



OMBUDSMAN'S REPORT

Complaint Investigation & Findings

OMB08/0024 - November 10, 2008

THE SITUATION

In the late autumn of 2007, shortly after midnight, Officer #1 of the Boise Police Department (BPD) initiated a traffic stop on a pickup truck being driven by the Complainant. The truck and Officer #1's police car stopped on Main Street between 16th Street and 15th Street. After contacting the Complainant at the driver's window of the pickup truck, Officer #1 had the Complainant get out of the truck and stand on the sidewalk. Officer #1 engaged in conversation with the Complainant. While they both stood on the sidewalk, Officer #1 conducted certain field sobriety tests on the Complainant. It so happened that three acquaintances of the Complainant (Witness #1, Witness #2, and Witness #3) were in and around a parked car directly behind where the Complainant stopped his pickup truck after he was pulled over by Officer #1.

After several minutes, Officer #1 made physical contact with the Complainant and a struggle ensued. The Complainant eventually broke free of Officer #1's grasp and ran away, with Officer #1 in foot pursuit. Approximately one block away, the Complainant was apprehended and handcuffed by Officer #1, with assistance from Supervisor #1 and Officer #2. The Complainant was examined at the scene by paramedics and then taken in a police car to the Emergency Department of a local hospital. After being cleared by medical personnel, the Complainant was booked into the Ada County Jail and charged with Felony Battery on a Law Enforcement Officer, Idaho Code (IC) § 18-915, Misdemeanor Resisting and Obstructing an Officer, IC § 18-705, and Misdemeanor Driving Under the Influence, IC § 18-8004.

THE COMPLAINT

Approximately ten weeks after the incident, the Complainant contacted the Office of the Community Ombudsman (OMB) and filed a complaint in which he alleged that Officer #1 had used excessive force on him during his arrest. At the time the Complainant filed this complaint, he expressed a concern regarding the effect his complaint might have on the outcome of the charges still pending against him. The Complainant asked that, in the interest of justice, notification of the complaint to Officer #1, as well as the OMB investigation into the complaint be delayed until final disposition of the criminal charges against the Complainant. After due consideration of the circumstances, this request was granted.

In April of 2008, the Complainant contacted OMB and informed us that the criminal case against him had been fully adjudicated through a negotiated plea agreement. The Complainant then requested that OMB commence its investigation into his allegation against Officer #1.

Two days later a full intake interview was conducted with the Complainant. Following this intake, Officer #1 was sent a notice of the complaint and the investigation was commenced. The following allegations were made by the Complainant during his intake interview:

Allegation #1

P.M. § 1.01.02 – Authorization (for the use of force)

The Complainant alleges that, without cause or justification, Officer #1 charged him, physically grabbed him, slammed his face against the side of a vehicle, and attempted to choke him. The Complainant asserts that, as a result of the force used by Officer #1, he sustained injuries to his face and mouth, as well as a fractured tooth.

Allegation #2

P.M. § 11.01.07 – Relationships with Others and Demeanor

The Complainant alleges that Officer #1 directed profanity at him, specifically that Officer #1 yelled the following at the Complainant as the Complainant ran from Officer #1, “I got your truck, f---er.”

Allegation #3

P.M. § 1.01.02 – Authorization (for the use of force)

The Complainant also reported to OMB that one or more officers struck and kicked him in the ribs after he was on the ground following a short foot pursuit. As a result of these blows, the Complainant asserted that he suffered contusions to and possible fractures to his ribs.

THE COMPLAINT INVESTIGATION

In the course of this investigation, the following steps were taken:

1. Interviews:
 - a. The Complainant was interviewed three times, once in person and twice on the telephone.
 - b. Officer #1 was interviewed twice in person.
 - c. Officer #2 was interviewed once in person.
 - d. Supervisor #1 was interviewed once in person.
 - e. Witness #1 was interviewed once in person.

- f. Witness #2 was interviewed once in person.
 - g. Witness #3 was interviewed once on the telephone.
2. All police reports associated with this incident were read and examined for relevant information.
 3. All BPD internal use of force reports and associated administrative investigations were read and examined for relevant information.
 4. All audio recordings created by BPD officers and associated with or related to this incident were reviewed and examined for relevant information.
 5. Court records, including the audio recording and transcript of testimony given at the Complainant's Preliminary Hearing were reviewed and examined for relevant information.
 6. Medical records associated with treatment received by the Complainant for injuries he alleges were associated with use of force by BPD officers were reviewed and examined for relevant information.
 7. Photographs taken by BPD, the Complainant, and Witness #2 shortly after the incident were examined.
 8. The area in which the incident took place was visited and examined. A canvas of the neighborhood to locate potential witnesses was not conducted due to the length of time that had passed between the incident and the commencement of this investigation.

WHAT THE COMPLAINT INVESTIGATION FOUND

Facts In Dispute

The following is a discussion of those facts, material to the allegations under investigation in this matter, which are in dispute, along with the relevant evidence and documents.

1. Warnings to the Complainant not to put his hands in his pockets

While there is agreement from all known sources of data that the Complainant placed his hands into his pockets on four occasions prior to the moment when Officer #1 made physical contact with the Complainant, there is disagreement about how many times Officer #1 told the Complainant to keep his hands out of his pockets.

At issue is whether or not Officer #1 gave this command after the second time that the Complainant put his hands into his pockets. According to Officer #1, this took place immediately after Officer #1 completed his first field sobriety test of the Complainant. Officer #1 recalls “instructing” the Complainant, for the second time, not to put his hands in his pocket.

This recollection by Officer #1 is only partially supported by his audio recording. Three such admonitions by Officer #1 can be heard on the audio recording. However, during the second audible warning to the Complainant not to put his hands in his pockets, Officer #1 says, “I’ve asked you twice now [not to put your hands in your pockets] ...” Officer #1 is either referring to two previous warnings, or he is counting the warning he just issued as the second one. The meaning of this statement by Officer #1 is not clear.

The Complainant recalls that the second time he reached into his pocket was when he retrieved his cell phone from his jacket pocket because it was vibrating. The Complainant

states that he then exchanged text messages with his wife. This recollection is supported by Officer #1's audio recording (the Complainant can be heard saying that he is "texting" with his wife), as well as Officer #1's recollection that he asked the Complainant if he had been successful in communicating with his wife. However, no command about the need for the Complainant's hands to stay out of his pockets can be heard on that section of the audio recording.

Based on the above, I find that the preponderance of the evidence supports the conclusion that, before Officer #1 made physical contact with the Complainant, Officer #1 verbally ordered the Complainant two times not to put his hands in his pockets.

2. Statement of possible future consequences by Officer #1 to the Complainant

Officer #1 has consistently asserted that, immediately before he engaged physically with the Complainant, he warned the Complainant that he (the Complainant) would be taken to the ground if he put his hands in his pockets again. However, the evidence does not support this assertion. Officer #1 told the Complainant, "You're about ready to go down to the ground, sir," followed by, "I'm ready to take you down to the ground." Both statements can be clearly heard on the audio recording made by Officer #1.

Officer #1 intended to warn the Complainant that one more attempt to reach into his pockets would result in a use of force by Officer #1. It is also clear that Officer #1's threat to use force on the Complainant was tied to the Complainant's failure to comply with the command to stop putting his hands in his pockets. Unfortunately, the actual construction of Officer #1's two statements was confusing; they were statements regarding what Officer #1 was about to do, not warnings about what might happen were the Complainant to put his hands into his pockets one more time.

For these reasons, I find that Officer #1 did not give a clear verbal warning to the Complainant that he (the Complainant) would be taken to the ground if he attempted to put his hands in his pocket.

3. The Complainant's level of resistance

Officer #1, the Complainant, Witness #1, Witness #2, and Witness #3 all agree that the Complainant resisted when Officer #1 grabbed him. However, they do not agree on the extent of that resistance. The Complainant claims that he merely turned away from Officer #1, who, the Complainant asserts, was charging at him without provocation. The three witnesses say that it looked like the Complainant was trying to get free of Officer #1's "bear hug" (as two of them describe it). Officer #1's description of the level of resistance offered by the Complainant is the most severe. Officer #1 claims that the Complainant struggled to get free, put his hands up, and swung his arms in a clear attempt to strike Officer #1. Officer #1 claims that the Complainant hit him on the right ear at least one time. Officer #1 also says that the Complainant threw his body weight around with such force that the two men moved along the sidewalk and fell against the Complainant's pickup truck.

The BPD Policy and Procedures Manual (§ 1.01.01) defines resistance in the following manner:

Resistance: Actions which seek to evade an officer's attempts of control, directed from a subject towards an officer. Types of resistance include:

- *Active Aggression: Physical actions or assaults against the officer or another person with less than deadly force (e.g., advancing, challenging, punching, kicking, grabbing, wrestling, etc.).*
- *Deadly Force Assaults: Any force used against an officer and/or another person that may result in great bodily harm or the loss of human life.*
- *Defensive: Any action by a subject that attempts to prevent an officer from gaining control of the subject. It is not an attack on the officer.*
- *Passive: Any type of resistance where the subject does not attempt to defeat the officer's attempt to touch or control him/her, but he/she still*

will not voluntarily comply with verbal and physical attempts of control (e.g., dead weight, does not react to verbal commands, etc.).

- *Psychological Intimidation: Nonverbal cues indicating subject's attitude, appearance, and physical readiness.*
- *Verbal Noncompliance: Any verbal response indicating subject unwillingness to obey commands of detainment, arrest, or to stop unlawful or dangerous behavior.*

Applying this definition of resistance and its various levels to the Complainant's actions once Officer #1 laid hands on him, I find that the Complainant physically resisted Officer #1's attempt to gain physical control of him. The level of the Complainant's resistance was, at least "defensive," and quite possibly "active aggression."

4. The cause of the Complainant's face striking the Complainant's pickup truck

At issue here is whether an Officer #1 intentionally caused the Complainant's face to hit the side of the Complainant's pickup truck. The Complainant alleges that Officer #1 grabbed the back of his head and slammed his face into the side of the pickup truck. According to the Complainant, this was not an unintended consequence of a struggle between himself and Officer #1. It was, alleges the Complainant, a deliberate act by Officer #1. This resulted, according to the Complainant, in breaking one of his teeth and cutting his mouth.

In contradiction to the Complainant's allegation, Officer #1's police report speaks to this issue in the following manner:

I put [the Complainant] in [a] shoulder pin hold in a further attempt to contain him. [The Complainant] continued to swing his fist back at me in a wild attempt to hit me. While attempting to gain control of [the Complainant] we went against his vehicle, where it appeared [the Complainant]'s face hit.

In his sworn testimony at the Complainant's Preliminary Hearing, Officer #1 described what happened with these words:

That's when he hit me. He was hitting the behind of his head on me, and we struggled for – I can't tell you how many seconds. We struggled for several seconds. We danced around in a half circle to where we were facing his car and then we went straight into the back of his car.

In his ombudsman's interview, Officer #1 provided roughly the same account he had given in his police report and during his testimony at the Preliminary Hearing. Officer #1 told me that, in an apparent attempt to get away, the Complainant threw his body weight around in such a way that the two men moved northwest along the sidewalk and into the side of the Complainant's pickup truck. During our interview, Officer #1 specifically denied doing anything to intentionally push the Complainant's face or head into the pickup truck. Officer #1 offered his opinion that he and the Complainant were thrown off-balance by the Complainant's active physical resistance. In Officer #1's view, it was the Complainant's own resistance that caused him to slam into the side of the pickup truck.

Officer #1 unintentionally recorded a conversation he had with an uninvolved third party (not a supervisor or fellow law enforcement officer) shortly after the incident took place. During this conversation, Officer #1 described how the Complainant's face came to strike the side of the pickup truck:

...and he said, "No way," and he put his hands in, so I jumped on him and I tried to put him in a strangle hold. But I could only get a side view on him, I can't get completely around, and ah, we start struggling so all I can do, with all my force, I slammed his head into the side of his car, and I do it with his face and it smashed his teeth in and, and it probably broke his nose.

When I pointed out to Officer #1 that his statement to the third party seemed to support the Complainant's allegation that he (Officer #1) had intentionally pushed the Complainant's head and caused his face to strike the side of the truck, Officer #1 told me that he was embarrassed at the time by the fact that he had been unable to gain quick control of the Complainant. In re-telling the events to the third party, he (Officer #1) embellished his account in order to make it sound like he had enough control of the Complainant to be able to

slam the Complainant's face into the side of the pickup truck. In fact, said Officer #1, they were both struggling so much that he (Officer #1) had little control of the Complainant.

Witness #1, in my interview with him, recalled that the Complainant "squirmed" after Officer #1 "lunged" at him and put his arms around him in a "bear hug." Then, according to Witness #1, the officer pushed the Complainant backwards and "slammed" him into the side of the pickup truck.

Witness #2 told me in our interview that she took her eyes off Officer #1 and the Complainant for a few moments and, when she looked back, she saw that Officer #1 had advanced towards the Complainant and had his (Officer #1's) arms wrapped around the Complainant in what looked like a "bear hug." It looked to Witness #2 like the Complainant was trying to get his arms free from being pinned against his body by Officer #1 and, as a result, was attempting to push Officer #1 away. Officer #1 and the Complainant struggled like this for a short time and then Officer #1 threw the Complainant against the pickup truck. According to Witness #2, the Complainant's back hit the truck and not his head or face.

Witness #3 told me that, like Witness #2, he looked away from the Complainant and Officer #1 for a brief time. When his attention was drawn back to them, he saw Officer #1 with his arms wrapped around the Complainant's upper body, causing the Complainant's arms to be pinned below the elbows against his own body. It looked to Witness #3 like Officer #1 was trying to keep the Complainant's arms down while the Complainant was trying to get away. Witness #3 described the two men as being "wrapped up" with each other and engaged in a struggle. While Officer #1 and the Complainant struggled, according to Witness #3, the two of them slammed against the side of the pickup truck. From the perspective of Witness #3, it looked like the contact with the truck was the result of the struggle between the two men, and not an intentional act by Officer #1.

Absent Officer #1's recorded statement that he intentionally pushed the Complainant's face into the side of the pickup truck, the available evidence, including the statements of the involved parties and witnesses, is inconclusive with respect to whether or not Officer #1 intentionally pushed the Complainant into the side of the pickup truck. Relatively similar descriptions of the men's struggle are given by the three witnesses and by Officer #1. Their descriptions of a struggle for control on the sidewalk not far from the pickup truck support the theory that the two men's shifting weight and balance inadvertently drove the Complainant's face into the side of the pickup truck. However, Officer #1's excited and closely contemporaneous utterance to another person that, "with all my [Officer #1's] force, I slammed his [the Complainant's] head into the side of his car, and I do it with his face and it smashed his teeth in and, and it probably broke his nose," cannot easily be ignored; especially in light of the Complainant's statement that Officer #1 grabbed the back of his (the Complainant's) head and pushed his face into the side of the truck. In addition, two of the three witnesses were of the opinion that the officer "threw" or "slammed" the Complainant into the side of the pickup truck.

If Officer #1's recorded statement, made to a third party, that he acted with intent and pushed the Complainant's face into the side of the pickup truck is deemed credible, then the preponderance of the evidence weighs towards the conclusion that Officer #1 intentionally pushed the Complainant's face into the side of the pickup truck. If the statement lacks credibility, however, then the preponderance shifts to support the finding that any contact between the Complainant and the pickup truck, once he and Officer #1 began struggling, was inadvertent and unintended.

Following the foot pursuit and Officer #1's capture of the Complainant, Supervisor #1 interviewed the Complainant. Supervisor #1 recorded this conversation in which the Complainant alleges that Officer #1 punched him in the face. To be fair, the Complainant sounds disoriented or intoxicated, possibly both, and says at first that he doesn't know who punched him in the face. Following this conversation, Supervisor #1 spoke with Officer #1

and asked him if he had punched the Complainant. Officer #1 replies that he punched the Complainant in the face after the Complainant punched, or tried to punch, him (Officer #1). This is the only time, based on the evidence available to me, in which Officer #1 claimed that he punched the Complainant in the face. On all other occasions, Officer #1 consistently reported that the Complainant's face struck the side of the pickup truck shortly after the Complainant punched Officer #1 in the right ear. There is no other evidence to suggest that Officer #1 punched the Complainant in the face.

Finally, while the documented injuries to the Complainant are consistent with the left side of his face striking the side of a pickup truck, there is nothing about the injuries that either supports or refutes the Complainant's allegation that Officer #1 intentionally pushed his face into the side of the pickup truck.

Based on the above, I find that the preponderance of the evidence supports the conclusion that Officer #1 pushed the Complainant and that this resulted in the Complainant's face striking the side of the pickup truck.

5. Officer #1's actions after the Complainant's face struck the pickup truck

The Complainant alleges that Officer #1 placed a forearm across the front of his (the Complainant's) throat and blocked the airway by applying pressure. According to the Complainant, this took place after Officer #1 pushed the Complainant's face into the side of the truck. The Complainant says that he had his back against the side of the truck bed and that Officer #1 put his forearm across his throat and pushed him back so that he was bent back at the waist, with the back of his head over the bed of the truck. The Complainant claimed that he could not breathe while this was happening.

Officer #1 denies that this happened, stating that he tried to hold onto the Complainant after the two of them crashed into the side of the truck. Officer #1 recalls that the Complainant

was facing the side of the pickup truck and he (Officer #1) was standing next to him. Officer #1 said that the Complainant continued to struggle, swung his arms, and tried to break free from Officer #1. Officer #1 tried to contain the Complainant further by using his body to pin the Complainant against the truck. Officer #1 denied ever placing his arm or anything else across the front of the Complainant's throat; or doing anything that would restrict the Complainant's airway.

Officer #1's police report does not mention anything about him placing an arm across the Complainant's throat. Regarding the time between when the Complainant hit the side of the truck and when he ran away, Officer #1 writes, "He continued to resist and pulled away from me by slipping out of his shirt and jacket."

At the preliminary hearing, Officer #1 testified under oath, "I continued to try to take him into a level-1 LVNR; however he slid down. He completely slipped out of his shirt and his jacket." Lateral Vascular Neck Restraint (LVNR) does not involve restriction of, or pressure on a person's airway. Instead, pressure is applied to the veins on either side of the subject's neck. If applied properly, the LVNR restricts the flow of blood leaving the brain and can cause a temporary loss of consciousness.

The audio recording that Officer #1 made of the incident does not contain any evidence to support the Complainant's allegation that Officer #1 tried to choke him with an arm across his throat. In fact, the audio tends to refute the Complainant's allegation. Approximately ten seconds elapse between the sound of the first metallic "bang", when it is presumed that the Complainant's face struck the side of the pickup truck, and the beginning of sounds that are consistent with Officer #1 running after the Complainant. About five seconds after the "bang," the Complainant can be heard cursing at Officer #1. The Complainant was breathing well enough at that point to articulate a complete sentence, including two expletives. Nothing was said by the Complainant about having trouble breathing, nor were there sounds of him choking or coughing.

On the audio recording Officer #1 unintentionally made of a conversation he had with a third party after the incident, he makes the following statement with respect to what took place after the Complainant's face hit the side of the truck: "I was still trying to get him into an LVNR then and he was able to duck and pull out of his jacket and his shirt."

Officer #2, Supervisor #1, and Supervisor #2 all recorded their various conversations with the Complainant after he was arrested. Nowhere on those recordings does the Complainant state that Officer #1 choked him and/or put an arm across his throat.

Witness #1 told me that he saw Officer #1 place his forearm across the front of the Complainant's throat and push the Complainant's head and upper body backwards over the bed of the pickup truck. Witness #1 said that the Complainant began "gasping," swearing at the officer, and saying that he could not breathe. According to Witness #1, the Complainant was using his arms to try and push Officer #1 away when he (the Complainant) was able to break free from the bent backwards position.

Witness #2 said that she saw the Complainant go partially down right after he hit the side of the pickup truck, Officer #1 tried to put the Complainant in a "headlock" and the Complainant was grabbing at the officer's arms.

Witness #3 also reported seeing Officer #1 put the Complainant in a "headlock," which he described as one arm around the Complainant's neck with the inside of Officer #1's elbow just below the Complainant's chin. Witness #3 specifically said that Officer #1 never had his arm across the Complainant's throat, nor did he push the Complainant backwards over the bed of the pickup truck.

Based on the preponderance of the evidence summarized above, I find that Officer #1 did not place his arm, or anything else, across the Complainant's throat with the effect of choking the Complainant or making it difficult for him to breathe.

6. Officer #1's use (or non-use) of profanity

The Complainant alleges that Officer #1 yelled after him as he (the Complainant) was running away: "I got your truck, F---er. You ready to leave your truck here?"

Officer #1 is very certain that he did not use profanity at or in the presence of the Complainant. After listening to his recording several times, Officer #1 asserted that the word he used in calling after the Complainant was, "sucker."

I have listened to this portion of Officer #1's audio recording several times using high fidelity earphones. The initial consonant sound on the word in question is not clear enough on the recording to allow me to determine, with reasonable confidence, whether or not Officer #1 shouted profanity after the Complainant.

In light of the above facts, I find that that the preponderance of the evidence neither supports nor refutes the allegation that Officer #1 used profanity in the presence of the Complainant and other members of the public.

7. The cause of the Complainant going to the ground at the conclusion of the foot pursuit

The Complainant claims that he voluntarily dove to the ground in a baseball-style, diving slide at the conclusion of the foot pursuit.

Officer #1, on the other hand, claims that he tackled the Complainant and knocked him to the ground. Officer #1 said that he hit the Complainant on the right side below the right arm; striking the Complainant hard with his shoulder and neck. In his police report, Officer #1 writes, "I caught him [the Complainant] and took him to the ground." Similarly, Officer #1

testified at the Preliminary Hearing, "At that point, I turned the corner and found him standing there. I took him to the ground at that point."

Officer #1's audio recorder, which was on at that point, recorded the sound of Officer #1 chasing after the Complainant, a rhythmic "clomping" sound accompanied by creaking, along with rapid and somewhat labored breathing. When the running sounds cease, they are immediately followed by a loud "thud" and a groan, followed by another "thud" and a groan. These sounds are consistent with Officer #1 hitting the Complainant with a tackle and then the two of them falling to the ground.

In a recorded conversation in which he was speaking with an unidentified party after the incident, Officer #1 described his "take down" of the Complainant in the following manner:

I was able to turn the corner on him and I just went full force right into his gut with my head and took him down to the concrete and then he smashed the other side of his face on it.

Other than Officer #1 and the Complainant, there are no known witnesses to the moment when Officer #1 caught up with the Complainant and the Complainant ended up on the ground.

Based on the preponderance of the evidence, I find that the Complainant went to the ground at the conclusion of the foot pursuit in the area of 17th Street and Fairview Avenue as a result of receiving a blow from Officer #1 to his right side and being tackled by Officer #1 to the ground.

8. Resistance by the Complainant while on the ground after the foot pursuit

In his ombudsman interview, the Complainant reported that he offered little or no resistance to the police officers once he was down on the ground. Immediately after the incident he

told Supervisor #1 that he, “just lay there,” once the officers caught him. However, after some more questions from Supervisor #1, the Complainant admitted, “I may have resisted a teeny-tiny bit.”

All of the other evidence, Officer #1's audio recording of the moments following the foot pursuit, his police report, Officer #2's police report, and my interviews of Officer #1, Officer #2 and Supervisor #1 support the conclusion that the Complainant resisted the efforts of Officer #1, Officer #2, and Supervisor #1 to bring him under control and to get him into handcuffs.

For these reasons, I find that the preponderance of the evidence supports the conclusion that the Complainant physically resisted the efforts of Officer #1, Officer #2, and Supervisor #1 to bring him under control and to put him into handcuffs.

9. Force used on the Complainant by Officer #2

The Complainant alleges that, once he was on the ground following the foot pursuit, several officers were on top of him, pulling him in different directions. Then, alleges the Complainant, he was hit and kicked in the ribs by several officers.

In his police report, Officer #2 reports that, other than using his empty hands to try and pull the Complainant's arm out from underneath his body, he used force three times. The first was a pain compliance technique (an infra orbital pressure point) in which Officer #2 put pressure on a nerve near the Complainant's ear. The second and third uses of force were both Suprascapular strikes with his hand to the Complainant's upper back.

Officer #2 reported the same three uses of force to me during his ombudsman interview.

In my interview of Supervisor #1, he told me that he saw Officer #2 strike the Complainant two or three times with his fist on the upper region of the Complainant's back/shoulder area. Supervisor #1 said that these strikes were consistent with a Suprascapular strike. Supervisor #1 also said that he did not see Officer #2 deliver the infra orbital pressure point technique, but was told about it later by Officer #2. Other than the two to three strikes with a fist to the Complainant's upper back, Supervisor #1 did not see Officer #2 use any other force on the Complainant. Specifically, Supervisor #1 did not see any officer, including Officer #2, kick the Complainant.

On the audio recording that Officer #1 made of the incident, Officer #2 can be heard shouting, "Suprascapular," during the struggle.

After the Complainant's arrest and transport away from the scene, Officer #1 recorded statements he made to others about the moments following when he caught up with the Complainant at the end of the foot pursuit. Officer #1 described how other officers, including Officer #2, arrived to assist him. Officer #1 recalled that Officer #1 used force to subdue the Complainant.

Officer #1 described to me, in his ombudsman interview, how he first heard Officer #2 shout, "Suprascapular," and then Officer #2 hit the Complainant twice in the upper back. Since Officer #1 was focused on exerting pressure on the Complainant's arm at that point and positioned close in to the Complainant's head and shoulder, he did not actually see Officer #2 deliver these two blows. It was not until after the whole incident when he read Officer #2's report, that Officer #1 became aware that Officer #2 had also delivered an infra orbital pressure point to the Complainant.

The audio recording of the actual incident itself is somewhat helpful in this regard. The recording clearly indicates that a struggle was going on. The sounds of running come to an abrupt end with a distinct thud and a grunt. These sounds are consistent with Officer #1

tackling the Complainant to the ground. Officer #2 says, "Hands behind your back," twice, followed by, "Suprascapular," and sounds that are consistent with blows.

The preponderance of the evidence supports the finding that Officer #2 applied force three times on the Complainant, one infra orbital pressure point delivery followed by two Suprascapular strikes with a closed fist.

Findings of Fact

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

1. Shortly after midnight, in the autumn of 2008, Officer #1 detained the Complainant for committing a traffic infraction in his presence. This took place on the south side of Main Street, east of 16th Street.
2. After making contact with the Complainant at the driver's door of the Complainant's pickup truck, Officer #1 began investigating the possibility that the Complainant was under the influence of alcohol and/or drugs.
3. Officer #1 directed the Complainant to get out of his truck and walk around onto the sidewalk. The Complainant complied with this command.
4. While the two men stood on the sidewalk near the Complainant's truck, Officer #1 questioned the Complainant and administered a field sobriety test to determine the Complainant's probable level of intoxication.
5. The Complainant placed his fingers and/or hands in either his jacket or his pants pockets four times while he and Officer #1 were standing on the sidewalk.

6. Officer #1 verbally ordered the Complainant twice not to put his hands in his pockets and the Complainant verbally acknowledged that he understood this command.
7. After the fourth time that the Complainant started to put his hands in his pockets, Officer #1 told the Complainant, "You're about ready to go down to the ground, sir," followed by, "I'm ready to take you down to the ground."
8. The Complainant replied, "No," and, "No, you're not," in that order, to each of Officer #1's statements quoted immediately above (see Finding of Fact #7).
9. Officer #1 initiated physical contact with the Complainant by grabbing him with both of his arms around the Complainant's upper body.
10. Up to the point when Officer #1 initiated physical contact with the Complainant, Officer #1 had not told the Complainant that he was under arrest, or that he was subject to arrest.
11. The Complainant physically resisted Officer #1.
12. During the struggle between the Complainant and Officer #1, Officer #1 pushed the Complainant and, as a result of this push, the Complainant's face struck the right, rear side of his pickup truck.
13. The Complainant broke free from Officer #1's grasp and ran westbound on Main.
14. Officer #1 pursued the Complainant on foot.
15. While running after the Complainant, Officer #1 said, "I got your truck, [either 'f---r' or 'sucker']. You ready to leave your truck here?"

16. Officer #1 caught up to the Complainant, delivered a blow to the Complainant's right side, and tackled the Complainant to the ground.
17. The Complainant physically resisted as Officer #1, Officer #2, and Supervisor #1 attempted to gain control of the Complainant.
18. The Complainant was verbally ordered to stop resisting and to put his hands behind his back. The Complainant did not immediately comply with these commands.
19. Officer #2 used his finger to push behind the ear of the Complainant in an attempt to create pain and gain the Complainant's compliance with the previous commands. The Complainant did not immediately comply with the command to bring his hands behind his back.
20. Officer #2 yelled, "Suprascapular," and then struck the Complainant in the upper shoulder/upper back region with his fist. The Complainant did not immediately comply with the command to bring his hands behind his back.
21. Officer #2 delivered a second Suprascapular strike with his hand to the same area of the Complainant's rear shoulder/back.
22. The Complainant then brought both his hands out from underneath his body and allowed the officers to handcuff them behind his back.
23. The Complainant was taken into custody, examined on the scene by paramedics, and transported by Officer #2 to a local hospital for treatment of his injuries.
24. Following the incident, the Complainant received medical treatment for the following injuries:

- a. A superficial laceration to the left side of his upper lip.
- b. A contusion to the right side of his chest wall (rib cage).
- c. A fracture to a tooth on his upper, left side.

OMBUDSMAN'S ANALYSIS

Use of Force

The Boise Police Department's policy (§ 1.01.02) Authorization (for the use of force) states:

An officer shall use only the amount of force that is reasonable and necessary to protect life, effect 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 effect 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.

BPD policy provides further guidance and direction to officers regarding the authorized use of force to overcome resistance by providing the following definitions in § 1.01.01:

Control: Techniques including physical force that are used to subdue a subject's resistant actions. These control techniques include:

- *Deadly Force: Any force used by an officer that is likely to result in great bodily harm or the loss of human life.*
- *Hard Empty-Handed Control: Higher probability of injury.*
- *Intermediate Weapons: The application/use of any Department-approved weapon/object that is not part of the human body to control resistance or an assault.*
- *Officer Presence: The identification of police officer's authority, either by the uniformed presence or the verbal identification of being a police officer.*

- Soft Empty-Handed Control: Minimal chance of injury.
- Verbal Direction: Commands of direction or arrest.

Resistance: Actions which seek to evade an officer's attempts of control, directed from a subject towards an officer. Types of resistance include:

- Active Aggression: Physical actions or assaults against the officer or another person with less than deadly force (e.g., advancing, challenging, punching, kicking, grabbing, wrestling, etc.).
- Deadly Force Assaults: Any force used against an officer and/or another person that may result in great bodily harm or the loss of human life.
- Defensive: Any action by a subject that attempts to prevent an officer from gaining control of the subject. It is not an attack on the officer.
- Passive: Any type of resistance where the subject does not attempt to defeat the officer's attempt to touch or control him/her, but he/she still will not voluntarily comply with verbal and physical attempts of control (e.g., dead weight, does not react to verbal commands, etc.).
- Psychological Intimidation: Nonverbal cues indicating subject's attitude, appearance, and physical readiness.
- Verbal Noncompliance: Any verbal response indicating subject unwillingness to obey commands of detainment, arrest, or to stop unlawful or dangerous behavior.

Based on the factual findings of this investigation and the evidence upon which these findings are based, it appears that there were four distinct instances when a BPD officer used force on the Complainant. Each instance will be examined and considered separately.

Officer #1 – First Use of Force: Officer #1 initiated physical contact with the Complainant while the two men were standing on the sidewalk on the south side of Main Street between 16th and 15th Streets. This includes the struggle that ensued between Officer #1 and the Complainant, along with the contact the Complainant had with the side of his pickup truck.

Officer #1 had probable cause for his initial traffic stop and detention of the Complainant, i.e. a wide turn and failure to signal a lane change, which is a traffic infraction.

Based on Officer #1's observation of the Complainant's driving behavior prior to the traffic stop; Officer #1's observations of the Complainant after contacting him at the driver's door

of the pickup truck, i.e., red eyes and the odor of an alcoholic beverage; and the Complainant's admission that he had consumed a beer that evening, Officer #1 had a reasonable basis to suspect that the Complainant had violated the law by operating a motor vehicle while under the influence of an alcoholic beverage (DUI). As a result, Officer #1 had the authority to detain the Complainant and control his actions for a reasonable period of time while he further investigated the suspected DUI, a misdemeanor.

From the early moments of this detention, the Complainant put or tried to put his hands into his pockets. This happened four times before Officer #1 used force. The first time that the Complainant began to put his hands into his pockets, Officer #1 ordered him not to and the Complainant verbally acknowledged that he understood the command. Officer #1 verbally gave this same order at least one other time in response to the Complainant beginning to put his hands into his pockets.

During this investigative detention, Officer #1 had the authority to prevent the Complainant from doing anything that would hinder the investigation (such as chewing gum), facilitate his (the Complainant's) escape, or endanger Officer #1. Since Officer #1 had not searched the Complainant to determine whether or not he was armed or if he had anything dangerous in his pockets, Officer #1's order for him to keep his hands out of his pockets was reasonable and the Complainant was obligated to follow that command. The Complainant's continued failure to follow Officer #1's command to keep his hands out of his pockets could be seen as a violation of Idaho Code § 18-705 Resisting and Obstructing Officers. This statute makes it a misdemeanor for any person who, "Willfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office."

In light of the Complainant's repeated failure to obey Officer #1's command to keep his hands out his pockets, the fact that Officer #1 had not searched the Complainant, and Officer #1's observation that the Complainant appeared to be growing increasingly nervous and confrontational, it was reasonable for Officer #1 to decide that, for his own personal safety,

he needed to physically restrain the Complainant. Physical restraint, by its very nature, involves the use of force. How much force is reasonable in any particular instance, will differ from situation to situation.

Officer #1 was the only police officer present when the Complainant took a defiant stance, said, "No," and, "No, you're not," and began to stick his hands into his pockets one more time. In explaining his actions after the incident, Officer #1 expressed the fear that the Complainant might be reaching for a weapon. As a result, Officer #1 believed that it was imperative that he immediately keep the Complainant from retrieving anything from his pockets until he (Officer #1) had a chance to search the pockets.

Officer #1 reacted by stepping quickly to the Complainant and grabbing him with both hands. According to Officer #1, he attempted to place the Complainant into a level 1 LVNR, but, due to the Complainant's resistance, he ended up holding the Complainant in a shoulder pin.

Witnesses #1, #2, and #3 all described the hold that Officer #1 used with the Complainant as a "bear hug" in which Officer #1 had his arms wrapped around the Complainant's torso with both of the Complainant's arms pinned between his own body and Officer #1's arms.

A shoulder pin hold is a relatively minor use of force. So minor, in fact, that it is considered a non-reportable use of force under BPD Policy. In and of itself, a shoulder pin hold is unlikely to result in injury or significant pain. Had the Complainant been compliant and not resisted or struggled, it is likely that no additional force would have been used other than handcuffing.

It should be noted that, immediately prior to grabbing the Complainant, Officer #1 did not effectively communicate with him. Officer #1 has reported that he intended to convey a final warning to the Complainant that one more instance of trying to put his hands into his pockets

would result in him being taken to the ground. Unfortunately, this is not what Officer #1 said. Given the Complainant's state of intoxication, Officer #1's poorly constructed "warning" created confusion rather than compliance.

Even though the Complainant may have been confused about the meaning of Officer #1's statements that he was about to be taken to the ground, Officer #1 had the authority to use a reasonable amount of force to keep the Complainant from reaching once again into his pockets. The force Officer #1 used, an attempted LVNR and a shoulder pin hold, was a low level of force designed only to control movement.

For these reasons, I find that Officer #1's first use of force was reasonable and necessary given the totality of the circumstances.

Officer #1 – Second Use of Force: Officer #1 pushed the Complainant into the side of the Complainant's pickup truck, resulting in the Complainant's face striking the right, rear side of the truck.

The Complainant began to struggle the moment that Officer #1 first took hold of him. The Complainant's resistance increased the likelihood that he was either trying to get away, or had something in his pocket that he did not want Officer #1 to discover. Officer #1's level of concern was naturally heightened by the Complainant's resistance.

Officer #1 also reported that the Complainant began to flail his arms, striking Officer #1 on the right ear. While the three nearby witnesses do not recall seeing the Complainant swinging his arms, all are in agreement that the Complainant was struggling and attempting to get free of Officer #1's grasp.

At this point, Officer #1 was locked into close-quarters, hand-to-hand combat with someone who had not been searched and had already demonstrated a defiant response to Officer #1's

lawful commands. A reasonable police officer in similar circumstances would consider it imperative to gain immediate control of the Complainant to prevent him from accessing his pockets before they had been searched. Officer #1's attempt to use an LVNR had been unsuccessful, while his attempt to control the Complainant using a shoulder pin hold was proving equally ineffective.

Given the circumstances, it was reasonable for Officer #1 to push the Complainant into the side of the pickup truck, just as it would have been reasonable to force him down to the ground. Despite Officer #1's statement about the consequences of pushing the Complainant into the truck (as heard on the recorded conversation he had with a third party after the incident), there is no evidence to suggest that Officer #1 intended to injure the Complainant. Instead, it appears that Officer #1 intended to stun the Complainant and overpower him so as to gain lawful control.

For these reasons, I find that Officer #1's second use of force was reasonable and necessary given the totality of the circumstances.

Officer #1 – Third Use of Force: Following a brief foot pursuit, Officer #1 struck the Complainant and tackled him to the ground.

Officer #1 had probable cause to believe that the Complainant had committed a crime in his presence (DUI, Resisting and Obstructing, and/or Battery on a Law Enforcement Officer). As such, under Idaho law and BPD's use of force policy, Officer #1 had the authority to use reasonable and necessary force to capture the Complainant. Based on the preponderance of the evidence, I find that Officer #1's use of a body tackle to take the Complainant to the ground was both reasonable and necessary.

For all the reasons stated above and for each of the three instances in which Officer #1 used force on the Complainant, I have issued a finding of exonerated in connection with the allegation that Officer #1 violated § 1.01.02 Authorization (for the use of force).

Officer #2 – Use of Force: The Complainant did not make an allegation with regard to Officer #2's use of his finger to apply pressure behind the Complainant's ear and create pain. It seems likely that the Complainant was unaware that Officer #2 had done this. Absent any other reason to conclude that this action may have violated BPD policy, I will not evaluate this particular use of force by Officer #2.

The Complainant did allege that one or more officers hit and kicked him in the ribs. As already stated, the preponderance of the evidence supports the conclusion that no officer, including Officer #2, kicked the Complainant in the ribs. However, Officer #2 did use his fist to strike the Complainant twice on the Complainant's upper back/shoulder area (also known as a Suprascapular strike). This took place as the Complainant was lying face-down on the grassy area between the street and the sidewalk on the east side of 17th Street, just north of Fairview Avenue.

The evidence clearly indicates that the Complainant continued to resist the officers after Officer #1 took him to the ground. Officer #1's audio recording makes it clear that the Complainant was ordered to stop resisting and to show the officers his hands.

Given the fact that the Complainant's front side was not visible to Officer #2, that his hands were under his body where Officer #2 could see neither them nor anything they might contain, and that the Complainant was physically resisting both Officer #1's and Officer #2's efforts to get his hands out from under his body, it was reasonable for Officer #2 to be concerned that the Complainant might have some sort of a weapon under his body. In addition, the fact that the Complainant had just attempted to run away from Officer #1 and was physically resisting the police provided further rationale for the involved officers to have

a heightened sense of concern regarding any danger the Complainant might pose. In such circumstances, a reasonable amount of force would be justified in order to get the Complainant's hands out where they could be seen and controlled by the officers.

A Suprascapular strike is specifically designed to overcome the precise kind of resistance being exhibited by the Complainant. Striking the Suprascapular nerve causes pain, temporary disruption of the arm and hand on that side, and mental stunning for three to five seconds. Such a strike, followed by an immediate effort by an officer to pull the subject's hand out from underneath and get it behind his or her back is usually effective, assuming the blow hits the target nerve. It rarely has any lasting effect on the subject and, other than temporary pain, results only in mild bruising to the target area.

It appears that Officer #2's first strike either missed the Suprascapular nerve or was not strong enough to be effective. The second strike caused the intended reaction in the Complainant and he was quickly handcuffed.

Based on the preponderance of the evidence, I find that Officer #2's use of two Suprascapular strikes on the Complainant were reasonable and necessary actions given the totality of the circumstances. I have, therefore, issued a finding of exonerated in connection with the allegation that Officer #2 violated § 1.01.02 Authorization (for the use of force).

Use of Profanity

The Boise Police Department's policy (§ 11.01.07) Relationships with Others and Demeanor states:

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.

The Complainant alleged that Officer #1 shouted the word “f--r” after him at the beginning of the foot pursuit. By any reasonable standard, this word constitutes profanity. Its use in the presence of the Complainant, the three witnesses, and other unidentified members of the public in the area was clearly prohibited by BPD Policy.

Officer #1's audio recording of the incident shows that he shouted something at the beginning of the foot pursuit. One of the words shouted by Officer #1 sounds very much like the profane word “f---r.” Officer #1 maintains that he said “sucker,” not “f---r.” I have listened to this recording many times using hi-fidelity headphones. Unfortunately, there is enough distortion and loud ambient noise in the recording that it is impossible for me, based on the recording alone, to be certain which word Officer #1 actually used.

Officer #1 strongly rejected the notion that he used this profanity in this public setting. He stated further that the word “sucker” is a regular part of his street use vocabulary.

Witness #1 stated that he heard Officer #1 shout after the Complainant, “Stupid f---r, I got your truck.” It should be noted that Witness #1 was standing on the sidewalk just a few feet west of where Officer #1 and the Complainant had been struggling. He was also standing in the general path that the Complainant took as he ran away from Officer #1.

Witness #2 and Witness #3 were seated in Witness #2's car which was parked right behind and to the west of the Complainant's pickup truck. Neither one of them heard Officer #1 shout anything after the Complainant as he fled westward from Officer #1.

Given that a recording of the potentially offending comment exists and that I am unable to tell which word was actually used, it is my finding that insufficient evidence exists to form a preponderance that either supports or refutes the allegation that Officer #1 used profanity in the presence of members of the public. For this reason, I have issued a finding of not sustained in connection with this allegation.

OMBUDSMAN'S POLICY FINDINGS

Officer #1:

P.M. § 1.01.02 – Authorization (for the use of force) – Based on a preponderance of the evidence, a finding of exonerated is made.

P.M. § 11.01.07 – Relationships with Others and Demeanor – Based on the preponderance of the evidence, a finding of not sustained is made.

Officer #2:

P.M. § 1.01.02 – Authorization (for the use of force) – Based on a preponderance of the evidence, a finding of exonerated is made.



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