

## **Monitor Concerns Regarding the Manager of Safety's Findings & Imposition of Discipline in a Case Involving Inappropriate Force and Commission of Deceptive Acts by Officers in the Employ of the Denver Police Department:**

### Introduction:

On July 20, 2010, the Manager of Safety imposed discipline in a case involving allegations of inappropriate force and commission of deceptive acts by two officers in the employ of the Denver Police Department. The Manager suspended one officer for three days and "fined" a second officer three days (the equivalent of giving up three vacation days) for writing inaccurate reports relating to the incident.<sup>1</sup> The Manager agreed with the Deputy Chief of Police to "not sustain" all other allegations, including the allegations of Inappropriate Force<sup>2</sup> and "Commission of a Deceptive Act."<sup>3</sup>

The Monitor disagrees with the Department of Safety's decision not to sustain the force and deceptive act specifications and believes that both officers should have been dismissed from the classified service for serious breaches of policy and ethics.

### Description of Case:

The incident took place on April 4, 2009 and was caught on a HALO (High Activity Location Observation) camera which was located near the intersection of 15<sup>th</sup> Street and Lawrence Street in Lower Downtown (LODO). The complainant was arrested by Denver police officers after he and a companion reportedly assaulted an officer (Officer "A")<sup>4</sup> who was working off-duty at a nearby bar.

The complainant was cited for "Interference" (in violation of Denver City Ordinance 38-31) and "Resisting" (in violation of Denver City Ordinance 38-32) by Officer "B" after he was taken into custody by Officer B.

Officer B wrote in the Statement of Probable Cause (under penalty of perjury) that supported the issuance of the citation as follows: "As I was assisting [the] off duty [officer] arresting co-[defendant], the [defendant] was about 1 ft away and began yelling and screaming at the officers. I advised him numerous times to get back and he refused. I then attempted to detain the defendant at which time he tensed up, made a fist and bladed his body. He then spun to his left attempting to strike me in the face with a closed right fist. I then took him to the ground where he attempted to strike me again..."

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<sup>1</sup> One officer received more serious discipline because that officer had a prior disciplinary history.

<sup>2</sup> Rule & Regulation 306 (Inappropriate Force) reads as follows: "Officers shall not use inappropriate force in making an arrest or in dealing with a prisoner or any other person."

<sup>3</sup> Rule & Regulation 112.2 (Commission of a Deceptive Act) reads as follows: "In connection with any investigation or any judicial or administrative proceeding, officers shall not willfully, intentionally, or knowingly commit a material deceptive act, including but not limited to departing from the truth verbally, making a false report, or intentionally omitting information."

<sup>4</sup> City Ordinance Article XVIII, Section 2-375(b) does not permit the Monitor's Office to identify specific persons in its reports. Hence, the involved officers will be referred to herein as "Officer A" and "Officer B;" the involved civilians will be referred to herein as "the complainant" and "the complainant's companion."

In a Use-of-Force report, prepared the night of the arrest, Officer B wrote: “The defendant was approximately 1 to 2 feet away. He was yelling at [Officer A] and myself. He was also talking on the phone at the same time and telling the person on the other end of the phone to get down there and help him out. I advised the defendant numerous times to step back and to get off of the phone. He refused and continued yelling and screaming. I then approached him and attempted to grab his arms and take him into custody. He tensed up and bladed his right shoulder away from me. He made a fist with his right hand and quickly turned towards me attempting to strike me with a closed fist. I took him down with a departmentally approved arm bar take down...As he was on the ground I attempted to grab his arms to detain him at which time he swung at me again with his fist.”

Officer A also wrote a Use-of-Force report wherein he reported that: “I told Officer B that he [the complainant] needed to go to jail as well. Officer B walked up to him and he tried to hit Officer B. Officer B took him to the ground.”

If what was documented by Officers A and B was true, the arrest of the complainant would have been justified. Based on a review of the HALO video, however, the officers’ recitation of the complainant’s acts appears to have been written to justify Officer B’s use-of-force and issuance of a citation without regard to the true facts underlying the incident.

In fact, the video shows that the complainant did not make any aggressive moves towards Officer B. Although the complainant was not complying with Officer B’s orders to get on the ground, the complainant did not make any attempt to strike at Officer B, either before being taken to the ground or upon being taken to the ground.<sup>5</sup>

An Internal Affairs (IA) investigation was initiated after the complainant alleged that unnecessary force was used upon him and that Officer B’s Statement of Probable Cause was false. On August 6, 2009, all charges against the complainant were dismissed by the City Attorney’s Office after the HALO video was reviewed.

Officer A was subsequently interviewed by Internal Affairs as part of the IA investigation. During his interview with Internal Affairs, Officer A claimed three times to have seen the complainant attempt to hit Officer B. In fact, Officer A was not in a position to have seen the complainant attempt to hit Officer B and, even if he were, he still could not have seen an act which did not take place.

The Department of Safety suggests that any discrepancies between Officer A’s Statement of Probable Cause and Use-of-Force report, as well as Officer B’s statements to Internal Affairs, can be explained as innocent misperceptions by the officers. The Monitor’s position, however, is that the above-noted disparities are intentional falsehoods made in an attempt to avoid Officer B from being held accountable for the inappropriate force allegation.

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<sup>5</sup> Shortly after the complainant is taken to the ground, the HALO camera zoomed away from the incident for a period of 30 seconds. The investigation disclosed that the camera likely automatically went back to its original position after it was left unattended and was refocused only after a HALO operator realized the camera was no longer in a position to clearly videotape the incident.

The Monitor identified numerous inaccuracies contained in Officer B's Statement of Probable Cause and his Use-of-Force report:

1. The complainant was clearly not "1 foot away" from the incident. In fact, he was anywhere from five to ten feet away from where his companion was being taken into custody and more than ten feet away from Officer B.
2. Although the complainant does appear to be yelling, the video does not show him attempting to interfere in the officers' arrest of his companion.
3. There is nothing in the video to suggest that Officer B ever advised the complainant "numerous times to get back and he refused." In fact, Officer B was clearly engaged in the arrest of the complainant's companion at that time and he cannot be seen verbally or physically engaging the complainant until after Officer A pointed out the complainant and told Officer B to make the arrest.
4. Although the complainant was not complying with Officer B's orders to put down his phone, he never made any aggressive movement toward Officer B and the statement that the complainant "spun to his left attempting to strike me in the face with a closed right fist" is pure fiction. It is unreasonable to conclude that Officer B perceived the complainant to be a threat before he decided to throw the complainant to the ground. The only reasonable explanation for Officer B's statement that the complainant made an aggressive move towards him, is that Officer B was trying to come up with a rationale for his having taken the complainant to the ground, (and having caused injury to the complainant's face).

In his Internal Affairs statement, Officer B tried to back down from his clearly enunciated reports by claiming that he "believed" or "perceived" that the complainant was going to strike him as opposed to his initial reports that the complainant did, in fact, attempt to strike him. When watching the HALO video, however, there is nothing that the complainant did that would have justified a conclusion that the complainant was prepared to take any aggressive action against Officer B.

In addition to the throw-down, there were other questionable aspects to Officer B's use-of-force against the complainant:

1. After taking the complainant to the ground, Officer B acknowledged striking the complainant at least nine times with his Departmentally issued sap.<sup>6</sup> At the time of this incident, the sap was only permitted to be used against an actively aggressive suspect.<sup>7</sup> However, immediately after having been taken to the ground, the video shows the complainant going into a defensive fetal position. No other officer acknowledged seeing the complainant attempting to strike at Officer B after he was taken to the ground and the complainant denied any attempt to strike Officer B. Given Officer B's other false

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<sup>6</sup> The "sap" consists of a piece of metal inside a pouch of leather that can be used as an impact weapon by officers who are in close proximity to a non-compliant suspect. As of March 15, 2010, the sap is no longer permitted to be used as an impact weapon by Denver Police Department officers.

<sup>7</sup> Operations Manual - Impact Tool/Device - General Guidelines - subsection 2: "If a person forcefully resists and/or attacks an officer or other person, an officer is permitted to strike the person with an impact tool/device, provided the officer uses reasonable care to confine such strikes and power levels, to areas of the body which, if struck, are not intended or likely to cause serious bodily injury."

statements, and the lack of corroborating video or witnesses, it is questionable as to whether the complainant ever engaged in any active aggression against Officer B which would have warranted the use of the sap as an impact weapon in this case.

2. Officer B's description of how he used the sap also causes concern. According to Officer B's Internal Affairs statement, it appears that instead of using the sap until the complainant became compliant, he only stopped striking the complainant after he noticed the complainant had been handcuffed.

With respect to Officer A: he wrote a false report the night of the incident and then made false statements to Internal Affairs when he stated (three times) that he saw the complainant try to hit Officer B. It is clear from the video that Officer A did not observe the interaction between Officer B and the complainant until after the complainant was taken to the ground. It was only then that Officer A looked up from taking the complainant's companion into custody and reacted to Officer B's use-of-force. Only after being confronted with the HALO video did Officer A change his statement and acknowledge that he could not have and did not see the interaction between Officer B and the complainant prior to the complainant being taken to the ground. He then went on to claim that he "thought" he saw the complainant try to hit Officer B.

Officer A acknowledged that after the incident took place, Officer B had told him that the complainant tried to hit him. As such, we are left with two possible conclusions. The first conclusion, proffered by Officer A, is that his mind played a trick on him and, as such, he remembered something that he could not have seen and that never happened. The Monitor's conclusion, however, is that Officer A decided to try to help out Officer B by corroborating Officer B's version of the incident to ensure Officer B would not be disciplined for his use of inappropriate force.

#### Conclusion:

The Monitor hopes that this case is an aberration and that, in the future, when provided with compelling evidence of lying, the Department will ensure that its officers are held accountable. To this end, the Monitor's Office offers this report to the elected and appointed officials of the City of Denver and its community in support of its mission towards transparency and to explain why we believe the Department's decision in this case was not reasonable.

## **MANAGER OF SAFETY'S RESPONSE**

This response was prepared in concurrence with the City Attorney's Office and Chief of Police.

As the Manager of Safety I diligently examine and review all cases submitted for final disciplinary action. Prior to submission to the Manager of Safety Office, cases are investigated and prepared by the Denver Police Department's Internal Affairs Unit. Command Level Officers including the Police Chief/Deputy Chief review; provide comment and recommendation for disciplinary action. The case is reviewed by the Disciplinary Review Board, consisting of citizens and police, for their recommendation. I carefully weigh and consider the recommendations by the Independent Monitor, the Disciplinary Review Board, and the Chief/Deputy Chief of Police.

The discipline I imposed on July 20, 2010, was made after reviewing the entire case in its totality. In addition to reading the Internal Affairs report, viewing the HALO video, and taped interviews, I personally visited the scene of the incident to gain a better understanding of the terrain. At the conclusion of my examination I disagreed with the Independent Monitor and the Disciplinary Review Board.

The video, when viewed in isolation, seems to portray the subject officers as overly aggressive for the situation. There is no audio and it appears that there is a man on the phone ignoring but not being overtly aggressive towards the officer when the officer takes him down. The video, however, does not tell the entire story.

There are witness statements that support that Subject Officer A was pushed by both Complainant 1 (the suspect already on the ground in the video) and Complainant 2 (the one that is later taken down on video) while on the other side of the street, off the visibility of the HALO camera. The two men then ran across the street. Witness testimony, as well as the statements of Complainants, supports the assertion that both men were quite intoxicated at the time. Complainant 1 was taken down and officers were in the process of arresting him when the incident with Complainant 2 occurred. While Complainant 1 was on the ground Complainant 2 called his father; he was upset and was talking loudly. On the tape Subject Officer A can be seen pointing to Complainant 2, and although there is no audio, from available information it appears he was telling Subject Officer B to arrest Complainant 2 for assaulting a police officer. Subject Officer B approached Complainant 2, who was still on the phone. Someone (apparently a civilian standing behind Complainant 2) grabbed his arm as Subject Officer B's hand moved towards him. Complainant 2 pulled away (or "bladed") by turning his right shoulder and arm away from the officer. While it is clear from the HALO camera that he is on the phone and does not appear ready to hit the officer, from the officer's position he was confronting someone already known to have assaulted one officer who then pulled his arm back at the shoulder with a closed fist. Subject Officer B could have easily believed that Complainant 2 was going to take a swing at him, even with the phone in hand. Subject Officer B reasonably took him to the ground. Complainant 2 did fall to the ground and go into a fetal position, and the officers arrested him. He was clearly injured when he fell, which is apparent in the video. The video does pan away at one point during the time Complainant 2 is on the ground so some of this encounter is not visible.

While there can certainly be debate whether the force was excessive or inappropriate, looking at all available evidence I do not believe excessive or inappropriate force could be proven. It was reasonable for Subject Officer B to believe Complainant 2 was going to hit him, as he motioned like he might and he had already hit one officer. The officer should not have to wait until someone, who has already assaulted one officer, actually throws a punch before he can take him down. Additionally, Complainant 2 seemed to have a great deal of trouble remembering anything that got him in trouble initially stating he drank too much, but seemed very able to recall (at times incorrectly) what the officers allegedly did. I simply do not find that he was credible. Part of his statement is directly refuted by the video.

As for the departing from the truth, I do not believe the inaccuracies rose to that level. There are some inconsistencies in the statements, the Monitor is correct about that issue. However, officers write their reports immediately after the occurrence without the benefit of reviewing a video multiple times and slowing it down, etc. I personally view the inconsistencies more as misperceptions than as a “willful, intentional, or knowing” deception as is required for a violation of RR 112.2 to be sustained. While Complainant 2 did not actively swing at the officer he did turn his upper body to the right in a motion that could easily and reasonably be interpreted as preparation to throw a punch. Subject Officer B did receive discipline for inaccurate reporting, which I believe was appropriate.

Subject Officer A also had inaccuracies in his report. Again, this appears to be more of a misperception than “willful, intentional, or knowing” deception. Subject Officer A believed he saw something he didn’t. The Monitor states he couldn’t have seen it because it simply didn’t happen, I disagree. I believe the actions of Complainant 2 could be seen as getting ready to throw a punch, Subject Officer A didn’t see it, and upon review of the video stated as much. It is not far-fetched to be in a high adrenaline situation, to hear people discuss the events, and to have a misperception about what was seen. Again, while I do agree there were troubling aspects of his statement, I do not believe that, by a preponderance of the evidence, I could show that his report “willfully, intentionally, or knowingly” was a commission of a deceptive act. Subject Officer A was also sustained for inaccurate reporting, which I thought was appropriate. It should be noted that Subject Officer A was “not-sustained” on every allegation from the commander, the division chief, and the DRB. The Deputy Chief added the reporting specification, which was appropriate.

Viewing the video alone is inflammatory, however when the entirety of the situation is reviewed as it should be I believe I made an appropriate disciplinary decision.