strike any further.

In the Shepherd case discussed above, the court found that despite Shepherd's subjective belief that he did nothing wrong and several co-workers agreeing with him, subjective intent does not mitigate a violation when the department has a clear and specific policy citing to *Graham.* In this case, the opposite occurred. The ARP determined it was not a violation to strike a handcuffed subject because the policy was unclear. Like the Shepherd case, Officer A and their co-workers believed the use of force was reasonable. This was very persuasive to the ARP. Taking lessons from the Shepherd case, courts will look favorably on decisions supported by clear and specific policy despite an officer's subjective belief.

***RECOMMENDATION R22-06**: THE OPO RECOMMENDS SPD UPDATE ITS POLICY TO UNAMBIGUOUSLY PROHIBIT ALLOWING STRIKING HANDCUFFED SUBJECTS, WITH FEW CAVEATS. FORCE USED AGAINST HANDCUFFED PERSONS SHOULD BE DEEMED SIGNIFICANT AND IMMEDIATE NOTIFICATION OF THE CHIEF/COMMAND DUTY OFFICER SHOULD BE MADE DETAILING THE CIRCUMSTANCES.*

Corporal A discussed alternatives such as mastoid pull or a hair pull, arm bars, OC, or TASER to the Level II strike but deemed them all ineffective. However, in analyzing the groin strike, the arbitrator suggests using leg restraints as an alternative to striking the subject. Further, another feasible alternative not discussed would have been a leg sweep. Officers with positive control positioned to the left and right of the subject could have attempted a leg sweep on the uncooperative subject. Spokane PD's discussion on alternatives started and stopped with Corporal A. Corporal A's advice and testimony had a clear conflict of interest as Corporal A was present on scene as the action occurred, and had provided technical advice to Officer A in explaining the factors present for why the force was used. It is reasonable that Corporal A did not deviate from the original advice provided. The ARP called in a separate SME who was uninvolved in the original incident to provide clarity for some aspects. As this case appeared to be complicated for many of the reviewers, an uninvolved SME may have been of benefit.

The OPO previously recommended SPD critically analyze an officer's tactical conduct through its review boards. Since the UOFRB has already reviewed this case but did not address tactical conduct, and SPD's DT Instructor's recommended findings diverged greatly from the arbitrator's findings, the UOFRB might

[57] *See supra* note 6 at 24.
[58] *See supra* note 13 at 7.

benefit from the exercise of using this case to critically analyze an officer's tactical conduct to improve future analysis.

***RECOMMENDATION R22-07**: AS PREVIOUSLY RECOMMENDED IN C19-040, RECOMMENDATION #2 AND R21-9, THE OPO RECOMMENDS SPD EITHER UPDATE THE FUNCTION OF THE REVIEW BOARDS TO CRITICALLY ANALYZE THE OFFICER'S TACTICAL CONDUCT AND MAKE FINDINGS LIKE LVMPD AND/OR ENHANCE THE CHAIN OF COMMAND FUNCTION OF THE CATEGORICAL USES OF FORCE LIKE LAPD THAT EXAMINE AN OFFICER'S TACTICS AND USES OF FORCE THAT RESULT IN SPECIFIC FINDINGS.*

The use of exceptional techniques

There was much debate about what type of kick Officer A intended to use on the subject, whether it was a front kick or a Thai kick. The SPD Defensive Tactics Manual allows for stop kicks and leg kicks, both of which are described as Level II strikes. Both kicks target the subject's pelvic area. In Sergeant A's review, they say the intent of the front kick was to double over the subject. While Officer A said in their initial report, "my intended target for the use of the Thai kick was the inside of [the subject]'s right thigh, but [they] were moving around and it struck [them] in the groin area. My intent was to strike [them] in the leg, which would cause [them] to lose [their] balance and we could quickly and safely place [the subject] on the ground."[59]

When Officer A was asked in their IA interview why the kick they used was an exceptional technique, they responded, "the technique itself was not 'exceptional' but the circumstance was and [Officer A] clarified that in [their] statement to the county detectives."[60] Officer A went on to explain kicking a handcuffed subject was the exceptional circumstance but the technique itself was taught. Officer A cited Lakewood Police Department's Defensive Tactics Manual. A copy of Lakewood Police Department's Defensive Tactics Curriculum outline is attached as part of the record in the IA investigation. It lists a Thai kick as a striking technique. The outline is sparse and does not provide much detail on Thai kicks. Following Thai kick it has a parenthetical that says, "lead leg w/quick switch, rear leg."[61]

In a couple of supplemental statements submitted, Officer A continued their defense of a use of force not sanctioned specifically under SPD policy, but rather sanctioned as an exceptional technique. In a statement dated October 16, 2019, Officer A said, "the kick was utilized to quickly take care of a large, strong subject who was assaultive and not under control, even while handcuffed. I used the single 'Thai' kick in order to get [the subject] off balance in order to get [them] safely on the ground." In a statement dated March 12, 2020 that Officer A submitted, they say the kick they used differed from the one listed in the SPD DT Manual. Officer A said, "it was not practical or safe to attempt to kick [the subject] on the outside portion of [the] leg due to officers being on either side."[62] Officer A goes on at length describing variations in a Thai kick and techniques of advanced Muay Thai fighters.

[59] *See* Officer A's Field Report pp. 4.
[60] *See supra* note 23 at 10. [IA summary]
[61] *See* Lakewood Police Department Defensive Tactics Curriculum Revised – August 2018, 4.
[62] *See* Officer A's Supplemental Statement, 1 (March 12, 2020).

Despite Officer A learning the Thai kick at a different department and it neither being authorized under SPD's Defensive Tactics Manual nor taught in the Police Academy, the department was liable for evaluating whether the force was reasonable. SPD's policy requires exceptional techniques be thoroughly documented. Here, Sergeant A had Officer A consult with a Master Use of Force/Defensive Tactics instructor. They agreed that due to the subject's size and resistance, the strike was the "best" course of action and there were no other feasible alternatives.

Continued use of exceptional techniques requires SPD to interpret individual officer's personal and professional experience and training as well as other department's training and policy standards to evaluate circumstances that essentially create loopholes in policy. The OPO has previously recommended SPD remove the use of exceptional techniques from its policy manual on multiple occasions. In this case, the ARP memo stated that the use of force on handcuffed individuals was not expressly forbidden by policy. That logic can easily be interpreted as exceptional techniques being a very permissive category in which anything could be considered reasonable. The OPO continues to maintain that a department's policy manual list out the specific forms of force that are approved, similar to the Seattle Police Department and move away from allowing exceptional techniques, with few caveats.

***RECOMMENDATION R22-08**: THE OPO RECOMMENDS SPD REMOVE THE USE OF EXCEPTIONAL TECHNIQUES FROM ITS POLICY MANUAL. IN THE ALTERNATIVE, THE DEFENSIVE TACTICS MANUAL AND POLICY SHOULD LIST THE DEPARTMENT'S EXPECTATIONS OF WHAT CONSTITUTES THOROUGH DOCUMENTATION.*

Summary of Recommendations

Recommendation R22-01: Subject matter experts should be required to document any assessment and analysis they provide and recommendations as a matter of policy. This will support any officer or supervisor that relies on this assessment and adds a level of accountability to the SME's evaluations.

Recommendation R22-02: To improve future analysis, I recommend SPD use the reasoning in this case as a case study to determine the type of analysis that supervisors, administrative review panels and review boards are expected to conduct.

Recommendation R22-03: The OPO recommends that the ARP or IA identify disputed facts and incorporate disputed facts as part of their analysis. The OPO previously recommended to SPD in C19-040, Recommendation #1 that IA investigators should identify disputed facts and provide available evidence for both sides of the dispute, document them clearly so the designated person can make fully informed determinations on how to view the facts.

Recommendation R22-04: The OPO recommends SPD carefully consider an officer's intent when evaluating any use of force incident.

Recommendation R22-05: The OPO recommends any department review include a dissenting opinion if a reviewer feels like their opinion or concerns have not been addressed by the majority. Further, if a member of the ARP or chain of command review feels the IA investigation did not address an issue in its investigation, the ARP or reviewer should send the issue back to IA for further investigation.

Recommendation R22-06: The OPO recommends SPD update its policy to unambiguously prohibit allowing striking handcuffed subjects, with few caveats. Force used against handcuffed persons should be deemed significant and immediate notification of the Chief/Command duty officer should be made detailing the circumstances.

Recommendation R22-07: As previously recommended in C19-040, Recommendation #2 and R21-9, the OPO recommends SPD either update the function of the review boards to critically analyze the officer's tactical conduct and make findings like LVMPD and /or enhance the chain of command function of the categorical uses of force like LAPD that examine an officer's tactics and uses of force that result in specific findings.

Recommendation R22-08: The OPO recommends SPD remove the use of exceptional techniques from its policy manual. In the alternative, the Defensive Tactics Manual and policy should list the department's expectations of what constitutes thorough documentation.

CITY OF SPOKANE

OFFICE OF POLICE OMBUDSMAN
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201
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June 14, 2022

Office of the Police Ombudsman Commission
808 W. Spokane Falls Blvd.
Spokane, WA 99201

RE: Memorandum on C21-070

Commissioners,

Pursuant to Article 27 of the Collective Bargaining Agreement (Agreement) between the City of Spokane and the Spokane Police Guild, we are submitting a case for your consideration in which we have reviewed the case and met with final disagreement with both Lt. Cowles in Internal Affairs (IA) as well as Chief Meidl regarding the objectivity of the investigation. Once we were unable to come to an agreement with the Chief, the next step in the process is that the case is submitted for your consideration and decision as to whether an independent investigation in this case is warranted.

If you determine an independent investigation is appropriate, the OPO requests that the scope of the independent investigation include:

1. The additional investigative steps that Luvimae requested and were unfulfilled by IA in the investigation. Luvimae requested that IA conduct additional interviews of persons who viewed the body worn camera (BWC) prior to when the public records request (PRR) was made by Chud Wendle.
2. Any training or policies regarding the dissemination of confidential information.
3. An email search of any email from a City employee or elected official to Mr. Wendle.
4. Whether there were any conflicts of interest during the investigation.
5. Whether there was bias in the investigation.
6. Whether all witnesses and involved parties were identified.
7. The ability to pursue any other reasonable investigative leads that may present themselves during the investigation.

We have outlined the procedure when presenting a case to the OPOC for further investigation, the investigation timeline and our rationale in reviewing the case under each prong of timely, thorough, and objective. We have also included additional information that may be persuasive to your deliberation process including our thoughts on the complainant's desire to proceed and an analysis that considers the benefits and drawbacks of conducting further review or an independent investigation.

Procedure for Requesting Further Investigation from the OPOC

1. The case must be of a complaint of a serious matter.[1]

[1] The agreement defines a "serious matter" as a complaint that could lead to suspension, demotion, or discharge that involves allegations that an employee either improperly used force or improperly/inappropriately interacted

2. The OPO is not satisfied with the Chief's determination concerning this investigation.
3. The OPO may present a request for further investigation to the OPOC.
4. The request shall specifically list the additional investigative steps that the OPO is requesting be taken.
5. The OPOC's decision will be final and based on the OPO's written request, the Chief's written response, and other information the OPO finds relevant to evaluate the request.
6. Once the OPOC makes a determination, an independent investigation will be completed consistent with the decision of the OPOC on the OPO's request.

Investigation Timeline

Luvimae conducted the complaint intake of this case on October 29, 2021 and submitted it to Internal Affairs for review on the same day. This case was sent to the OPO for review three times. First on January 7, 2022, second on March 29, 2022, and lastly on April 5, 2022. Each time, Luvimae requested additional interviews. The request included seven SPD employees and a request for a voluntary interview of four individuals who work for the County, as well as City Administration officials, City Council members, and their staff. These requests only resulted in interviews of two additional SPD employees. On March 30, 2022, Lt. Cowles forwarded information regarding Director MacConnell's order for IA to stop conducting additional interviews, which is complicated by the fact that she was on the list of persons to interview.

On April 5, 2022 the OPO met with Chief Meidl who determined there was no policy violation for improper release in this complaint. Chud Wendle, the person who allegedly received the information at issue in this complaint said his information came from the "City administration." The OPO raised concerns about SPD's Law Enforcement Code and Ethics, Canon 9 and corresponding standards. Canon 9 provides, "Members of the SPD shall observe the confidentiality of information available to them through any source, as it relates to law enforcement." Standard 9.2 requires SPD members to treat all official business as confidential and only release or disseminate information in an authorized manner. Standard 9.4 requires members to neither disclose nor use for their personal interest any confidential information acquired by them in the course of their official duties.

On April 11, 2022, Luvimae declined to certify the investigation for objectivity.

Certification Process

The OPO reviews complaints and determines whether IA conducted the investigation in a timely, thorough, and objective manner. While Luvimae ultimately declined to certify the case under objectivity, we had concerns under all three categories further explained below.

Timeliness

Under the current Police Guild Contract (2017-2020), Article 24(E)(12), an administrative investigation must be completed within 180 days of the matter coming to the attention of the department. This case was filed on October 29, 2021. The OPO received IA's first 'completed' investigation on January 7, 2022 (70 days from filing), the second on March 29, 2022 (151 days), and the third investigation on April 5, 2022 (158 days).

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with citizens. Due to the negative national coverage for the complainant, we believe the improper release of protected information is significant and rises to the level of a serious incident.

The length of the investigation does not correlate with the amount of work conducted. There are several factors that impact the length of an investigation. Some factors include the number of issues being investigated, the number of interviews conducted, the investigator's workload, and holidays. In this case, IA relayed to the OPO they had several other cases they were working on. After the OPO returned the first investigation, Luvimae requested IA interview all persons in the audit trail up until the PRR was made. This amounted to 11 individuals plus City Administration/City Council and their staff. However, when the case was sent to Luvimae again 81 days later, only 2 of those interviews had been conducted. When the case was sent to Luvimae for the third time, IA conducted one additional interview of a citizen who had been previously interviewed but not recorded, but this time was recorded for the record.

IA only communicated their opinion of a lack of policy violation in the last 30 days of the 180-day investigation window. This complicated the resolution process of this investigation.

Thoroughness
As mentioned above, Luvimae received this case three times for review and returned it for additional investigation twice. We have attached emails that include the full request, but for ease of your review Luvimae summarized her requests below:

The first time Luvimae returned the investigation, she requested the following items:

1. Interviews of all persons on scene and all persons listed in the audit trail of the officers' BWC prior to a PRR being made. For non-SPD employees, she asked IA to at a minimum request a voluntary interview since those employees cannot be compelled by IA. We felt it was important the record reflect an effort was made to request an interview whether they agreed to be interviewed or not.
2. Include a copy of the PRR to establish the timeline of events.

IA attached the timeline of events and interviewed 2 officers who were on scene.

The second time Luvimae returned the investigation, she requested the following items:

1. Same interviews as in first return but with individuals and entities listed
2. Attach email from Bart from Brian Breen dated 3/10/22 titled, "Fwd: Officer Arthur R Plunkett."
3. Who in the department can view videos without a 'viewed by' name on it?

IA attached the email and clarified the 'viewed by' issue. Interviews were not conducted.

Objectivity
Based upon requests Luvimae made and her review of SPD's investigation, we still maintain objectivity concerns that fall within SPD's Law Enforcement Code and Ethics, Canon 9 and corresponding standards. SPD was unwilling to consider that any dissemination or release of information from body worn camera which originated with SPD, should be treated as confidential in accordance with Canon 9.

Furthermore, Mr. Wendle's public records request indicates he was specifically told by someone with inside information when the records would be available. There was a lack of acknowledgement that the records disseminated in the request were used to negatively target a current City Council member during a campaign.

Lastly, it is our opinion that SPD displayed a lack of investigative interest from the onset of this complaint. This is best exemplified in the multiple requests for further investigation and Director MacConnell stopping the investigation inappropriately.

Additional Information

Meeting with CM Wilkerson

At Chief Meidl's direction, Bart and Luvimae met with Council Member Wilkerson on April 8th to update her on the status of her case. Based on the information we provided her, we are under the impression she was content with the steps the OPO had already taken in her case. On May 20th, Council Member Wilkerson placed a phone call to Bart and relayed that in light of recent emails she had received admonishing her, she would like to request that an independent investigation be conducted.

Benefits and drawbacks of conducting an independent investigation

Ultimately, while we had concerns in all areas (timely, thorough, and objective) we must examine to certify a case, Luvimae (upon consultation with Bart) decided to go with lack of objectivity. The timeliness of the investigation was unusually long. However, the OPO and SPD came to an impasse on the case within the 180 days.

Luvimae also chose not to decline the case based on thoroughness because any additional investigation would focus on interviews of the listed individuals and entities IA did not interview. The fruitfulness of additional interviews come with two considerations. First, should the case be returned to the OPO by the OPOC for an Independent Investigation, the OPO does not have the authority to compel SPD employees or any of the individuals listed to attend an interview. All we have authority to do is ask for voluntary interviews which, in our view, will likely not be complied with. Thus, it is unlikely the OPO will receive additional material information by conducting additional investigations outside of IA. Second, the information that would be material is not physical, i.e. the alleged leak was likely a verbal communication. Thus, conducting additional interviews would not likely definitively indicate who the alleged leaker was. The limitations placed upon the OPO and the OPOC regarding Closing Reports following an Independent Investigation also dictate that the Closing Report will not include opinions regarding what may have occurred, only a summation of facts that we have backed up with some form of evidence. Should we have a declination of interviews, we will have limited information to include in a report.

On the other hand, conducting an OPO independent investigation is an uncharted path that could be a worthwhile endeavor, albeit not without challenges. There are the considerations listed above on the fruitfulness of additional investigation. It is also important to consider that the OPO is prohibited from providing its opinion in any report under the Police Guild Contract.

It is our view that there is potential for forward momentum for the OPOC and the OPO regardless of the direction we go in. It seems prudent to do everything we can to conduct an independent investigation while documenting all of the steps that we undertake. This will definitively show how the process set forth in the contract is inadequate as we will have all of the attempts to obtain voluntary interviews and other information as physical proof regarding how an independent investigation would go. This should help us gain the leverage that any ombudsman investigation should have, at a minimum, the same authority to compel interviews as an IA or even a HR investigation which seems doable, although it would take some political will by elected officials to get it done. At a maximum, the OPO may be given the same authority as a City Legal investigation, which would include subpoena power, although we believe this would be a super long shot. Additionally, a Closing Report regarding steps taken would also

prove that the restrictions in the contract on closing reports are unreasonable, and significantly detract from transparency and accountability.

Should the OPOC decide that we do not need to undertake further investigation due to the obvious limiting factors, we should still be able to document the reasons why we feel an investigation would not be fruitful. However, this approach would not be as strong of an argument. An independent investigation will need to be conducted by Bart and Luvimae, as we currently do not have funding, nor a path towards it, to hire an outside investigator. This is something that we will need to address budget wise moving forward.

In closing, we believe that there will be significant value in conducting an independent investigation into this matter, especially regarding processes that are in place for conducting an investigation and for writing a final closing report. Thank you for your consideration of this request.

Very Respectfully,

Bart Logue
Police Ombudsman
City of Spokane

SPOKANE POLICE DEPARTMENT

CHIEF OF POLICE

CRAIG N. MEIDL

June 7, 2022

Office of the Police Ombudsman
808 W. Spokane Falls Blvd
Spokane, WA 99201

Re: Fail to Certify I.A. Investigation #C21-070

Dear Mr. Logue, Ms. Omana and members of the OPO Commission:

Please accept this correspondence in accordance with the Spokane Police Guild's Collective Bargaining Agreement (CBA) related to the above Internal Affairs investigation. This correspondence is in response to Ms. Omana's declination to certify as "complete" the steps taken by Internal Affairs, at my direction, related to this investigation.

This investigation revolves around a public records request related to an incident involving several SPD officers and a City of Spokane Councilmember. The officers involved were following up on a homicide investigation and believed a business owned by the councilmember had surveillance video viewing the front outside public area of the business, possibly along the path that the homicide suspect fled after committing murder. When initially authorizing this investigation to proceed, it was on the premise of ensuring no unauthorized access was allowed by non-SPD members or others who have access to the body worn camera (BWC) viewing system (e.g., prosecutor's office).

The subsequent release of the BWC footage related to this incident was mandatory and compliant with Washington State's PRR laws. No basis existed to withhold the release of the footage once cleared by the detective in charge of the homicide investigation.

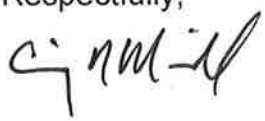
The officers both testified to Internal Affairs investigators that they did not talk with the requestor of the footage or reveal the existence of the footage to the requestor. Additionally, neither officer was familiar with who the requestor was.

The requestor informed Internal Affairs investigators that he did not learn of the existence of the incident, including the BWC footage, from the officers, nor did he learn of the footage from any officer at SPD. In subsequent postings on social media, the requestor indicated that he learned of the incident from staff members at City Hall who overheard the councilmember speaking about the initial incident while at City Hall shortly after it occurred, making a statement that she refused to allow officers to view the surveillance footage of the outside of the business to determine if the suspect had fled that direction (along with a possible suspect description).

Based on the statements of the officers and the requestor to Internal Affairs investigators, no specific nexus to SPD was established. Additionally, the councilmember relayed to the OPO in the initial complaint that she had no information indicating SPD released any information related to this incident, but she suspected it ("hunch"). This, coupled with statements from the requestor that he heard of this incident from staff at City Hall, who in turn indicated to the requestor that they overheard it from the councilmember, further investigation of SPD staff would not be material to the outcome (see Police Guild CBA; Article 27 (j)(3)).

For these reasons, I am convinced the investigation was complete, thorough and unbiased in determining a lack of nexus to SPD officers related to this incident, and no policy violation exists to justify the continuation of the investigation.

Respectfully,



Craig Meidl
Chief of Police