



OMBUDSMAN'S REPORT

Critical Incident Investigation & Findings

OMBOS/0055 - July 29, 2005

EXECUTIVE OVERVIEW

The Office of the Community Ombudsman investigated an incident in which two Boise Police Department (BPD) officers used OC (pepper) spray and a Taser on a suspect (Subject) in a strong-armed robbery. Following the use of the Taser, the Subject was examined by paramedics and taken to the emergency room. After a medical examination, the Subject was admitted to the hospital for observation and further testing.

As a result of this investigation, both officers were exonerated regarding their use of force. However, one officer was found to have used profanity and uncomplimentary speech in dealing with the Subject, while the other officer failed to audio record his interactions with the Subject as required by BPD policy.

THE SITUATION

On April 8, 2005, at approximately 3:41 p.m., the 911 Center received a report that a strong-armed robbery had just occurred in the area of S. Latah and Alpine. The victim was injured and required paramedics. BPD officers responded to contact the victim and look for the suspects, who were described as five black males.

Officer #1, along with other officers, arrived on the scene. Officer #1 saw a black male on foot walking away from the crime scene. Officer #1 identified himself as a police officer and ordered the Subject to stop. The Subject attempted to flee by jumping a fence and running away on foot. Officer #1 gave chase and confronted the Subject in the back yard of a nearby residence. Officer #1 deployed OC spray into the Subject's face after the Subject did not

immediately comply with the officer's commands to show his hands and get down on the ground.

The Subject was arrested and transported to the offices of the Criminal Investigations Division (CID) for questioning by detectives. Upon arriving at CID, the Subject was placed into a locked interview room. The Subject remained handcuffed with his hands behind his back. Two uniformed patrol officers (Officer #2 and Officer #3), a third officer, and a detective responded to sounds of a disturbance in the interview room. Officer #2 and Officer #3 entered the interview room, while the third officer and the detective remained in the doorway. Following the Subject's refusal to sit down, Officer #2 used a taser to deliver a touch stun to the Subject.

Paramedics were called to evaluate the Subject, as required by BPD policy following the use of a Taser. The Subject was transported to the hospital where he was admitted for observation.

REASON FOR THE INVESTIGATION

Boise City Code defines the authority and duties of the Community Ombudsman. Boise City Code § 2-22-04 (H) grants the ombudsman the authority to investigate and evaluate the performance of officers whenever certain criteria are met:

Critical Incidents

In the event that an employee of the Boise Police or the Airport Peace Officers Division of the Aviation and Transportation Departments is involved as a principal, victim, witness or custodial officer, where death or bodily injury results, the Community Ombudsman shall be notified immediately and shall act as an observer to any criminal, administrative or civil investigation conducted by or on behalf of the such Departments. The Office of Community Ombudsman may also conduct an independent administrative investigation into such a critical incident. The Community Ombudsman shall assess the

conduct of the 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. The report of investigation and recommendations shall be given to the relevant Department Head for purpose of discipline and/or commendation when warranted, and for use in the development of the affected law enforcement officer or police employee's formal personnel evaluation. A law enforcement officer, police employee, or citizen may waive their personal privacy right. Critical incidents include but are not limited to situations involving the following:

- (i) Use of force or any other Department action that results in death or serious bodily injury. (Serious bodily injury is an injury that results in the subject being admitted to a hospital.)*
- (ii) Use of Deadly Force where only minor bodily injuries occur.*
- (iii) Intentional use of Deadly Force but no injury occurs (excluding animals).*
- (iv) Vehicle pursuits, roadblocks or intercepts resulting in death or serious bodily injury.*
- (v) Police employee involved in a traffic accident resulting in death or serious bodily injury, while operating a city vehicle or a private vehicle while on City business.*

FOCUS OF THE INVESTIGATION

This investigation had, as its primary focus, the following acts and related sections of the BPD Policies and Procedures Manual (P.M.).

Officer #1

This officer's use of force, specifically OC spray, on the Subject.

P.M. § 1.01.02 (Use of Force) Authorization:

An officer 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. An officer may use deadly force when necessary to defend himself/herself or others when the officer reasonably believes that imminent danger of death or serious bodily injury exists. An officer may also use deadly force when necessary to affect the capture or prevent the escape of a subject, 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, an officer may also use any other reasonable force to gain control of the situation.

P.M. § 1.02.00 Intermediate Weapons (in part)

An officer is authorized to carry and use an intermediate weapon to gain control when faced with actual or threatened physical resistance and the use of an intermediate weapon is reasonably necessary based on officer-to-subject disparity, reaction times, environmental conditions, and the totality of the circumstances. Physical resistance includes all physical resistance, except passive physical resistance.

P.M. § 1.02.02 OC Aerosol:

Oleoresin Capsicum (OC) Aerosol is defined as a non-flammable aerosol chemical.

1.02.02A Authorization to Carry and Use

An employee shall only carry Department provided OC. An officer assigned to uniformed patrol functions shall always carry OC Aerosol on his/her person. An officer assigned to plain clothes duty should always carry OC Aerosol on his/her person when encountering suspected or known combative situations.

An officer will consider all options before using OC Aerosol on a passive resistor and articulate those options in the arrest report. An officer's use of OC Aerosol on a passive resistor during peaceful demonstrations shall be determined by the Incident Commander. An officer may use OC Aerosol when faced by a crowd that will not disperse and would threaten the loss of a subject that is in the officer's custody. An officer will not use OC Aerosol on the driver of a motor vehicle to gain compliance while the subject is still in the vehicle and has the capability of driving away from the scene and the officer's control.

1.02.02B Officer's Responsibilities

The officer shall use the OC as prescribed in Department training and shall:

- *Cease use of OC Aerosol when subject discontinues resistance or aggression.*
- *Ensure the subject receives adequate decontamination or medical attention after having been exposed to OC Aerosol.*
- *After subject(s) have been controlled and secured, attend to innocent bystanders that may have been exposed.*
- *As soon as possible after the incident, notify a supervisor that OC Aerosol had been used and the nature of the incident.*
- *Include details of the incident, the rationale for the use of OC Aerosol, and the results of that use in related reports.*

Officer #2

This officer's use of force, specifically a Conducted Energy Weapon (Taser), on the Subject.

P.M. § 1.01.02 (Use of Force) Authorization:

An officer 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. An officer may use deadly force when necessary to defend himself/herself or others when the officer reasonably believes that imminent danger of death or serious bodily injury exists. An officer may also use deadly force when necessary to affect the capture or prevent the escape of a subject, 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, an officer may also use any other reasonable force to gain control of the situation.

P.M. § 1.02.00 Intermediate Weapons (in part)

An officer is authorized to carry and use an intermediate weapon to gain control when faced with actual or threatened physical resistance and the use of an intermediate weapon is reasonably necessary based on officer-to-subject disparity, reaction times, environmental conditions, and the totality of the circumstances. Physical resistance includes all physical resistance, except passive physical resistance.

P.M. § 1.02.03 Conducted Energy Weapon (Taser):

The Taser is defined as a conducted energy weapon that fires barbed projectiles. The deployment generates an electrical current that causes motor dysfunction and pain compliance. An officer shall only carry the Department-approved Taser.

1.02.03A Authorization to Carry and Use

The Taser will never be used punitively, or used for coercion or threat in the absence of actual or threatened physical resistance. The Taser is to be used as a way of averting a potentially injurious or dangerous situation. The Taser is not meant to be used in deadly force situations. The Taser should not be used without a firearm backup in those situations where there is substantial threat towards the officer(s) or others present.

1.02.03C Officer's Responsibilities

Before being issued a Taser, an officer must successfully complete the certified Taser class. On completion of the program, an officer will be certified to carry and use the Taser. The officer shall:

- Determine if the Taser needs to be deployed based on Department policy. Do not deploy the Taser in combustible environments or on women known to be, or that obviously appear to be, pregnant.*
- Notify a supervisor to respond when an incident dictates the necessity for the deployment of the Taser if time and conditions permit.*
- Ensure all personnel at the scene are notified by radio or other means that the Taser is being deployed and may be used if time and conditions permit. Acknowledgement is necessary to avoid confusion with the use of lethal force when the Taser is fired.*
- Ensure that a plan is in place for taking physical control of the subject once the Taser has been deployed.*
- Once the suspect is restrained or has complied, there should be not further use of the Taser.*
- Summon medical personnel to the scene to assess the subject. Ensure the subject receives medical treatment by EMS and/or hospital personnel after being struck by the Taser. Medical treatment will not be refused to anyone who requests it. Probes from the Taser shall be removed by EMS or medical personnel.*
- Request CSI assistance to take photographs of probe impact sites and any other related injuries.*

- *Probes that have penetrated a body should be treated as bio-hazardous and handled properly.*

This investigation also examined any collateral actions of the principal officers, Officer #1 and Officer #2.

THE INVESTIGATION

In the course of this investigation I reviewed and analyzed all related BPD reports and investigations. I listened to audio recordings made by Officer #1 and others at the scene of the Subject's arrest. The following individuals were interviewed:

1. Officer #1.
2. Officer #2.
3. The third officer in the interview room.
4. The detective.
5. The Subject.

I also obtained a release from the Subject and analyzed the medical records related to his hospitalization.

ADDITIONAL POLICY CONCERNS ARISING DURING THE INVESTIGATION

Officer #1

Officer #1 made the following statement to the Subject at the end of his brief foot pursuit:

Hey, stop right there. Show me your [unclear] hands. Show me your f---ing hands, right now. Show me your hands. Get up. You better stand right there, punk. Show me your hands. Get your hands out where I can see 'em.

P.M. § 11.01.07 Relationships with Others and Demeanor

An employee shall treat all other persons in a civil and respectful manner. He/she shall not use profanity or uncomplimentary speech in the presence of members of the public, prisoners, or other persons he/she has contact with nor shall he/she intentionally antagonize any person.

Officer #2

Officer #2 took custody of the Subject near the corner of Roosevelt and Hoover and had personal contact and conversation with him there and while he drove him to CID. Officer #2 also rode with the Subject in the ambulance to the hospital. He (Officer #2) stayed with the Subject for more than one hour, during which he and the Subject interacted and had conversation. Officer #2 did not audio record any of the contacts or conversations he had with the Subject on April 8, 2005.

P.M. § 8.05.03 Cassette and Digital Voice Recorders (in part)

An officer shall record his/her own actions, not the actions of other officers. SOG officers involved in a deployment are exempt from recording. The officer shall index each contact by verbally recording the date, time, location, subject's name, DR number (if applicable), and other pertinent information on the recorder following each contact. If possible, the officer also will index the recorded entry at the beginning of the recording with date, time, and location.

An officer will record during prisoner transport if verbal or physical interaction occurs.

P.M. § 8.05.03A Officer's Responsibilities (in part)

A uniformed officer shall ensure that his/her recorder is recording during the full duration of all personal contacts with suspects and persons complaining of officer misconduct while engaged in enforcement action or when any contact is anticipated to be confrontational in nature, unless an articulated reason justifies otherwise. The officer shall make every effort to record the entire contact in a manner which will provide a clear audio recording.

WHAT THE INVESTIGATION FOUND

Based on the preponderance of evidence made available during this investigation, I have made the following findings of fact:

1. Officer #1, along with other officers, was dispatched to the area of Alpine and Latah to investigate a report of a strong-armed robbery.
2. Ada County Dispatch told Officer #1, along with the other responding officers, that the suspects in the robbery were five black males.
3. Officer #1 was told by other officers that they had located four black males in the area of the robbery.
4. Officer #1 observed a single black male (the Subject) walking in the area.
5. Officer #1 ordered the Subject to stop so he could talk with him.
6. The Subject disobeyed Officer #1's lawful order and took flight on foot.
7. Officer #1 observed furtive hand movements by the Subject, pointed his handgun at the Subject, and ordered him to show his hands.
8. Officer #1 said to the Subject, "Show me your f--ing hands," and called him a "punk."
9. The Subject was slow in complying with the order to show his hands.
10. Officer #1 ordered the Subject to get on the ground.

11. The Subject was slow in complying with Officer #1's order to get on the ground and began to back away from Officer #1.
12. Officer #1 delivered a burst of OC spray at the Subject's face.
13. Officer #1 made an audio recording of his personal contact with the Subject on April 8, 2005.
14. Officer #2 took custody of the Subject near the intersection of Roosevelt and Hoover.
15. Officer #2 transported the Subject to CID in the back of his police car.
16. After arriving at CID, Officer #2 assisted in placing the Subject into a locked interview room. The Subject remained handcuffed.
17. Sometime after the Subject was placed into the interview room, he began shouting and banging on either the wall or the door.
18. Officer #2, along with two other officers, entered the interview room.
19. Officer #2 and a second officer verbally ordered the Subject to get away from the door and sit down.
20. One officer used his hand(s) to try and push the Subject down into a chair.
21. The Subject continued shouting, visibly tensed his muscles, and did not sit down.
22. Officer #2 used his Taser to deliver a touch stun to the upper right region of the Subject's torso.

23. The Subject sat down and began to comply with the directions given to him by the officers.
24. The Subject was examined by paramedics at CID and then taken by ambulance to the hospital.
25. After examination by medical personnel, the Subject was admitted to the hospital for observation and further tests.
26. Officer #2 rode in the ambulance with the Subject and remained with him at the hospital until he (Officer #2) was ordered to release the Subject from custody and leave the hospital.
27. Officer #2 had personal and verbal interaction with the Subject off and on from the time he took custody of the Subject at the scene until he (Officer #1) released the Subject from custody at the hospital.
28. Officer #2 did not create any audio recordings of his personal and verbal contacts with the Subject.
29. A supervisor investigated Officer #1's use of force (OC spray) and reviewed Officer #1's audio recording of the incident.
30. The supervisor did not document the fact that Officer #1 had used profanity and uncomplimentary speech towards the Subject.

OMBUDSMAN'S ANALYSIS AND FINDINGS

Use Of Force (OC Spray) By Officer #1

As an “intermediate weapon”, OC spray is intended to be used when reasonably necessary to gain control when an officer encounters actual or threatened physical resistance (see P.M. § 1.02.00).

By the time Officer #1 sprayed OC in the Subject’s face, the Subject had failed to obey Officer #1’s lawful command to stop. The Subject actively resisted Officer #1 by walking and running away from him, despite the fact that a uniformed police officer had ordered him to stop several times. In addition, the Subject made furtive movements with his hands and was slow to show them to Officer #1 when commanded. Immediately before using the OC spray, Officer #1 concluded that the Subject was about to run away a second time and judged that the use of OC spray to control the Subject was less likely to injure either one of them than were other available force options.

I find that Officer #1 acted reasonably to use necessary force to control the Subject and prevent him from further attempts to escape. For this reason, I have issued a finding of **exonerated** in connection with Officer #1’s use of OC spray on the Subject.

Use Of Force (Taser) By Officer #2

As an “intermediate weapon”, the Taser is intended to be used when reasonably necessary to gain control when an officer encounters actual or threatened physical resistance (see P.M. § 1.02.00). Additionally, the Taser is not to be used, “punitively, or used for coercion or threat in the absence of actual or threatened physical resistance. The Taser is to be used as a way of averting a potentially injurious or dangerous situation” (see P.M. § 1.02.03A).

Once Officer #2 and Officer #3 were inside the interview room, face-to-face with a prisoner who refused to sit down and was displaying potentially aggressive behavior, the use of a Taser to gain compliance, with little or no danger to those involved, was reasonable and

appropriate. In fact, this situation was exactly the sort of incident for which the Taser is ideally suited. Other force options (hard, empty-hand strikes, impact weapons, OC spray) available to Officer #2 all carried with them a much greater risk of injury to the Subject and the officers. For these reasons, I have issued a finding of **exonerated** in connection with Officer #2's use of the Taser on the Subject.

While not a matter of potential policy violation, I do have some concerns regarding the tactics used by Officer #2 and Officer #3 leading up to and as they entered the interview room in which the Subject was being held. By their own admission, the officers did not communicate with each other regarding their purpose in entering the room or the tactics they would employ. The Subject was being loud and disruptive, and it was necessary that this behavior be addressed and not allowed to escalate. However, the situation was not an emergency. There was adequate time for the two officers to talk with each other and formulate a plan to deal with the Subject's behavior and limit the risk of injury to themselves and to the Subject. While this incident was resolved favorably and without injury, the risk of injury to involved parties was increased due to the lack of tactical planning and communication between the two officers.

Use Of Profanity And Uncomplimentary Speech (Officer #1)

Officer #1's use of profanity and a derogatory term while interacting with the Subject clearly violated P.M. § 11.01.07. Therefore, I have issued a **sustained** finding.

The on-duty field commander was Officer #1's functional supervisor for the incident under investigation and conducted BPD's administrative review of Officer #1's use of force (OC spray). However, since Officer #1 is a member of a different unit, the field commander was not his direct (regular) supervisor. The field commander reported in his review that he listened to the audio recording Officer #1 made of the incident. However, the field commander made no mention of Officer #1's use of profanity and uncomplimentary speech,

even though it was clearly audible on the recording. Instead, the field commander chose to handle this by speaking informally with Officer #1. No record of this conversation was made for the purposes of performance appraisal. In addition, Officer #1's direct supervisor was not informed.

P.M. § 3.08.05B Functional Supervision states (in part):

Under normal circumstances, functional supervisors will refer disciplinary concerns to the subordinate's direct supervisor for any action needed.

While the field commander was not required to notify Officer #1's direct supervisor of this apparent policy violation, the policy suggests this as a preferred course of action.

Failure To Audio Record (Officer #2)

Officer #2 did not audio record any of his contacts with the Subject on April 8, 2005. However, Officer #2 had sustained personal contact and extended conversations with the Subject that day. These contacts and conversation began at the scene of the Subject's arrest, continued during the time Officer #2 drove the Subject to CID and rode with him on the ambulance, and ended at the hospital after Officer #2 spent an extended time guarding the Subject.

P.M. § 8.05.03A requires that an officer, "shall ensure that his/her recorder is recording during the full duration of all personal contacts with suspects and persons complaining of officer misconduct while engaged in enforcement action or when any contact is anticipated to be confrontational in nature, unless an articulated reason justifies otherwise." In addition, P.M. § 8.05.03 requires that officers record, "during prisoner transport if verbal or physical interaction occurs."

The intent of the recording policy is to require officers to audio record an entire enforcement contact. The contact begins from the moment an officer contacts a suspect or potential

suspect until that suspect is either released and the contact ends or the suspect is turned over to the jail for booking or to a detective for interrogation. Each officer has the obligation to audio record that portion or portions of the entire enforcement contact over which he or she has primary responsibility. When Officer #2 accepted custody of the Subject at the scene of the arrest, he became the primary officer with respect to the Subject. The policy required him to record his entire contact with the subject: there at the scene, during transport if there was conversation, while riding with him in the ambulance if there was conversation, and while guarding him at the hospital. All of the time Officer #2 spent with the Subject was part of an overall enforcement action against the Subject.

For these reasons I have issued a **sustained** finding for Officer #2's failure to audio record his contacts with the Subject as required by P.M. §§ 8.05.03 and 8.05.03A.

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