



OMBUDSMAN'S REPORT
Officer-Involved Shooting At Fairview & Milwaukee
Investigation & Findings

OMB04/0023 - February 2, 2005

EXECUTIVE OVERVIEW

A Boise Police officer shot and killed an armed subject on the evening of January 30, 2004. The officer was attempting to question the subject regarding a report from a resident that the subject had been seen coming from the resident's back yard. When told by the officer to stop, the subject declared that he had a gun in his pocket. The subject pulled a gun from his pocket and held the gun up in the air. The officer ordered the subject to drop the gun, but the subject held onto the gun and began turning towards the officer. The officer fired two shots at the subject. The subject immediately fell to the ground. As the officer approached the subject, he told him to show his hands. The subject's right hand (the one previously seen holding the gun) was not visible to the officer. The officer saw a movement by the subject that he judged to be consistent with bringing out the gun. The officer fired a third time. One of the three rounds fired by the officer struck the subject in the upper, right arm. This bullet passed through the subject's arm and penetrated his chest. The subject later died as a result of this wound.

The ombudsman investigated the incident and concluded that the officer's use of deadly force was consistent with the restrictions placed on such use by department policy and law.

The ombudsman also made recommendations for improvement regarding handling of evidence, documentation of witness interviews, use of audio recorders, and public statements by police officials following such incidents.

THE SITUATION

A Boise resident called 911 on January 30, 2004, to report a suspicious person. The resident spotted a man coming from his (the resident's) back yard in the 1200 block of N. Gawaine Place. The resident followed the man to Fairview where he was last seen on foot heading eastbound on the south side of the street. The resident described the suspicious person and his clothing and provided the man's last known direction of travel.

Officer #1 was dispatched to check the area for the suspicious person. The officer was given a description of the person and his clothing. Several minutes later, Officer #1 spotted an individual matching this description walking eastbound along the sidewalk on the north side of Fairview, just west of Milwaukee in front of the Winco Store.

Officer #1 drove past the subject, made a U-turn on Fairview, and parked his marked police car so that it was across the north side sidewalk partially blocking an entrance to the Winco parking lot and several feet west of the subject's location.

Officer #1, who was in uniform, got out of his police car and made contact with the subject. A confrontation ensued and the subject displayed a handgun. As the subject began to turn towards Officer #1, the officer fired two shots at the subject. The subject immediately fell to the ground. Officer #1 fired a third shot at the subject as the subject was lying on the ground. The subject was treated by paramedics and transported to a local hospital where he was pronounced dead. An autopsy determined that the subject died as a result of a gunshot wound to the chest. A small, semi-automatic handgun was recovered at the scene near the subject.

THE PURPOSE OF THE OMBUDSMAN'S INVESTIGATION

Boise City Code § 2-22-04 (Duties and Responsibilities) authorizes the Boise community ombudsman to conduct an independent investigation whenever a Boise City law enforcement officer uses deadly force. In such cases, the ombudsman is required by ordinance to:

assess the conduct of the [involved] Boise City law enforcement officer or police employee in light of the facts discovered through the investigation, the law, and the policies and training of the relevant department, and shall further make recommendations for personnel action to be taken (BCC § 2-22-04 (H)).

The ombudsman also is directed by the ordinance to act as an observer to any criminal, administrative, or civil investigation conducted by or on behalf of the agency that employed the involved officer.

The same ordinance also authorizes the ombudsman to develop:

specific recommendations as to the policies, procedures, practices and training of Boise City police and law enforcement employees. Such recommendations should have as their goal improved professionalism, safety, effectiveness and accountability of Boise City police and law enforcement employees (BCC § 2-22-04 (E)).

In this particular case, I focused my investigation and analysis on answering the following questions:

1. Was the use of deadly force by Officer #1 in compliance with the policies and procedures of the Boise Police Department (BPD)?
2. Did any action or inaction by Officer #1, prior to his use of deadly force, contribute to the circumstances and conditions present at the time of the shooting?

3. Were BPD's policies and procedures governing officer-involved shootings followed?
4. Was the criminal investigation by the Critical Incident Task Force (CITF) on behalf of BPD conducted in a thorough and objective manner?
5. What role, if any, did policy, procedure and/or training play in contributing to this incident (either positively or negatively)? What changes, if any, are recommended?

THE OMBUDSMAN'S INVESTIGATION

I was notified by the Boise Police Department (BPD) that an officer-involved shooting had taken place. This notification took place just minutes after the shooting. I responded to the scene and began my investigation of the incident. I also observed the operations of the police personnel assigned to the Ada County Critical Incident Task Force (CITF). This task force is authorized by mutual agreement to conduct a criminal investigation on behalf of any agency whose officers use deadly force that results in death or life-threatening injury. The CITF is staffed by officers from all Ada County law enforcement agencies, as well as the Idaho State Police. In this particular instance, the Ada County Sheriff's Office led the CITF team investigating the incident.

While at the scene, I had the opportunity to walk through the area where the shooting took place. I visually inspected all the evidence previously identified and marked by the CITF investigators.

In the weeks following the shooting, I obtained and analyzed documents and recordings connected with the incident, such as recordings of police radio transmissions, dispatch records, and a digital audio recording made during the incident by Officer #1.

I noted the following times associated with this incident:

19:00:49 Officer #1 out with a possible subject.
19:01:13 Officer #1 requests a "code three assist".
19:01:20 Officer #1 calls out "shots fired".
19:02:25 An unknown officer asks if an ambulance is needed.
19:02:33 A supervisor tells dispatch to start an ambulance rolling code three.
 Dispatch acknowledges the requests and says they will stage at the ShopKo.
19:03:18 Officer #2 arrives on scene.
19:03:29 Officer #1 asks if the paramedics are on their way.
 Dispatch responds that the paramedics are on their way.
19:03:48 Officer #3 (a supervisor) arrives on scene.
19:03:54 Officer #4 (a higher ranking supervisor) arrives on scene.
19:04:46 The Watch Commander arrives on scene.
 Dispatch asks if the paramedics can come in and treat the injured person.
19:05:05 Officer #3 tells dispatch that the paramedics can come in.

Following is a transcript of what I heard when I listened to the recording made by Officer #1 during the incident:

Subject: I got a gun in my pocket.
Officer #1: Stop right there. Boise 13 code three assist. Drop the gun.
[Sound of shot(s)]
Officer #1: Drop the gun.
Subject: Shoot me.
Officer #1: Shots fired. Shots fired.
Subject: Shoot me.
Officer #1: Drop the gun. Drop the gun. Show me your hands. Show me your
[expletive] hands.
[Sound of shot(s)]

Subject: Oh [moaning].

Officer #1: Show me your [expletive] hands.

Subject: Oh. Oh [moaning]. Oh.

Officer #1: 2313 I got one down. Show me your [expletive] hands, man.

Subject: Oh [moaning]. Why me? The gun doesn't even work.

Officer #1: I don't care. You pointed it . . . why'd you point it at me? Keep your hands where I can see 'em.

Subject: [cough] Serious, it didn't even work.

Officer #1: 2313 I need code three. I got one guy at gunpoint. He's got a gun by him. He's un, he's being uncooperative.

Subject: It didn't even work. I'm being serious.

Officer #1: Put your hands above your head.

Subject: I can't move my other arm. I can't breath. Sorry it had to be you.

Officer #1: You make one move and I'm going to shoot you right through the head, okay?

Subject: I hear ya.

Officer #1: You understand? I got help on the way, man. I don't want to kill you, but you forced me into it.

Subject: They forced me into it.

Officer #1: Who forced you into it?

Subject: Narcotics division.

Officer #1: What's your name?

Subject: [name].

Officer #1: What's that? What's your name? Right in front of the store. Right in front of the store.
[Sound of siren] Get back ma'am, get back. Get back. [Sound of voice] What's that? Get back. Get back in your car, now. [Sound of voice and siren] Okay, but I don't know that, sir. [Siren] 2313, we got paramedics coming here? [Loud siren] [Voice] Right over there. Right there. [Unintelligible]

Officer #2: Do you have another suspect, or just him?

Officer #1: Just him.

Officer #2: Okay.

Officer #3: Go off tape.

On April 6, 2004, I received a copy of the CITF investigation. I reviewed and analyzed the reports, photographs, documents, and recordings associated with the investigation and noted that twenty-eight individuals were interviewed as eye witnesses. Eleven of the twenty-eight said they saw a gun or a metal object in the subject's hand immediately before Officer #1 fired the first shots at the subject. Several of the eleven said the subject was either turning towards Officer #1 and/or beginning to point the gun at Officer #1. Two of the twenty-eight witnesses said definitely that the subject had nothing in his hands when Officer #1 shot him. The remaining witnesses either were not certain or were not in a position to see the subject's hands. An anonymous envelope was sent to my office with a diagram indicating that the subject did not have a gun. This diagram was made available to the CITF investigators and included in their report.

Officer #1 told the investigators that the subject refused to stop when ordered. Officer #1 said the subject immediately said he had a gun in his pocket and continued walking away from him. Officer #1 said he drew his own gun and pointed it at the subject, while using his radio to request a code three assist.

Officer #1 said the subject, who had his back to him, began to turn to his (the subject's) left while removing a gun from his right pocket and holding it up above his right shoulder. Officer #1 said he told the subject twice to drop the gun but the subject continued his rotation to the left. Officer #1 said he feared that the subject was bringing the gun "on target" in preparation to shoot him (Officer #1). Officer #1 said he fired about three shots at the subject in order to protect his own life.

Officer #1 said the subject immediately fell to the ground on his (the subject's) left side. The subject was looking over his left shoulder at Officer #1 as Officer #1 walked out into the street and towards the subject's feet. Officer #1 said he could see the subject's left hand but not his right hand. Officer #1 said the subject's right hand was tucked in front of his body. Officer #1 said he gave the subject commands to show his hands but the subject did not show his right hand. Officer #1 said the subject said to him, "Shoot me."

Officer #1 said he saw the subject's upper body, particularly his right shoulder and upper right arm, begin to move towards him (Officer #1). Officer #1 said he interpreted this movement (he described it as a "flinch") as a sign that the subject was beginning to pull the gun out from under his body and was going to shoot him (Officer #1). Officer #1 said he fired two more rounds at the subject when he saw this "flinch". Officer #1 said that, after this second volley, the subject's right hand came out from under his body and there was no gun in it. Officer #1 said a small handgun was lying on the ground between the subject's legs in the same general area where the subject's right hand had just come from.

The forensic pathologist who performed the autopsy on the subject determined that the subject was struck by a single round from a firearm. The bullet first struck the subject's right arm, entering the lateral (outside) side of the arm above the elbow, and passed through the tricep and bicep muscles. The bullet exited the upper right arm on the medial (inside) surface of the right bicep muscle. This same bullet then entered the subject's chest through the right side, passed through the muscles of the right side of the chest, fractured a rib, entered the right chest cavity, grazed the upper lobe of the right lung, lacerated the superior vena cava, and stopped when it impacted, but did not fracture, the cervical spine. The pathologist reported that there was no soot deposition or stippling at either entrance wound. The direction of the bullet's path through the subject's arm and chest was from right to left, front to back, and upwards.

The forensic pathologist also tested for drugs. This test confirmed the presence of methamphetamine in the subject's blood.

On July 13 and 14, 2004, I attended an inquest into the subject's death conducted by the Ada County coroner. Following two days of testimony by 35 witnesses, the coroner's jury found that the subject died from a penetrating wound to the chest caused by the lawful actions of Officer #1.

On September 29, 2004, I received copies of the transcripts of the two days of testimony at the coroner's inquest. I reviewed the testimony of those who testified that they saw all or part of the confrontation between Officer #1 and the subject. I compared this testimony to the statements these same witnesses gave the CITF investigators immediately after the incident. The witnesses' accounts remained essentially the same. I also looked at the statements made by twelve witnesses who were not called to testify at the inquest. Nine of these witnesses were unable to see if the subject had anything in his hands immediately before Officer #1 fired his first round. Of the remaining three witnesses, one reported seeing a gun in the subject's right hand, another saw something metal in the subject's hand, and the third said there was nothing in the subject's hands.

The forensic pathologist testified that the level of methamphetamine found in the subject's blood was significant. Another witness, an expert in pharmacology, testified that the concentration of methamphetamine in the subject's blood at the time of his death was, "incredibly high, potentially lethal."

I also compared Officer #1's testimony at the inquest with his statements to the CITF investigators. I noted a high degree of consistency between his two statements, with no direct contradictions or material changes.

Between November 1, 2004, and January 12, 2005, I interviewed Officer #1 and the first three officers/supervisors who arrived on scene after the shooting.

Officer #1 provided me with the same information and account he gave to the CITF investigators and at the coroner's inquest. Specifically, Officer #1 stated that he fired his gun both times because he believed the subject was in the act of pointing a gun at him. Officer #1 said it was his belief at the time that, if he did not immediately stop the subject's actions, he (Officer #1) was in danger of being shot and killed himself.

Officer #1 also told me he was aware that he used profanity while ordering the subject to show his hands. Officer #1 explained that his use of profanity was unintentional and a direct result of high stress and his fear that the subject was attempting to kill him.

I asked Officer #1 about his statement to the subject that he (Officer #1) would shoot the subject "right through the head" if the subject were to move again. Officer #1 explained that he used this phrase in order to leave no doubt in the subject's mind that the results would be catastrophic if he (the subject) were to move again. Officer #1 said he thought this was necessary because the subject had already ignored his commands to drop the gun and to show his hands.

Officer #1 told me that Officer #2 was the first officer to arrive on the scene following the shooting. Officer #1 said he told Officer #2 that there was a gun between the subject's legs. Officer #1 said that Officer #2 kicked the gun away from the subject and out of the subject's reach. Officer #1 said that, once the subject was secure, he walked away from the subject and picked up the gun that Officer #2 had kicked away. Officer #1 said the gun was several feet from the subject and out of the subject's reach. Officer #1 said he then placed the gun on the hood of a nearby police car. He said he did this without thinking and probably to get it out of the way of the paramedics and other emergency workers who would soon arrive on scene.

Officer #1 said he began to give a safety briefing to the first supervisor on scene, Officer #3. Officer #1 said he also briefed Officer #4 (a higher ranking supervisor), who arrived just a few moments after Officer #3. Officer #1 said that Officer #4 took his (Officer #1's) handgun as evidence.

Officer #1 said he requested that Officer #2 be assigned as his escort officer, since he and Officer #2 are good friends and have known each other for many years. He said that Officer #2 transported him from the scene to a nearby hotel where he was later interviewed by CITF investigators. Officer #1 said he also submitted to blood and urine testing, both as required by BPD policy and voluntarily at the request of the CITF investigators.

When I interviewed Officer #2, he provided much the same information as he had when interviewed by the CITF detectives and when questioned during the coroner's inquest. Officer #2 was certain that there was a small handgun between the subject's legs when he (Officer #2) first saw the subject lying on the ground. Officer #2 could not recall exactly how he managed to kick the gun from between the subject's legs and several feet down the sidewalk to the west. However, Officer #2 did recall hearing the sound of the metal gun hitting and sliding along the sidewalk after he kicked it. Officer #2 said the gun was quite a distance west of the subject when it landed and certainly not close enough for the subject to reach from where he was lying.

Officer #3 (a supervisor) reported seeing Officer #1 reach down and pick a gun up off the ground. Officer #3 said Officer #1 indicated that the gun belonged to the subject. Officer #3 had the impression the gun was close enough to the subject that he could have reached it from where he was lying. Officer #3 directed Officer #1 to put the gun on the hood of a nearby police car, which he did.

Officer #3 stated that the paramedics arrived on scene within a few minutes and gave immediate medical attention to the subject.

Officer #4 (a supervisor) told me he arrived after Officer #2 and Officer #3. He said he received a safety briefing (number of shots, number of suspects, known injuries, etc.) from Officer #1 and then took Officer #1's handgun as evidence. Officer #4 said he placed this gun in a paper bag and locked it in his police car.

WHAT THE INVESTIGATION FOUND

Based on the preponderance of the evidence obtained and reviewed in the course of this investigation, I make the following findings of fact:

1. Officer #1 was assigned by dispatch to conduct an area search for a suspicious subject reported to have been last seen on foot, eastbound of Fairview from Five Mile.
2. Officer #1 received the following description of the subject: a white male adult, 5' 8", short strawberry blond hair, last seen wearing a white shirt and blue jeans.
3. Officer #1 drove west on Fairview from Curtis to the intersection of Fairview and Milwaukee.
4. Officer #1 saw an individual, matching the description of the suspicious person, walking east along the north sidewalk of Fairview, west of the far west entrance to the Winco parking lot.
5. Officer #1 drove past the subject and parked his marked BPD police car at the far west entrance to the Winco parking lot.
6. Officer #1, who was dressed in standard BPD "class B" uniform, stepped from his vehicle, and ordered the subject to stop.

7. The subject, who was east of Officer #1, continued to walk east on the sidewalk, looked back at Officer #1, and yelled an obscenity.
8. Officer #1 verbally identified himself as a police officer and again ordered the subject to stop. As he did this, Officer #1 walked around to the front of his vehicle and toward the subject.
9. The subject continued to walk away from Officer #1.
10. The subject had his back to Officer #1 and his right hand in the right pocket of his jeans. The subject told Officer #1 that he (the subject) had a gun in his pocket.
11. Officer #1 drew his weapon and ordered the subject to stop.
12. The subject began to turn to his left and removed a handgun from his right pocket.
13. Officer #1 ordered the subject to drop the gun.
14. The subject held the gun in his right hand and continued to rotate to his left.
15. Officer #1 fired two rounds at the subject from his .45 caliber service weapon.
16. The subject fell to the ground onto his left side with his back to Officer #1. The subject's left hand was empty and visible to Officer #1. The subject's right hand was not visible to Officer #1.
17. Officer #1 ordered the subject to drop the gun and show his hands. In doing so, Officer #1 used profanity towards the subject.

18. The subject said, "Shoot me, shoot me," and did not show his right hand to Officer #1.
19. Officer #1 observed a movement towards him in the subject's right shoulder.
20. Officer #1 fired one round at the subject as the subject was lying on the ground.
21. One .45 caliber bullet fired by Officer #1 struck the subject in the upper right arm. This bullet passed through the subject's arm and entered the subject's right chest cavity.
22. The subject died as a result of the injuries he received when he was struck by a single bullet fired by Officer #1.
23. Officer #2 kicked a handgun from between the subject's legs.
24. Officer #1 picked up a handgun from the sidewalk and placed it on the hood of a police car.
25. A handgun, other than the handgun used by Officer #1, was recovered at the scene of the shooting. This weapon was not loaded with ammunition at the time it was recovered.

OMBUDSMAN'S ANALYSIS AND FINDINGS

Use of Deadly Force

BPD's policy on the use of deadly force (§ 1.0100) reads as follows:

1.0100 Use of Force

Officers shall use only the amount of force that is reasonable and necessary to protect life, affect a lawful arrest, and/or gain control in any lawful circumstance. Officers may use deadly force when necessary to defend themselves or others when the officer reasonably believes that imminent danger of death or serious bodily injury exists. Officers may also use deadly force when necessary to effect the capture or prevent the escape of a suspect, whose freedom is reasonably believed to represent an imminent danger of death or serious bodily injury to the officer or to others. When authorized techniques are not available or practical, officers may also use any other reasonable force to gain control of the situation.

The appropriateness of an officer's actions will be determined by the totality of the circumstances and by the reasonableness of the officer's perceptions at the time of the incident.

The criteria for determining use of force shall include, but not be limited to,:

- *The severity of the crime*
- *The nature and extent of the threat posed by the suspect*
- *The degree to which the suspect resists arrest or detention*
- *Attempts by the suspect to evade arrest by flight*
- *Other factors, including:*
 - *Nature and quality of intrusion upon the individual*
 - *Duration of that intrusion*
 - *Severity of injuries inflicted, if any*
 - *Officer/subject size and other physical attributes*
 - *Environmental considerations*
 - *Reaction Time*
 - *Totality of circumstances*

Officer #1 had a lawful purpose in contacting the subject on the sidewalk in front of the Winco store. The subject closely matched the description of the suspicious person about whom Officer #1 had been alerted. Acting in good faith on the information provided to him by Ada County Dispatch, Officer #1 made contact with the subject to further investigate the circumstances reported to him through Dispatch.

It is clear, from the evidence and testimony available, that the subject ignored Officer #1's lawful order to stop, said he had a gun, displayed an item resembling a handgun, failed to drop the item when ordered to by Officer #1, and began turning towards Officer #1 with the item still in his hand. Officer #1 reported that, based on these factors, he believed that the subject was about to shoot him. Fearing for his life, Officer #1 fired his police handgun at the subject.

Given the totality of the circumstances and what was known or reasonably assumed by Officer #1 at that time, I find that Officer #1 acted reasonably in this instance to protect his own life.

Immediately following the two shots by Officer #1, the subject fell to the ground. Officer #1 was able to observe the subject's left hand and see that there was nothing in it. However, Officer #1's view of the subject's right hand was blocked by the subject's body. The subject did not reveal his right hand in response to Officer #1's demand that he show his hands. Officer #1 observed the subject looking directly at him and interpreted this gaze as "target lock," something officers are trained to look for when dealing with potentially dangerous individuals. Officer #1 feared that the subject's right hand still held the gun that he (Officer #1) had seen the subject holding just moments earlier. Officer #1 was concerned that the subject was looking for an opportunity to bring the gun out from in front of his (the subject's) body and shoot Officer #1. Officer #1 observed a slight movement towards him in the subject's right shoulder. Officer #1 described this movement as a "flinch." Officer #1, who was only a few feet from the subject, feared that the subject's movement was the

beginning stage of pulling out the gun and shooting him (Officer #1). Fearing for his own life, Officer #1 fired his weapon at the subject a third time.

Given the totality of the circumstances and what was known or reasonably assumed by Officer #1 at that time, I find that Officer #1 acted reasonably in this instance to protect his own life.

In determining whether or not Officer #1's actions were in compliance with the requirements of § 1.0100 of the BPD policy manual, it is not reasonable to consider the actual working condition of the gun displayed by the subject. One can only consider what was known or what reasonably should have been known at that time by Officer #1. The subject told Officer #1 he had a gun in his pocket. The subject immediately removed an item resembling a gun from his pocket. Officer #1 had no means by which he could assess the condition and state of the gun being displayed by the subject. Officer #1 could not determine if the weapon was loaded or unloaded. Because Officer #1 had an absolute right to defend his own life and was not expected to confirm a threat to his life beyond a reasonable doubt, he reasonably concluded that the subject's gun was capable of killing him and that the subject was in the act of preparing to shoot him.

For these reasons, I have issued a finding of "exonerated" regarding Officer #1's use of deadly force against the subject on January 30, 2004.

Officer #1's Actions Prior To His Use of Deadly Force

At the time the subject drew a handgun from his pocket and began to turn towards Officer #1, the officer was in an exposed position. Officer #1 had no cover or concealment to reduce his vulnerability vis-à-vis the subject's weapon. The nearest such cover was Officer #1's police car, which was a few feet behind him.

Given the information Officer #1 had from dispatch, together with his own observations of the subject, was it reasonable for Officer #1 to walk out from behind the cover provided by his police car? Is this consistent with his training and experience? Put another way, did Officer #1 recklessly expose himself to danger by walking towards the subject and away from the police car?

The answer to this last question is clearly “no”. Officer #1 had no reason, either from the information given to him by dispatch or from his own observations, to believe that the subject was armed. The call itself was to check for a suspicious person who had been seen going through a back yard. Officer #1 saw the subject and noted that he matched the description given and was dressed lightly for the weather. Officer #1 said the subject was, “walking with a purpose,” and described this as “odd.” All of this formed an adequate basis for Officer #1 to stop the subject, make contact with him, and investigate further.

Police officers routinely make personal contact with people who are acting suspiciously. While officers are trained to look for signs of danger, they are not expected to maintain cover and concealment when they have no reason to suspect that a person might be armed or otherwise pose a threat. In fact, officers are expected to make direct, unprotected contact with a wide variety of people every day, some of whom may be armed but who display no outward sign that would alert an officer to that fact. This is one of the inherent risks of being a police officer and part of the reason why officers are given the authority to carry guns. They are also trained to watch for signs that someone might be a threat and to take reasonable and appropriate action in the face of any threat.

Officer #1 acted reasonably under the circumstances. He approached the subject and attempted to question him regarding his possible involvement in the reported suspicious circumstances. Officer #1 did not needlessly expose himself to danger, nor did he act recklessly and create the circumstances that required his use of deadly force. Instead, it was

the subject who created the danger and the circumstances necessitating Officer #1's use of deadly force.

Officer #1's Use of Profanity

BPD's Policy and Procedures prohibit the use of profanity in the presence of members of the public or prisoners (§ 21.0307). In this particular case, Officer #1 used profanity three times while ordering the subject to show his hands. Officer #1 believed that his own life was in danger and that the person threatening him was refusing to obey his orders. Under conditions of such fear and stress, it is not uncommon for individuals to utter profanities, even if they have no intention of doing so. Officer #1's use of profanity was a violation of BPD policy. It was also an unintentional response to high stress and mortal danger. For this reason and because the use of profanity was not material to the focus of my investigation, I have not issued a finding regarding this behavior.

On a similar note, Officer #1 threatened to shoot the subject, "through the head," if the subject made any further movements towards the gun. This statement was made after all three shots had been fired and as the subject lay injured on the ground with a handgun lying between his legs. Taken out of context, such a statement could easily be seen as antagonistic, or worse. However, under the circumstances, the statement must be seen as an expression of desperation by Officer #1. By the time this threat was made, the subject had already displayed a gun, refused to drop the gun or show his hands, and acted in a threatening manner towards Officer #1. In response to these threats, Officer #1 had already fired three shots at the subject. As Officer #1 stood near the subject, he could clearly see a gun lying on the ground between the subject's legs. Officer #1 explained during his interview that he wanted to say something to get the subject's attention and convince him not to reach for the gun. His statement to the subject was intentionally meant to shock and frighten the subject. Given the totality of the circumstances, I find that Officer #1's statement was reasonable and served a legitimate purpose.

Critical Incident Response

The Boise Police Department Policy and Procedures Manual § 6.0100 and General Order II-A-22 provide specific policy and procedural direction for the response of BPD and CITF personnel to an officer-involved shooting. Based on my first-hand observations and review of the record, it is my opinion that, with one exception, all responding BPD employees acted in accord with policy and procedure.

The one exception was Officer #1's decision to pick up the subject's gun. The gun was lying where it had come to rest after Officer #2 kicked it from between the subject's legs. The gun was on the sidewalk, to the west of where the subject was lying.

General Order II-A-22 of the Policy and Procedure Manual states that any employee involved as a principal in a Critical Incident should:

Ensure that no evidentiary items are removed from the scene or disturbed in any way without approval by the Scene Commander and/or CID Lieutenant, unless removal is necessary for the safety of personnel and/or the preservation of evidence.

Note: Loose weapons or instruments of either the suspects or employees shall be left in place if the scene is secure and it is possible to place a guard on the weapon. If the scene is not secure, safeguard items, but do not alter them. Alteration includes "making a weapon safe." This shall not be done unless it is impossible to safeguard the weapon in any other way. Notify supervisor upon his/her arrival of location of all weapons and any alternations made to them.

Officer #2 was justified in kicking the handgun away from the subject. At the time Officer #2 kicked the gun, the subject was still alive and it was reasonable for Officer #2 to consider the weapon a threat where it was lying.

When Officer #1 picked up the gun and placed it on the hood of a nearby police car, however, the gun was not an immediate threat to him or the other officers. The subject was

handcuffed and under control; he could not reasonably be considered capable of getting the handgun and using it to shoot anyone. Officer #1 should have drawn Officer #3's attention to the weapon so steps could have been taken to prevent it from being disturbed. However, Officer #1 was under a high degree of traumatic stress at the time he moved the gun and the specific location where the gun landed after it was kicked was not, in this case, of material value to the investigation. For these mitigating reasons, I find that Officer #1's action in violation of BPD's critical incident procedures did not rise to the level of a policy violation.

The Boise Police Department Policy and Procedures Manual § 6.0100 and General Order II-A-23 provide specific policy and procedural direction for the chemical testing of BPD employees who have been directly involved in an officer-involved shooting. The required blood and urine samples were drawn/obtained from the officer and the mandated testing was conducted and reported.

CITF Criminal Investigation

A thorough and objective investigation of the entire incident was completed by the CITF under the supervision of the Ada County Sheriff's Office. As has been noted in previous investigations of critical incidents, an absence of standardization in the documentation of witness interviews was noted. Specifically, not all witness interviews were audio recorded and only some witnesses provided a signed, written statement. One of the witnesses was interviewed at the scene and the interview was recorded on a digital recorder. All of the other recordings made of witness interviews were made on analog tape. A summary of the interview conducted at the scene was included in the detective's report about his other activities at the scene. As a result, this witness' account was not included in the witness section of the binder and his name did not appear on the witness list.

Impact of Policy, Procedure, and Training

Officer #1 reported that he felt the training he received from BPD enabled him to respond quickly and appropriately to the threat he encountered. All known evidence and witness testimony support this conclusion.

OMBUDSMAN'S POLICY RECOMMENDATIONS

Security of Evidence

As noted above, both Officer #1 and Officer #2 disturbed the weapon found near the subject. Officer #2 kicked the gun to get it out of the subject's reach. This was justified and allowable under the procedures for such an incident. Officer #1 later picked up the gun and put it on the hood of a patrol car. This was not justified and was a needless alteration of the evidence. Fortunately, the specific location of the gun after it had been kicked was not of material importance to the investigation. While it is understandable that a person operating under a high level of traumatic stress might act without thinking, all officers should be reminded of the need to leave weapons in place at the scene of an incident unless moving them is the only way to keep them from being accessed by suspects or the public.

CITF Interviews

It should be noted that significant improvement in the documentation of interviews conducted by CITF members has been made since the last such incident. However, some minor inconsistencies still exist. I encourage BPD to work with the other CITF member agencies to insist that all witness interviews be audio recorded and documented in the same manner.

Audio Recorders

One of the first things said to Officer #1 by the first supervisor on scene was a directive for him to turn off his audio recorder. I have seen this happen in previous critical incidents. Potentially valuable statements by witnesses, suspects, and involved officers are not recorded for use by those who later must investigate the incident. Statements made in the first few minutes following an incident by suspects, witnesses, and involved officers can have tremendous value for investigators. These so-called "excited utterances" are particularly helpful when a subject dies or other involved parties have difficulty recalling what they saw or heard during the incident.

I recommend that BPD examine this issue and consider establishing a practice of leaving recorders on (or turning them on if necessary) following an officer-involved shooting. Given that all BPD audio recorders are now digital, each officer can record up to 10 hours without interruption. Consideration should be given to requiring the following personnel to activate their audio recorders until they have departed the scene of the incident:

1. Involved officers.
2. Witness officers.
3. Supervisors arriving on the scene who receive safety briefings from the involved officers.
4. Officers assigned as escorts to the involved officers.

Public Statements By Police Officials

Whenever a police officer uses deadly force, three different investigations ensue, CITF, Internal Affairs, and the Office of the Community Ombudsman. In addition, when police actions result in a death, a coroner's inquest is held. These elaborate and overlapping processes are in place to promote public confidence and assure an open and thorough review of such incidents.

When police shootings occur, tremendous pressure is placed on the involved law enforcement agency to quickly produce the facts of the case and respond to media questions. The police have a difficult balance to strike between informing the public on the one hand and presenting mere rumor and speculation before all the facts are known. In the hours and days following a critical incident, it is understandable that some information from the police, shared in good faith with the public, will later turn out to be false, or at least different than it seemed to be at the time. Therefore, it is important that the police publicly communicate only that information they reasonably believe to be true.

This incident took place on Friday evening, January 30, 2004. Three days later, Monday, February 2, 2004, the Boise Police Department held a press conference to brief the media on the facts of the case as they were known at that time. During the press conference, a police official demonstrated for the cameras how the subject held a gun in his hands and turned towards Officer #1. This official demonstrated a combat style pistol grip by bringing both of his hands together in front of his chest. Holding his hands in this fashion, the official turned so that the imaginary weapon held in his hands was trained directly at the assembled reporters.

No one at the scene of the January 30th shooting ever testified this was the grip used by the subject, or that he came fully around and pointed the gun directly at the officer. To the contrary, Officer #1 and the many eyewitnesses who saw what happened told CITF

investigators the night of the shooting that the subject held the gun in the air with one hand and began to turn around towards Officer #1. Officer #1 and some of the witnesses said that, as the subject was turning, he also began to lower the gun towards Officer #1. In the final analysis, it makes no difference how the subject held the gun as he began to turn towards the officer. Officer #1 was under no obligation to wait and find out if the gun worked or if the subject intended to shoot him with it.

Nonetheless, two days after the shooting the local television news displayed images from the press conference of a police official holding his hands together in a combat style and pointing them directly out in front of him. The newspaper carried a similar picture the next day. This dramatic image, it turns out, was unsupported by the evidence and unrelated to any witness testimony known to the police at the time of the press conference. Such a discrepancy could erode the public's trust in the police and the credibility of their public statements.

I recommend that BPD review its media philosophy and practices in light of this incident.

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