



OMBUDSMAN'S REPORT Complaint Investigation & Findings

OMB09/0014 - July 13, 2009

Reader Advisory

This report contains language which some may find offensive. The original language present on an audio recording created during the incident has not been edited, nor have euphemisms been used.

EXECUTIVE OVERVIEW

The Complainant alleged that a Boise Police Department (BPD) officer (Officer #3) used excessive force during the Complainant's arrest. Specifically, the Complainant alleged that, after he was handcuffed and while offering no resistance, he was tased three times by Officer #3, once on the wrist, once on the lower back, and once on the inside of his right buttock. In addition, the Complainant alleged that, while he was handcuffed and prone on the floor, Officer #3 pushed the Taser in between the Complainant's legs and up against his anal and genital regions. Finally, the Complainant alleged that Officer #3 accompanied his actions with taunts and threats to tase the Complainant "in the ass" and "in the balls."

Due to the nature of these allegations, and based on a preliminary review of the evidence, the ombudsman determined that there was credible evidence to suggest that a criminal offense may have been committed by Officer #3. In accordance with the Policies and Procedures of the Office of the Community Ombudsman, the ombudsman requested that an outside law enforcement agency conduct an investigation to determine if there was any criminal wrongdoing on the part of Officer #3. The matter was investigated by the Idaho State Police, the results of which were reviewed by the Ada County Prosecutor's Office, who declined to

pursue criminal charges.

The ombudsman's independent investigation determined that Officer #3 tased the Complainant only twice, once before he was handcuffed and once after being handcuffed. The first use of the Taser was applied to the Complainant's lower back and came moments after the police came into direct contact with the Complainant. There was credible contradictory evidence regarding the extent and nature of the resistance shown by the Complainant at the time of the first use of the Taser. As a result, there was no clear preponderance of evidence to support a finding of either Exonerated or Sustained. Therefore, a finding of Not Sustained was issued.

The Complainant was handcuffed when Officer #3 activated the Taser the second time. Although the Complainant was still moving and was not totally compliant with the officers' commands to stop moving, he was not resisting or behaving in a way that would justify the use of a Taser on a handcuffed individual. The evidence clearly shows that, not only did Officer #3 threaten to put the Taser against the Complainant's anus and genitals, Officer #3 acted on his threats and pushed the Taser between the Complainant's legs and against that area of his anatomy. Officer #3's Taser left burns on the inside of the Complainant's right buttock. The preponderance of the evidence clearly supports the conclusion that this second use of the Taser by Officer #3 was neither reasonable nor necessary given the totality of the circumstances. Therefore, a Sustained finding was issued.

Two recommendations, one for a policy change and the other for training, were also made as a result of this investigation.

THE SITUATION

On a winter evening in early 2009, Officer #1 and Officer #2 were dispatched to single-

family residence based on a third-party report of a fight between the female resident and an unknown male subject (later identified as the Complainant). The female resident (Witness #1) was in the home with her three-year-old son. The only other information given the officers was that the male subject was known to the woman and that he had just been released from jail. When the officers arrived, the Complainant refused to open the door despite the officers' repeated knocks and demands. A female voice (later identified as Witness #1) could be heard inside asking the Complainant to open the door and let "them" in. The officers failed to verbally identify themselves as police officers while outside the door. At the same time, the Complainant and Witness #1 both believed that the people on the other side of the front door were friends of Witness #1 who she had previously called to assault and forcibly remove the Complainant from the residence.

Officer #4 arrived on scene to assist Officer #1 and Officer #2. The three officers then began to kick in the door and asked via radio that additional officers respond to assist on an emergency basis (Code 3). After a short time, Officer #2 went around to the backyard of the residence to see if he could get in through the back door.

Officer #3 was the next officer to arrive. He came in response to the request for Code 3 assistance. Officer #3 joined Officer #1 and Officer #4 in their efforts to force their way through the front door. Although the Complainant held the door shut for over 80 seconds while three officers pushed against it, the officers were eventually able to force the door open and gain entry. The Complainant was immediately placed on the ground and handcuffed. The Complainant was tased twice with the Taser in the "drive stun mode."

THE COMPLAINT

The Complainant originally alleged that he was tased three times after he had been handcuffed. After listening to the audio recording of the incident, the Complainant reported

that he realized he was mistaken and that he was tased only one time after he was handcuffed. The Complainant still believes that he was tased twice before he was handcuffed.

The Complainant alleged that he was first tased on the right wrist, shortly after the officers came through the front door. He alleged that the second use of the Taser was on the small of his back while he was lying on his stomach, just before he was handcuffed. The Complainant identified this as the longest and most painful of the three Taser uses. According to the Complainant, the third tasing took place while he was still lying on his stomach, but after he was handcuffed. He alleged that this third tasing was administered to the inside of his buttocks. The Complainant reported that, once the officers came through the front door and he realized that they were the police, he cooperated with them and complied with their commands.

These allegations, if proven true, may have been violations of the Boise Police Department's Policy § 01.01.02 – Authorization (for the use of force) that requires officers to only use force that is reasonable and necessary, given the totality of the circumstances.

THE COMPLAINT INVESTIGATION

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

1. Review of all police reports and related documents concerning this incident.
2. Review of all Dispatch records related to this call.
3. Review of all audio recordings known to have been made by BPD officers during and after this incident, if related. It was found that Officer #1 had recorded the entire

incident. This recording began with an unrelated contact he had before he was dispatched to this call and ran continuously until after the Complainant was taken out of the house to be placed in a police car. A transcript was produced of the portion of Officer #1's recording that covers this incident and is attached to this report.

4. Review of all car-to-car text messages sent or received by any of the involved officers for the 24 hours following the incident.
5. Review of the report produced by the Idaho State Police following their investigation of possible criminal behavior by Officer #3 during this incident.
6. Review of the photographs and report produced in connection with the forensic medical examination of the injuries to the Complainant's right buttock.
7. Two interviews of the Complainant, including, during the first interview, taking photographs of the areas of the Complainant's body where he claimed he had been tased.
8. Interview of Witness #1.
9. On-site examination of the scene of the incident, including photographs and measurements.
10. Interviews of the following BPD officers:
 - a. Officer #1 – the primary officer for the call who was present for the entire incident.
 - b. Officer #2 – an assist officer who was present for portions of the incident.

- c. Officer #3 – an assist officer who was the officer who used the Taser on the Complainant.
 - d. Officer #4 – an assist officer who was present for the entire incident.
 - e. Officer #5 – an assist officer who arrived on scene after the second use of the Taser.
 - f. Officer #6 – an assist officer who arrived on scene at about the time of the second use of the Taser, or shortly thereafter.
 - g. Officer #7 – an assist officer who arrived on scene at about the time of the second use of the Taser, or shortly thereafter.
 - h. Officer #8 – an assist officer who arrived on scene after the second use of the Taser.
 - i. Officer #9 – A BPD officer who is a Taser Master Instructor and expert on the mechanics and use of the Taser; this officer was not present during the incident.
 - j. Officer #10 – Officer #3's supervisor.
11. Consultation with a technical representative from Taser International, the manufacturer of the device used by Officer #3.
12. Examination and photography of the Taser cartridge that was attached to the Taser at the time that Officer #3 used it on the Complainant.
13. Examination and photography of an unused Taser cartridge.
14. Consultation with R. Ross Reichard, M.D., an independent, board certified forensic pathologist. Dr. Reichard is Director of Neuropathology and Assistant Professor of Pathology at the University of New Mexico. Dr. Reichard is also the Assistant Chief Medical Investigator for the State of New Mexico, Office of the Medical Investigator. Dr. Reichard reviewed photographs of the injuries to the Complainant's buttocks,

those photographs taken ten days after the incident by the ombudsman and those taken thirteen days after the incident during the forensic medical examination.

UNDERSTANDING HOW THE TASER WORKS

The Taser is a conducted energy weapon manufactured by Taser International and is used by law enforcement agencies world-wide. BPD uses the most recent model produced for law enforcement by Taser International, the Taser X26. While the use of a Taser is not without danger to the person upon which it is used, it is considered by the law enforcement community to be a “less-than-lethal” weapon¹. By policy, BPD classifies the Taser as an intermediate level use of force, along with the baton, shotgun bean bag rounds, pepper spray, police canines, etc. An intermediate use of force is considered to be a greater level of force than verbal commands or hand controls, but less than deadly force.

The Taser may be used in two ways: probe mode and drive stun mode. When activated in the probe mode, two metal darts are propelled by nitrogen gas out of a cartridge attached to the front of the handheld unit. The probes deploy out of the cartridge at a slight angle from one another so that they separate as they travel, thus causing a separation between the darts of several inches to several feet, depending on the distance to the target. The two darts are connected to the Taser cartridge and the handheld unit by thin trailing-wires. When both probes strike the subject, an electric current is sent from the Taser down the wires and through the subject’s surface muscles for an automatic five-second cycle. The electric current passing through the subject’s body between the two probes causes disruption to the subject’s sensory and motor nervous systems. The sensory nervous system carries information to the brain, including a pain message brought on by the electric current of the

¹ This term came into use by law enforcement in the latter part of the 20th Century and is widely used today to describe weapons that are, “designed to temporarily incapacitate, confuse, delay, or restrain an adversary in a variety of situations.” The Honorable Sarah V. Hart, Director, National Institute of Justice, in a statement given before a subcommittee of the U.S. House of Representatives on May 2, 2002.

Taser. The motor nervous system carries command signals to the muscles. The Taser's electrical current disrupts these command signals and causes the affected muscles to contract and spasm involuntarily.

When used in the drive stun mode, the Taser is pressed against the subject (either through clothing or directly onto the skin) and the trigger pulled. This may be done with or without the cartridge attached. Used in the drive stun mode, the Taser delivers electric current to the subject through two metal contacts on the front of the Taser, or on the front of the cartridge if one is attached. Since the contacts are less than two inches apart, the electrical current does not disrupt the subject's motor nervous system as it does when the Taser is used in the probe mode and the darts are a much greater distance apart. In the drive stun mode, only the sensory nervous system is affected. This causes pain, sometimes quite intense, but little or no muscle contraction. Because the electrical shock in the drive stun mode hurts, the subject is motivated to stop resisting and/or comply with commands in order to avoid the pain if shocked again.

The use of a Taser can leave marks on the skin of the person who receives the shock. The probes have sharp, dart-like barbs on the end that can leave small puncture wounds and irritation to the surrounding skin. When deployed in the drive stun mode, the electrical current delivered through the metal contacts on either the Taser or the cartridge can leave burn marks on the subject's skin. This can happen even if the drive stun is delivered through clothing.

In both the probe and the drive stun modes, a single trigger pull on the Taser delivers an automatic five-second cycle of electrical current, after which the Taser device automatically turns off the flow of electricity. Each subsequent trigger pull delivers an additional five-second cycle of electrical current. If the officer does not release the trigger but continuously holds it down beyond the five-second automatic cycle, the Taser will continue to deliver electric current as long as the trigger is held down. Once the trigger is pulled and the

automatic five-second cycle begins, the user may end the cycle early by turning the device off with the safety switch.

An internal computer in each Taser device records the date and time of each activation (trigger pull), the length of the activation, the battery charge status at the time, and the temperature. Each Taser's calendar and clock is set manually and is not independently calibrated by the unit through reference to an outside source. As a result, the date and/or time of an activation recorded on a Taser's computer may not correspond with the actual time of the incident. Nonetheless, a Taser's computer can be relied upon to accurately record the relative time between activations, as well as the duration of each activation.

WHAT THE COMPLAINT INVESTIGATION FOUND

Based on the preponderance of the evidence obtained and reviewed in the course of this investigation, I have issued the following findings of fact. A discussion of the basis for the finding follows each one.

1. Officer #1 and Officer #2 were dispatched to a single family residence regarding a fight situation.

Discussion of Finding: Dispatch unit history.

2. While en route to the call, both officers were given additional information that a third-party caller was reporting that a male subject was in the female's residence, that the male was known to the female resident, that the male was just out of jail, that there had been a physical fight between the two, and that there was also a three-year-old boy in the residence.

Discussion of Finding: Audio recording of Dispatch radio traffic and audio recording by Officer #1.

3. Officer #1 and Officer #2 arrived, in separate patrol vehicles, at the residence approximately six minutes after being dispatched.

Discussion of Finding: Dispatch unit history.

4. Officer #1 and Officer #2 were at the front door when they saw a shadow move behind the peephole in the front door.

Discussion of Finding: Consistent statements of the Complainant, Officer #1, and Officer #2.

5. Officer #1 knocked or rang the door bell at the front door as the two officers heard sounds of a struggle and voices coming from inside.

Discussion of Finding: Consistent statements of the Complainant, Officer #1, and Officer #2 and portions heard on the audio recording.

6. Officer #1 yelled, "Open the door."

Discussion of Finding: Consistent statements of the Complainant, Officer #1, and Officer #2 and audible on the recording.

7. The Complainant yelled from inside the residence, "Fuck off."

Discussion of Finding: Consistent statements of the Complainant, Officer #1, and Officer #2 and audible on the recording.

8. Shortly after Officer #1 first demanded that the door be opened, Officer #4 arrived at the residence and joined Officer #1 and Officer #2 at the front door.

Discussion of Finding: Consistent statements of Officer #1, Officer #2, and Officer #4 and audible on the recording.

9. Officer #2 left the front door, climbed the side gate, and went into the backyard in an effort to gain entry from the rear of the residence.

Discussion of Finding: Consistent statements of Officer #1, Officer #2, and Officer #4 and audible on the recording.

10. Officer #1 and Officer #4 continued to demand that the door be opened and began to force the door when it wasn't opened.

Discussion of Finding: Consistent statements of the Complainant, Officer #1, and Officer #4 and audible on the recording.

11. Officer #4 requested Code 3 assistance.

Discussion of Finding: Consistent statements of Officer #1 and Officer #4 and audible on the recording.

12. As Officer #1 and Officer #4 tried to kick and push the door open, the Complainant pushed back in order to keep the door closed.

Discussion of Finding: Consistent statements of the Complainant, Witness #1, Officer #1, Officer #2, and Officer #4.

13. Officer #3 arrived at the front door approximately one minute and twenty seconds after Officer #1 first commanded, "Open the door."

Discussion of Finding: Consistent statements of Officer #1, Officer #3, and Officer #4 and audible on the recording.

14. With the combined efforts of Officer #1, Officer #4, and Officer #3, the door was pushed open.

Discussion of Finding: Consistent statements of Officer #1, Officer #3, and Officer #4, and audible on the recording.

15. Officer #1, Officer #2, Officer #3, and Officer #4 were in BPD uniforms at the time of the incident. However, they did not verbally identify themselves as the police prior to entering the house.

Discussion of Finding: Consistent statements of the Complainant, Witness #1, Officer #1, Officer #2, Officer #3, and Officer #4, and no such identification was heard on the recording.

16. Once the door was forced open, Officer #1 led the way inside, with Officer #3 and Officer #4 following, nearly side-by-side, immediately behind him.

Discussion of Finding: Consistent statements of Officer #1, Officer #3, and Officer #4, and audible on the recording.

17. The Complainant was pushed back from the doorway, down the short entryway hall, and against the hallway wall approximately 12 feet away from the front door.

Discussion of Finding: Consistent statements of the Complainant, Officer #1, Officer #3, and Officer #4, and measurements taken at the scene.

18. As the Complainant was pushed back and against the wall, Officer #4 ordered the Complainant to, "Get on the ground." The Complainant responded, "Oh my God. Hey, I'll get on the ground." Officer #4 then repeated the command, "Get on the ground."

Discussion of Finding: Audible on the audio recording.

19. Once he was pushed against the wall, the Complainant immediately went to the floor, face down, with his right side close to the hallway wall and at least one of his arms under his torso.

Discussion of Finding: The Complainant reported that he went to the floor on his own volition as a result of the officers' commands. Officer #1, Officer #3, and Officer #4 all stated that the Complainant was forced to the ground, but none reported any specific moves or throws that were used to take the Complainant to the ground. Based on the evidence, it is most likely that the Complainant was attempting to get to the floor at the same time that the three officers were pushing him down. Officer #4 gave two commands, two seconds apart, to get on the ground. These can be heard on the recording. The first command comes only two or three seconds after the three officers can be heard coming through the front door. In between the two commands to get on the ground, the Complainant said, "Oh my God. Hey, I'll get on the ground." Seven seconds after the second command to get on the ground, the Complainant is told by Officer #3 to put his hands behind his back. This clearly indicates that the Complainant was already on the ground.

20. After the Complainant was on the floor, Officer #1 was at the Complainant's head with his knee across the Complainant's shoulders. Officer #4, positioned at the Complainant's mid-section, held the Complainant down with her knee and hands as she attempted to pull the Complainant's arms out from under his torso. Officer #3 was at the Complainant's feet and at some point placed his right knee on the Complainant's left thigh.

Discussion of Finding: This is supported by the Complainant, although he was unable to see or identify any of the individual officers. Officer #2, in his statement, reversed the positions of Officer #3 and Officer #4. Officer #3 did not know where Officer #1 was located, as his attention was on the Complainant. However, the totality of the statements supports the positions as outlined in the finding above.

21. The Complainant was face down on the floor and not handcuffed when Officer #3 placed his Taser against the small of the Complainant's back and delivered an eight-second cycle in drive stun mode, three seconds after Officer #4's second command to get on the ground and four seconds before Officer #3 first told the Complainant, "Get your hands behind your back."

Discussion of Finding: The Complainant reported that he was tased three times. In his initial interview, he reported that all three uses of the Taser were administered after he was handcuffed. After listening to the audio recording of the incident, the Complainant stated that he realized he had been mistaken in his initial interview. What he believed to be the first two uses of the Taser took place before he was handcuffed. The Complainant identified a sound at approximately the time the front door opened as the first time he was tased on the right wrist. He identified a scream, made by him while he was lying on his stomach just before being handcuffed, as the point where the second Taser use occurred, the one that

was applied to the small of his back. The Complainant identified this Taser activation as the longest and most painful of the three. The third tasing, according to the Complainant, took place after he was handcuffed and was administered to the inside of his right buttock.

That the Complainant was tased only twice is supported by the statements of Officer #3 and the evidence provided by the Taser download. The Taser download documents the date and time the Taser was fired and the length of each cycle. The download for Officer #3's Taser shows two uses the night of the incident. The first use was at 20:58:56 hours and the second at 21:00:28 hours. While the activation times shown on the download do not correspond with the actual time of the incident, the date is correct and the relative time between the first and second cycle (1 minute and 32 seconds) is consistent with the time between the Complainant's two screams that can be heard on the audio recording. The Taser download also shows that the first Taser cycle was for eight seconds and the second lasted two seconds. These times are consistent with the relative length of each cycle according to the Complainant and Officer #3. While Officer #1 reported being aware of only one Taser activation, he was some distance from Officer #3 and was not focused on that particular issue.

The evidence supports a finding of only two uses of the Taser. The first was shortly after the Complainant went to the floor and before he was handcuffed. The second was approximately one minute thirty-two seconds later, after the Complainant had been handcuffed.

22. Immediately after the Complainant was tased the first time, Officer #3 told the Complainant, "Put your hands behind your back. Put your hands behind your back."

Discussion of Finding: Audible on the audio recording.

23. While the Complainant was lying face-down on the floor, before he was handcuffed, but after the first use of the Taser, Officer #3 said, "...Taser up your asshole?"

Discussion of Finding: Audible on the audio recording.

24. Officer #4 handcuffed the Complainant with his hands behind his back. This took place between twenty and thirty seconds after the Complainant was tased the first time.

Discussion of Finding: Consistent statements of the Complainant, as well as Officer #1, Officer #3, and Officer #4. Sounds consistent with handcuffs being ratcheted into place can be heard on the audio recording. Immediately before the sounds of the handcuffs, Officer #3 said, "Okay, [Officer #4]," as if signaling her to go ahead with handcuffing the Complainant. Shortly after the sounds of handcuffing, Officer #4 commented that they needed someone to check the house and referred to the other two people she believed were in the house. Officer #4 reported that she saw Officer #3 looking around. This suggests that, having accomplished one priority (handcuffing the Complainant), the officers were moving to the next priority (looking for other persons or threats).

25. Approximately five to ten seconds after the Complainant was handcuffed, Officer #3 advised Dispatch that they were, "Code 4 with one," to continue one assist unit Code 3, to downgrade one assist unit to Code 2, and to cancel the rest.

Discussion of Finding: Audible on the audio recording. Officer #3 was advising Dispatch of their status.

26. After he was handcuffed, the Complainant asked, "Can you let me up please?" and then screamed, "My hand." Officer #3 replied, "If you move again, I'm going to stick this Taser up your ass -." The Complainant replied, "Okay," and Officer #3 finishes, "-and pull the trigger." The Complainant responded, "I'm sorry."

Discussion of Finding: Audible on the audio recording.

27. Officer #3 asked, "Do you feel this?" The Complainant responded, "Yes, sir." Officer #3 immediately responded, "Do you feel that? That's my Taser up your ass." The Complainant said, "Okay. Okay."

Discussion of Finding: Audible on the audio recording.

28. Officer #3 told the Complainant not to move or to stop moving four times after the Complainant was tased the first time.

Discussion of Finding: Audible on the audio recording.

29. Officer #4 told the Complainant once, "Don't move."

Discussion of Finding: Audible on the audio recording.

30. After being handcuffed and within the space of less than a minute, the Complainant stated at least five times, "I can't breathe," or similar words.

Discussion of Finding: Audible on the audio recording.

31. Officer #1 said, "If you're talking, you're breathing."

Discussion of Finding: Audible on the audio recording.

32. Immediately after Officer #1's statement about talking and breathing, Officer #3 delivered a two-second Taser cycle to the inside of the Complainant's right buttock. This took place one minute and thirty-two seconds after the first use of the Taser and over a minute after the Complainant was handcuffed.

Discussion of Finding: The Complainant's scream is audible on the recording and both he and Officer #3 identified it as the point at which he was tased after he was handcuffed. This timing is consistent with the time between the two uses of the Taser as recorded on the printout of the Taser download.

Officer #3 has denied tasing the Complainant in the area of the buttocks, although he reported that he threatened to do so in order to gain compliance from the Complainant. Officer #3 also denied ever placing the Taser in the area of the Complainant's buttocks. According to Officer #3, he held the Taser against the small of the Complainant's back except for those times when the Complainant's movements caused the Taser to lose contact with his body. Officer #3 reported that both times he activated the Taser it was to the small of the Complainant's back.

Officer #1 reported that he was only aware of one Taser activation. This occurred before the Complainant was handcuffed. He reported that at one point, prior to the Complainant being handcuffed, he saw Officer #3 with the Taser held down between the Complainant's legs.

Comparing the recorded voices on Officer #2's recording to those on Officer #1's recording, it is clear that Officer #2 came through the front door of the residence approximately thirty seconds before the second use of the Taser. Officer #2

describes seeing the Taser in Officer #3's right hand held approximately 18 inches away from the Complainant. At the same time, Officer #2 saw Officer #3's left hand on the Complainant. Officer #2 reported that Officer #3 told the Complainant that he would tase him "in the ass" if he didn't stop. Officer #2 did not hear the sound of a Taser activation.

The audio recording made by Officer #2 shows that Officer #6 arrived at approximately the time the Taser was used the second time. Officer #6 reported that he saw Officer #3 holding the Taser up against the Complainant's "rear end." Officer #6 heard Officer #3 tell the Complainant that he was going to tase him in the "asshole" if he didn't stop fighting. According to Officer #6, this threat seemed to calm the Complainant down.

Officer #7 arrived at the same time as Officer #6. Officer #7 reported that he could not see which officer held the Taser, but recalled seeing a male officer holding a Taser pressed against the junction of the upper thigh and the buttocks of the Complainant. Officer #7 reported hearing someone tell the Complainant that he would be tased if he didn't cooperate. Officer #7 did not hear or see the Taser activated.

Officer #8 can be heard on Officer #1's recording telling Dispatch that no further assistance was needed and that a person was in custody. This takes place approximately one minute after the second Taser deployment. Officer #8 said that the Complainant was struggling and trying to "peel up" from the officers. Officer #8 reported seeing Officer #3 holding the Taser about 12 to 18 inches away from the Complainant.

The Complainant reported that an officer held the Taser, "On my right butt cheek, in between my butt cheek and right down by my balls." Witness #1 reported that

she saw an officer place the Taser between the Complainant's buttocks and heard it fire.

In summary, the statements of the Complainant and Witness #1 both contradict Officer #3's statements regarding the location of the Taser. Officer #2 and Officer #8 also contradict Officer #3's statement that the Taser was always directly on or in close proximity to the small of the Complainant's back by reporting that the Taser was being held 12 to 18 inches away from the Complainant. Finally, Officer #1, Officer #6, and Officer #7 all reported that they saw the Taser held between the Complainant's legs, directly on the Complainant's buttocks, or at the junction of the buttock and the upper thigh.

Officer #3 characterized his statements to the Complainant about the use of the Taser in his private parts as "empty threats." According to Officer #3, he did not place the Taser on the Complainant's buttocks, or at the junction of the Complainant's buttock and upper thigh, at any time, but left the Taser in the small of the Complainant's back. However, the following exchange between Officer #3 and the Complainant can be heard on the recording:

Officer #3: Do you feel this?
Complainant: Yes, sir.
Officer #3: Do you feel that? That's my -
Complainant: Okay
Officer #3: -Taser up your ass.
Complainant: Okay
Officer #3: So don't move.
Complainant: I'm trying not to. I can't breathe.

This exchange, especially the Complainant's response, strongly suggests that, at that moment anyway, the Taser was pressed between the Complainant's buttocks and near his anal area.

33. The Complainant suffered two circular burns approximately 1.0 to 1.2 cm in size on the inside of his right buttock. The burn marks are approximately 4.5 cm apart. The distance between the two electrical contact points on the exterior of the Taser cartridge attached to Officer #3's Taser at the time it was used on the Complainant is approximately 4.3 cm.

Discussion of Finding: These marks are visible on photographs taken during the ombudsman's intake interview of the Complainant ten days after the incident. The same marks are also visible on the photographs taken at a local hospital during the forensic examination of the Complainant thirteen days after the incident. The Taser cartridge used by Officer #3 during the incident was booked into the Ada County Property Room the day after the incident. Measurements of this cartridge and of a new, unused Taser cartridge were taken. Both cartridges were also photographed for comparison purposes.

Dr. Reichard, the forensic pathologist, reported that, based on his review of the photographs of the Complainant's injuries, as well as the record of the forensic medical examination of the Complainant, "The distance between the fixed electrodes is ~ 2.7 mm less than the distance between the two alleged injuries. The fact that the injuries are on a curved and on a fluctuant surface could account for this discrepancy. The edges of the central portions of the injury are not circular and might be reflective of the electrodes that are rectangular in shape. The size of the central portion of the injury is consistent with documented direct contact stun gun injuries. The alleged injuries do not appear to be caused by

disease. In conclusion the two alleged injuries could have been made by the X-26 Taser with direct contact.”

34. Twice after the second tasing, Officer #3 directed the Complainant to stop moving.

Discussion of Finding: Audible on the audio recording.

35. No officer told the Complainant to stop kicking, stop head butting, to stop trying to get up, or anything similar.

Discussion of Finding: The audio recording reveals no such language by any officer.

36. Officer #3 asked, “Now do you feel this in your balls?” to which the Complainant responded, “I do, sir. I’m not going to move. I’m not gonna move.” Officer #3 responded, “Now I’m gonna tase your balls if you move again.”

Discussion of Finding: Audible on the audio recording.

37. A minute after the exchange above, Officer #3 asked, “Okay, I’m gonna take this Taser out of your asshole now. Are you going to fight with me?” The Complainant responded, “No, not at all, sir.”

Discussion of Finding: Audible on the audio recording.

38. In a comment apparently directed at another officer, Officer #3 said, “So far, for the last two minutes, he’s been cooperative. But then my Taser’s in his ass.”

Discussion of Finding: Audible on the audio recording. It is conceivable that Officer #3 might make false statements to the Complainant as “empty threats,” it makes less sense that he would repeat the false statement to another officer.

39. The Complainant was not completely still in response to the orders from police to stop moving. The Complainant was moving his torso and his legs in a manner consistent with trying to breathe more easily. The Complainant's movements were not consistent with trying to escape from the police, attempting to head butt them, trying to kick any officer, or assaulting the officers.

Discussion of Finding: Consistent statements from the Complainant, Officer #1, Officer #2, Officer #6, and Officer #7. Although Officer #4 described the Complainant as “fighting” with the officers, yelling profanities, not doing what was commanded, kicking, and attempting to head butt them, the audio recording does not support her contention. No yelling of profanity by the Complainant can be heard. When the officers first entered the residence, the Complainant exclaimed, “God damn it. What the fuck?” The Complainant used no profanity after this. Officer #3 also stated that the Complainant was kicking. However, no officer can be heard on the recordings telling the Complainant to, “Stop kicking,” or, “If you kick again, I'll tase you.” Instead, between the two of them, Officer #3 and Officer #4 told the Complainant several times to, “Stop moving.”

40. Over the space of approximately two minutes, Officer #3 pressed and held a Taser with a live Taser cartridge attached, between the Complainant's buttocks, making contact with the inside of the buttocks and the anal and genital regions.

Discussion of Finding: Although Officer #3 adamantly denied placing or activating the Taser on the Complainant's buttocks or in the genital or anal area, other officers have confirmed that they saw the Taser on or near the buttocks. It

is not reasonable to think that Officer #3's Taser remained in the small of the Complainant's back during the entire incident. A Taser in the small of the back would have been in the way and interfered with handcuffing the Complainant as the Complainant's hands would have been in the same area. In addition, two separate recorded exchanges between Officer #3 and the Complainant make it very clear that the Complainant felt the Taser pressed between his legs. Finally, there was physical evidence that the Taser was used on the Complainant's right buttock.

OMBUDSMAN'S ANALYSIS

The Boise Police Department Policy and Procedure Manual § 01.01.02 – 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.

The Complainant alleged three separate uses of the Taser which he believed were improper. The first was to his wrist, the second to the small of his back, and the third to his buttocks. Initially, he reported that all three occurred after he was handcuffed. After reviewing the audio recording made the night of the incident, the Complainant now believes that the first two uses of the Taser came before he was handcuffed and only the third use was after he was handcuffed. Each of these allegations will be examined separately.

First Allegation

The Complainant reported that he was tased on his right wrist just below the palm. He identified the point on the audio recording where he believed he was tased the first time. This occurred at about the same time that the officers pushed the door open and gained entry to the house.

There is no evidence to support this use of the Taser. The printout of the Taser download shows only two uses of the Taser. Officer #3 confirms only two uses of the Taser. It is possible that the pain the Complainant felt to his wrist was the result of a blow to his wrist or shoulder, either of which could have caused a painful sensation in the area described by the Complainant. In addition, ten days later when the Complainant first met with the ombudsman, there were no observable marks to the Complainant's wrists consistent with the use of a Taser in the drive stun mode.

Based on the preponderance of evidence, I have issued a finding of Unfounded in connection with the Complainant's allegation that Officer #3 used excessive force by applying the Taser to the Complainant's wrist.

Second Allegation

The Complainant initially reported that he was tased in the small of his back after he was handcuffed. The investigation shows that, while the Complainant was tased in the small of his back, it was before he was handcuffed. After listening to the audio recording of the incident, the Complainant agrees that he was not handcuffed at the time he was tased in the small of his back.

According to BPD policy, 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 is not required to use minimal force, or even the least force needed to effect an arrest or to overcome resistance. An evaluation of the reasonableness of the force used must be based on the information known to the officer at the time, not the situation as known in the light of 20-20 hindsight. The standard for an officer’s conduct is that of a reasonable officer in the same or similar circumstances, with the same or similar experience, and the same or similar training.

When Officer #3 arrived on the scene he knew nothing about the nature or details of the original call. He only knew that the officers on the scene had called for Code 3, emergency assistance. When he arrived, Officer #3 saw two officers trying to forcibly enter a residence. He quickly realized that they were being resisted by someone on the other side of the door. Officer #3 also knew, based on the voices and sounds he could hear, that there were at least two people inside the residence and that some sort of scuffle was going on inside.

Officer #3, relying on the knowledge of the situation by Officer #1 and Officer #4, followed their lead in forcibly entering the residence. With his assistance, Officer #1 and Officer #4 were able to force the door open and enter the residence.

Although Officer #1, Officer #3, and Officer #4 stated that the Complainant resisted and pushed back at them after they entered the residence, there is no other evidence of resistance by the Complainant once the officers came through the door and into his view. As the officers entered, the Complainant can be heard saying, “God damn it. What the fuck. I wasn’t doing anything.” Officer #4 told the Complainant to get on the ground. The Complainant replied, “Oh my God. Hey, I’ll get on the ground.” The command to get on the ground was repeated by Officer #4. Approximately three seconds after Officer #4’s second command to get on the ground, Officer #3 tased the Complainant in the small of his back. According to both the Complainant and Officer #3, the Complainant was face down on the floor when he was tased. This was only nine seconds after the officers first entered the residence.

The initial exclamations and surprise in the Complainant's voice indicate that he did not know that it was the police who were trying to come through the front door. In fact, before the officers opened the door, the Complainant can be heard on the audio recording telling Witness #1, "Call the cops," something the Complainant would be unlikely to say if he knew that the police were already at the door. Witness #1 had told the Complainant that a friend of hers was coming to the house to beat him up. It appears that the Complainant concluded that the people at the door were not the police, but Witness #1's friends who had come to beat him.

At the same time, Officer #1, Officer #2, Officer #3, and Officer #4 believed that the Complainant knew they were the police and that he was deliberately resisting them in order to prevent them from entering the house. This initial misunderstanding is important because it may have contributed to the officers' belief that the Complainant's resistance, which began at the door in response to their attempts to enter, continued once they gained entry. Officer #1, Officer #4, and Officer #3 reported that, once they came through the door, the Complainant pushed against them, had to be forced to the floor, and would not comply with their commands to put his hands behind his back.

Officer #3 reported that he believed that the Complainant had deliberately resisted the officers' attempts to enter the residence. From Officer #3's perspective, the Complainant resisted mightily at the door and continued this resistance once the police gained entry. He believed that the Complainant had to be forcibly pushed to the floor, and that the Complainant resisted the officers' attempts to pull his arms out from under him so that he could be handcuffed. According to Officer #3, he placed the Taser in the small of the Complainant's back and delivered an eight-second cycle in drive stun mode in order to overcome the Complainant's resistance.

Despite the fact that it was later determined that the Complainant was unaware that the police were at the door, it was reasonable, at the time, for Officer #3 to believe that the Complainant

had intentionally resisted the officers at the front door. While the Complainant reported that he went to the floor himself in response to the officers' commands, the officers were also pushing him against the wall and to the floor. It may be that, even as the Complainant was trying to put himself on the floor, the officers were pushing him down. In any case, it is obvious that the Complainant was given very little time to comply with the commands to get on the floor. The entire process happened very quickly. The officers had momentum on their side as they pushed through the door, and no doubt were upon the Complainant before he had time to react. Officer #3 perceived that the Complainant did not voluntarily get on the floor, that he had to be pushed down. Officers were pulling at the Complainant's arms in order to handcuff him. Seeing what he interpreted as resistance, Officer #3 used his Taser to gain cooperation from the Complainant.

With regard to the officers' contention that the Complainant failed to comply with police commands to show his hands and/or that he resisted their commands before he was tased, the audio recording does not support this assertion. The recording clearly proves that the Taser was used before any commands to put his hands behind his back were given to the Complainant. It is impossible to resist, comply, or fail to comply with a command that has not been given.

Officer #1, the first officer through the door, reported that the Complainant was generally not compliant, was not following directions to get his hands out from underneath his body and to hold still, and may have been overwhelmed by the sudden on-rush of three officers into the house after such a struggle at the door. Although Officer #1 used the term "active resistance" as a label to describe the Complainant's behavior once the officers were inside the house, the specific behaviors described by Officer #1 included the Complainant lying on his stomach with his hands underneath, moving around, and not holding still.

Only nine seconds elapsed between the time the officers entered the residence and when Officer #3 used the Taser in the small of the Complainant's back. This is very little time to

be pushed back twelve feet from the door to the wall of the hallway, to go face-down on the floor, and to get your hands behind your back. When someone goes from a standing position to being prone on the ground, whether voluntarily or as a result of being pushed, it is reasonable to expect that person to put his or her hands and arms out in front in an effort to either control the descent to the ground or to break the fall. In such a case, the hands and arms are likely to be directly under one's body rather than spread far to the sides. As the body is lowered, initially, the hands and arms are going to be close to, if not under the body. Even if one attempts to move the hands out and put them behind the back, it will take some time. It is likely to take even more time if one's body is being held down with the arms underneath, especially if one is unable to raise the body in order to free the hands and arms. This would be compounded if one of the arms was against a wall or other solid object, as was probably the case with the Complainant.

The following exchange between the Complainant and Officer #3 can be heard on the recording immediately after Officer #3's first use of the Taser. Officer #3 said, "Get your hands behind your back." The Complainant responded, "They already are, sir." Officer #3 repeated, "Get your hands behind your back," to which the Complainant said, "Alright, sir." It appears that Officer #3's conscious awareness had not yet caught up to the current situation. He may not have heard, seen, or processed the information that the Complainant already had, or was in the process of putting his hands behind his back. It is possible that Officer #3 failed to recognize that the Complainant was, in fact, trying to cooperate. Based on these perceptions, Officer #3 may have believed that the Complainant was resisting, despite clear evidence to the contrary.

In order for me to conclude that Officer #3's first use of the Taser complied with the policy requirement that it be reasonable and necessary, thereby issuing a finding of exonerated, the preponderance of the evidence must show that the circumstances known to Officer #3 were such that a reasonable officer would have used a Taser or another intermediate force weapon.

Due to the difference between what Officer #3 reported about the Complainant's behavior and what the audio recording reveals, I cannot find such a preponderance.

On the other hand, for me to sustain the allegation that Officer #3's first use of the Taser violated BPD's policy on the use of force, I would have to find that the preponderance of the evidence showed that a reasonable officer would have perceived that, despite the Complainant's obvious resistance at the door, he was no longer resisting as he went to and lay on the floor prior to being handcuffed. As a result, a reasonable officer would not have, at that moment, used a Taser or equivalent level of force. Here, too, I find myself unable to find that the preponderance weighs against the reasonableness of this use of the Taser. It is possible that Officer #3 honestly believed that the Complainant was resisting the officers' efforts to control him. Officer #3 was forced to make decisions about his use of force in a situation that was tense, uncertain, and rapidly evolving.

In summary, I have come to the conclusion that the evidence provides no clear preponderance to establish whether Officer #3's first use of the Taser on the Complainant was either reasonable or unreasonable. For this reason, I have issued a finding of Not Sustained for the Complainant's second allegation regarding Officer #3's use of the Taser.

Third Allegation

The evidence clearly proves that the Complainant was tased on the inside of his right, lower buttock. The Complainant had visible injuries there ten days after the incident. The same marks were photographed during a forensic medical examination conducted thirteen days after the incident.

The report by the forensic pathologist, Dr. Ross Reichard, stated that the Complainant's injuries did not appear to have been caused by disease or Taser probes (the barbed darts that are deployed when the Taser is used in a probe mode). He reported that the injuries, "could

have been made by a Taser X-26 with direct contact [drive stun mode],” and that, “the stage of healing of the injuries in the photographs would be consistent with the reported date of the injury.”

The use of the Taser on the buttocks is not, in and of itself, a violation of policy. Depending on the totality of the circumstances, a Taser may be used on the buttocks. The issue here is whether Officer #3's second use of the Taser on the Complainant in these circumstances was reasonable and necessary.

At the time that he was tased on the buttocks, the Complainant was handcuffed and lying face-down on the floor. Officer #1 was holding the Complainant's head and upper torso down with a knee across his shoulders. Officer #4 was positioned near the Complainant's waist preparing to search the Complainant, and Officer #3 was situated near the Complainant's legs and feet. Officer #3 had just advised Dispatch via radio that they had one person in custody. He also asked Dispatch to keep two more units coming (one Code 3 and the other Code 2) and to cancel all the others. These additional units were needed to search the rest of the house to ensure the officers' safety. At the same time, Officer #2 had returned from the backyard and was inside the residence searching the other rooms and speaking with Witness #1 and her child. Based on what he observed, Officer #2 saw no need to assist Officer #1, Officer #3, and Officer #4 in controlling the Complainant. According to Officer #1, the Complainant “mellowed out” after being handcuffed.

Officer #1 and Officer #4 said that the Complainant was yelling and screaming. Officer #4 described the Complainant as “bucking,” trying to “head butt” the officers, “yelling profanities,” and “kicking.” Officer #1 said that the Complainant was “actively resisting” in that he did not obey commands to get his hands behind his back, struggled with the officers, attempted to get back up, moved around, complained about being out of breath, and did not hold still. Officer #6 said that he saw the Complainant kicking his legs free, either trying to get them free or trying to kick Officer #3 off of him. However, the audio recording of the

interaction after the Complainant was handcuffed does not support the assertion that the Complainant was verbally and physically assaulting the officers. In fact, it supports the opposite conclusion. Regarding the Complainant's speech, he was polite and, at times, deferential when speaking with the officers, once he was on the ground. Even though Officer #3 was threatening to shove the Taser "up your ass" and use it, the Complainant addressed Officer #3 as "sir" and said "please" when asking to be allowed to get up so that he could breathe. The Complainant did raise his voice at times; once to scream, "My hand," and at other times to say in a voice filled with panic, "I can't breathe." He also said, "Gosh darn," under his breath shortly after he was tased the second time. It would hardly be accurate to describe this as "yelling profanities."

Regarding the Complainant's alleged kicking and head butting, it is possible to draw reasonable inferences from what can and cannot be heard on the audio recording, even though it does not provide a picture of what happened. Officer #3 and Officer #4 can be heard telling the Complainant, several times, to stop moving. What can be heard on the audio recording is consistent with the descriptions of the Complainant's actions provided by the Complainant, Officer #1, Officer #2, Officer #6, and Officer #7, all of whom described the Complainant as moving and squirming. Not once during the entire recording of the incident can an officer be heard telling the Complainant to stop kicking, hitting, or butting his head. While the absence of such statements is not, in and of itself, proof that the Complainant did not engage in this behavior, it does, when combined with other statements and evidence, help form a preponderance of evidence leading to the conclusion that the Complainant did not assault the officers by kicking or trying to head butt them.

Officer #7 arrived about the same time that Officer #3 tased the Complainant on the right buttock. However, since the precise time of Officer #7's arrival is not known, it is not clear whether his initial observations of the Complainant's behavior were from just before or just after the Complainant was tased for the second time. Officer #7 reported that, while he saw that the Complainant's hands were not underneath his body, he was not certain if the

Complainant was handcuffed when he (Officer #7) first saw him. It should be noted that the evidence clearly proves that the Complainant was handcuffed at this point.

Upon his entry into the house, Officer #7 also observed that Officer #1, Officer #4, and Officer #3 were with the Complainant and that all three officers appeared to have their weight on the Complainant. The three officers and the Complainant were breathing heavily and the Complainant was sweaty. Officer #7 reported that it seemed to him that the three officers had control of the Complainant and that the Complainant was not bucking, kicking, or punching. However, Officer #7 did note that the Complainant was moving side to side, squirming, and stiffening his body.

The Complainant did not remain completely motionless between the time he was handcuffed and when he was tased the second time. This conclusion is supported by the preponderance of the evidence. The Complainant himself acknowledges that that he was moving. He says that his movements were a desperate attempt to breathe in order to overcome his rising panic and belief that he was suffocating. At the same time, the evidence does not support the contention that the Complainant was acting in a threatening, aggressive, or assaulting manner.

In addition to the restrictions placed on the use of force contained in BPD policy § 01.01.02, more specific and restrictive language is contained in the policy regarding the use of the Taser. BPD policy §1.02.03B Use of Conducted Energy Weapon (Taser) states:

The decision to use the Conducted Energy Weapon should be based on:

- *The totality of the circumstances*
- *The severity of the crime committed*
- *Prior acts by the suspect (fleeing, threats, etc.)*
- *The level of resistance*
- *To prevent them from harming themselves or others*
- *Other criteria listed for determining use of force (see 1.01.04 Criteria for Use of Force)*

In the case of a fleeing subject, the fact that the subject is fleeing should not be the sole justification for use of the Conducted Energy Weapon. The severity of the offense, as well as other circumstances, should be considered before officers use a Conducted Energy Weapon on a fleeing subject.

Unless exigent circumstances exist, the Conducted Energy Weapon will not be used:

- *On women known to be or that obviously appear to be pregnant*
- *On elderly persons, young children, and visibly frail persons*
- *On passive subjects*
- *In combustible environments*
- *On a handcuffed subject unless actively resisting or exhibiting active aggression to prevent individuals from harming themselves or others*
- *On subjects in physical control of a vehicle in motion, including automobiles, trucks, motorcycles, ATVs, bicycles, and scooters*
- *On subjects in a location where a fall may cause substantial injury or death*

This policy mandates that a Taser not be used on a handcuffed person unless, “exigent circumstances,” exist and that person is, “actively resisting or exhibiting active aggression to prevent individuals from harming themselves or others.” BPD policy §1.01.01 defines active aggression as, “physical actions or assaults against the officer or another person with less than deadly force (e.g., advancing, challenging, punching, kicking, grabbing, wrestling, etc.).” Clearly, the use of a Taser on a handcuffed person requires more justification than on a person who is not so restrained.

Although Officer #3 and Officer #4 described the Complainant’s actions as being actively aggressive and actively resisting, in that he was kicking, pushing, and head butting, it has already been shown that the preponderance of the evidence does not support these contentions. Movement and a lack of total compliance are not the same as active resistance and active aggression. While the Complainant was not totally motionless, there is no evidence to suggest that he presented a realistic danger of harm to himself or others, as required by policy to justify the use of a Taser on a handcuffed person. In addition, the audio recording clearly shows that the Complainant reported having difficulty breathing and the panic heard in his voice lends authenticity to this claim.

The clear preponderance of the evidence does not support the view that the Complainant was so resistant or aggressive that the use of the Taser on a handcuffed person was warranted. The Complainant's resistance at the door was over. Any perceived resistance to being handcuffed was over. Sufficient time had passed since the struggle at the door that only the actions of the Complainant immediately prior to the use of the Taser on his buttocks were relevant to the level of resistance or aggression being shown by the Complainant. The Complainant was handcuffed and in custody. Even if he had previously fought with the officers (something the Complainant did not do once the police came through the door and were visible to him), he was neither assaulting the officers nor being aggressive when he was tased the second time. The Complainant's continued movement clearly justified the continued use of the officers' hands and body weight to control the handcuffed Complainant, a level of force lower than the use of a Taser.

The language Officer #3 directed toward the Complainant in this incident must be addressed. It contributes to the "totality of the circumstances" in which Officer #3's second use of the Taser took place. Fifteen seconds after the Complainant was first tased, Officer #3 referenced a, "...Taser up your asshole." Later, Officer #3 told the Complainant, "If you move again, I'm going to stick this Taser up your ass." A few seconds after that, he tells the Complainant, "Feel that. That's my Taser up your ass." Less than a minute later, Officer #3 asks, "Now do you feel this in your balls?" and then tells the Complainant, "I'm going to tase your balls if you move again." After the second use of the Taser, just before the Complainant was sat up, Officer #3 said to him, "I'm going to take this Taser out of your asshole now."

While it is understood that, at times, officers must use "rough" language in order to quickly gain the attention of someone who is out of control, such was not the context within which Officer #3 used offensive and demeaning language. The Complainant was in handcuffs, he had the weight of three officers on top of him, and he was desperately trying to breathe more deeply so as to overcome the growing sense that he was suffocating. More importantly, this

was not just a case of Officer #3 using “rough” language to get the Complainant’s attention. Officer #3 punctuated his offensive speech language by pushing the Taser between the Complainant’s buttocks and against his anal and genital areas. Such speech combined with these actions was especially offensive.

While BPD policy includes a section that prohibits the use of “uncomplimentary speech,” violation of this policy is viewed as a relatively minor offense. I have chosen not to issue a separate finding with respect to Officer #3’s possible violation of this section of the policy. To do so would be to run the risk of trivializing such offensive behavior. Instead, I have taken the view that Officer #3’s demeaning language and behavior regarding the placement of the Taser against the Complainant’s body were part of a series of acts by Officer #3 that led to and included his use of the Taser on the inside of Complainant’s right buttock. As such, I have included this speech and these acts in my evaluation of Officer #3’s second use of the Taser.

Based on the preponderance of evidence, Officer #3’s second use of the Taser on the Complainant while he was handcuffed was neither reasonable nor necessary. For this reason, I have issued a finding of Sustained to this allegation of excessive force.

Items of Note

1. Inaccurate Recollection of Details

The Complainant was tased in the buttocks. In light of this fact, Officer #3’s statement to the contrary was clearly inaccurate. This does not necessarily mean that Officer #3 is guilty of deliberately lying in his statement. A person’s recollection of details which happen during situations involving high stress and emotion can be faulty. In such situations, the focus is often on other actions and issues, and one isn’t always able to recall specific details. For example, the Complainant’s recollection of the situation was changed after listening to the

audio recording of the incident. The Complainant then recognized that his initial recollection about when he was handcuffed was erroneous.

As a police officer, however, Officer #3 is expected to be able to recall not just events and actions, but also policies, procedures, and training in situations of high stress and emotion. An officer whose recollection of events in which he was directly involved just two months prior cannot be counted on to be accurate, may have difficulty fulfilling his or her duties as a witness in legal proceedings.

Accordingly, this issue should be reviewed by the Department.

2. Inaccurate Recollection of Details

Officer #4, in her interview with ISP, initially described the actions of the Complainant as fighting, kicking, yelling, screaming, not rolling over, and trying to head butt officers. Officer #4 told the ISP investigator that officers were yelling commands, “over and over,” to the Complainant including, “Get your hands out. Get your hands out.” In the ombudsman’s interview, Officer #4 indicated that the Complainant was resisting, yelling profanities, and breathing so hard he was spitting and gargling. Officer #4 also said that the Complainant was kicking, bucking his head and fighting the officers, and that the Complainant screamed, “Fuck you,” and, “Get off me.”

The picture painted by Officer #4 was of a wildly out-of-control person who was actively resisting the officers. The Complainant was, by his own admission, moving. Officers did tell the Complainant twice to get on the ground, which was quickly done. The Complainant was told twice to put his hands behind his back. This was also done relatively quickly and the handcuffs were applied only 11-12 seconds after the command to get on the ground. Clearly there was no wild resistance, no “long time” struggle to get the Complainant’s hands out from his body. No profanities can be heard from the Complainant after he was on the

floor. There was no screaming that was directed at the officers. No commands were issued, "over and over." At times, the Complainant spoke quite calmly as he explained to the officers that he didn't know that it was the police at the door. He answered their questions and responded to their directions. He said several times that he couldn't breathe. At times, the Complainant's voice rose and there was the sound of panic in his voice as he told the officers that he couldn't breathe. He did scream, "My hands," at one point.

While there is no evidence to support the notion that Officer #4 is lying, an inability to accurately recall facts associated with situations involving high stress and emotion is problematic in a police officer.

This issue should be addressed by the Department.

3. Inaccurate Recollection of Details, Deletion of a BPD Audio Recording, Standards for a Use-of-Force Investigation

Officer #10 told the ISP investigator that he did not record the jailhouse interview of the Complainant because Officer #1 was already recording it. During his interview with the ombudsman's investigator, Officer #10 said that he initially started his recorder, but then turned it off when he saw that Officer #1 was also recording the interview.

In the course of this investigation, it was learned that Officer #10 deleted all his audio recordings for the shift that covered the night of the incident. He reported that he did this because, at one point, he accidentally left his recorder turned on and recorded several hours of "dead air." Much of the deleted audio was later recovered through a forensic examination of the digital audio recorder's memory card. Based on this recovered audio, it is clear that Officer #10 recorded the entire interview of the Complainant at the jail, was aware that he had just recorded it, and deleted the recording at a later time.

There are then two issues regarding Officer #10 and the audio recording. First is Officer #10's differing explanations to the ISP and Office of the Community Ombudsman regarding the jailhouse recording. Second, there is an issue regarding the deletion of an official Boise Police Department record.

Lastly, the investigation into the use of force by Officer #10 does not appear to meet the standards required by BPD. As required, officers at the scene promptly notified Officer #10 of the use of force. Officer #10 responded to the scene and spoke to several of the officers, but did not document anything that they told him. Officer #10 reported that he would have re-interviewed them after reviewing the arrest report. But Officer #10 did not interview Witness #1 at the scene, nor did he interview the Complainant at the jail regarding the use of force, even though he had ample opportunity to do so. Although the Complainant had not told anyone about the injuries to his buttocks, no photographs were taken of the Taser application site on his back. Officer #10 took little action to investigate the incident so that he could complete the Use of Force Report required by BPD policy.

These issues should be reviewed by the Department.

4. Dedication to Duty and the Protection of the Public

It should be noted that, while one of the findings resulting from this investigation is critical of Officer #3's second use of the Taser, recognition should be made of the fortitude demonstrated by Officer #1, Officer #2, Officer #3, and Officer #4 during this incident. These officers did not know exactly what was happening behind the front door. They did not know how many people were inside the house, or if they had guns or other deadly weapons. All they knew was that a woman and a child on the other side of the door were in danger and needed their help. In spite of the potential danger to themselves, these officers did not hesitate to take immediate action. Any evaluation of this incident would not be complete without recognizing such selfless dedication to duty.

POLICY FINDINGS

The following findings have been issued with respect to the Complainant's allegations that, employing a Taser, Officer #3 used excessive force on him three times:

Allegation #1

That Officer #3 violated BPD Policy § 01.01.02 Authorization (for the use of force) when he tased the Complainant on the wrist.

UNFOUNDED

Allegation #2

That Officer #3 violated BPD Policy § 01.01.02 Authorization (for the use of force) when he tased the Complainant on the back.

NOT SUSTAINED

Allegation #3

That Officer #3 violated BPD Policy § 01.01.02 Authorization (for the use of force) when he tased the Complainant on the buttocks at a time when the Complainant was handcuffed behind his back.

SUSTAINED

POLICY AND TRAINING RECOMMENDATIONS

Use of Force Investigation Policy

In the course of this investigation, it became clear that BPD has not articulated to its supervisors clear standards regarding the investigation of an officer's reportable use of force. Since the use of force by a police officer involves the seizure, at least momentarily, of a person by an agent of the government, it is important that such acts be investigated and documented using consistent, best practices. This assures the community that the police officers who serve and protect them are held to high standards when it comes to the use of force. Of equal importance is the fact that the use of force by a police officer, even if it is later determined to have been reasonable and necessary, may expose both the officer and the agency to potential civil liability. Consistent, objective, and thorough use-of-force investigations ensure the creation of an accurate and reliable record of material evidence and witness statements pertaining to the use of force. Finally, the best training for officers, particularly when it comes to defensive tactics and officer safety, is continuously informed by lessons learned in the field. A high quality investigation of each reportable use of force will provide these "lessons learned" to those who develop and deliver this training.

Therefore, I recommend that the Boise Police Department establish specific standards and procedures for those tasked with investigating reportable uses of force by BPD officers. Particular attention should be paid to the timely collection of evidence, recorded interviews of involved officers and witnesses, and documentation (including photographs) of the presence and/or absence of injuries to subjects and officers. These standards should also include a clear expectation regarding the timeframe within which a use-of-force investigation and its subsequent report should be completed.

Training Regarding Positional Asphyxia

In the course of this investigation, it was clear that the involved officers were familiar with the concept of Positional Asphyxia as it relates to prisoners who are hobbled. However, none of the officers seemed to be aware of the possible danger posed by Positional Asphyxia to the Complainant in this case. This was a situation where a heavy, not terribly physically fit, middle-aged man had engaged in heavy physical exertion at the door. He was then placed face-down on the ground and handcuffed with his hands behind his back and the weight of three officers on his body. This may have had the effect of restricting the expansion of the Complainant's chest and diaphragm, thus inhibiting the ability of the Complainant to get adequate oxygen and exhale sufficient carbon dioxide to compensate for the physical exertion in which he had just engaged.

Around the nation, many in-custody deaths have been attributed to Positional Asphyxia. The following is taken from an article appearing in the June, 1995, National Law Enforcement Technology Center Bulletin produced by the US Department of Justice, National Institute of Justice.

Basic Physiology of a Struggle

A person lying on his stomach has trouble breathing when pressure is applied to his back. The remedy seems relatively simple: get the pressure off his back. However, during a violent struggle between an officer or officers and a suspect, the solution is not as simple as it may sound. Often, the situation is compounded by a vicious cycle of suspect resistance and officer restraint:

A suspect is restrained in a face-down position, and breathing may become labored. Weight is applied to the person's back—the more weight, the more severe the degree of compression. The individual experiences increased difficulty breathing. The natural reaction to oxygen deficiency occurs—the person struggles more violently. The officer applies more compression to subdue the individual.

Predisposing Factors to Positional Asphyxia

Certain factors may render some individuals more susceptible to positional asphyxia following a violent struggle, particularly when prone in a face-down position:

- *Obesity.*
- *Alcohol and high drug use.*
- *An enlarged heart (renders an individual more susceptible to a cardiac arrhythmia under conditions of low blood oxygen and stress).*

The risk of positional asphyxia is compounded when an individual with predisposing factors becomes involved in a violent struggle with an officer or officers, particularly when physical restraint includes use of behind-the-back handcuffing combined with placing the subject in a stomach-down position.

Major portions of this bulletin are drawn from a report prepared by the International Association of Chiefs of Police for the National Institute of Justice (NIJ), based on research conducted by Dr. Charles S. Petty, Professor of Forensic Pathology, University of Texas, and Dr. Edward T. McDonough, Deputy Chief Medical Examiner, State of Connecticut, and reviewed by the Less-Than-Lethal Liability Task Group.

I recommend that BPD review its training regarding Positional Asphyxia to ensure that officers are aware of the potential for this condition under a variety of circumstances, including those not involving the use of hobbles. Officers should be trained to spot the signs of possible Positional Asphyxia and to know what they can do to minimize its occurrence and respond appropriately, if necessary.



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The following is a partial transcript of the audio recording made by Officer #1 on the day of the incident. It represents the best understanding of what can be heard on the audio recording. The recording actually begins over thirty minutes before Officer #1 is dispatched to the incident. The first 38 minutes are not related to this incident and are not included in the transcript.

O1 is Officer #1
O2 is Officer #2
O3 is Officer #3
O4 is Officer #4
C is the Complainant
W1 is Witness #1

38:41 O1 (conversation with dispatcher via radio followed by sounds of driving & music)
41:44 male “[call sign]. Both units are in the area”
“Copy. 2105”
42:15 (sounds consistent with car stopping, put into ‘Park’ and movement)
42:20 (sound consistent with a car door being opened)
42:24 (sounds consistent with officer getting out of the car, music fades away, sounds consistent with officer walking, male(s) speaking in hushed tones. Officer discusses fresh footprints in the mud)
43:29 O1 “Open the door.”
43:31 C “Call the cops.”
C (unintelligible) “Fuck off”
(sounds consistent with rapid movement by officer)
43:37 male “He’s holding it shut.”
female (unintelligible)
43:40 C “...door.”
43:41 female “Wait, wait, wait...”
(sounds consistent with struggling and banging)
43:41 O1 “Get away from the door; do it now.”
43:44 O1 “Back up.”
43:45 C “Wait. Wait.”
43:46 O1 “Back up.”
43:47 W1 “Let them in.”
C “Tell them to leave.”
43:48 W1 “Let them in.”
43:51 O1 “Back up.”
43:54 O1 “Back away from the door.”
43:56 O1 “Okay, get in there; go around back.”
43:59 O4 “I’ll stay up front with him.”
44:03 O4 “I need more units, code three.”
44:04 male “Stop. Stop. Stop.”
44:06 O1 “Open the door; do it now.”
44:11 (muffled male and female voices)

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44:12 W1 "Stop. Stop. Go out the back room. Now."
44:14 W1 "Now."
44:15 (sounds of more struggling and banging)
44:19 W1 "Go out now. Go. Go. Go. Go. Go."
44:23 O4 "Open the door."
44:28 W1 "Let go..."
female (muffled sound of crying and shouting)
(sounds of banging and struggling)
44:36 O4 "Open the door."
44:41 W1 "[The Complainant's first name]"
44:42 male "Knock it off."
44:49 W1 "[The Complainant's first name]."
44:50 male "Okay."
44:51 male "Go."
(sounds of banging and struggling)
male (grunts)
44:54 male "I can't get it."
44:55 O3 "One-two-three."
44:57 "Aahh"
44:58 C "God damn it. What the fuck. I wasn't doing anything."
44:59 O4 "Get on the ground."
45:00 C "Oh my God. Hey, I'll get on the ground."
45:01 O4 "Get on the ground."
45:04 C "I didn't touch her at all."
45:05 male "Get back."
45:06 male (scream)
45:08 O3 "Get your hands behind your back."
C "They already are, sir."
45:09 O3 "Get your hands behind your back."
45:10 C "Alright, sir."
45:13 O3 "Okay. [Officer #4]."
45:18 C "Sir, I thought,"
O3 "Don't move."
45:19 C "I thought it was her friends trying to get in."
45:20 O1 "Bullshit."
45:21 O3 "... get this Taser up your ass hole?"
45:22 C "I did."
45:24 C "I did, sir, I didn't touch, lay hands on her."
45:28 (clicking sound consistent with the sound made when handcuffs are put on)
45:29 male "Okay, is this the only problem?"
45:30 O4 "Yeah, I think so; check, we need somebody to check the house. We have a kid and a wife maybe."
45:38 O3 "...four with one PD. One more unit code three. Downgrade one other unit code two, cancel the rest."
45:45 C "I'm good, sir."

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45:48 C "I'm good." (heavy breathing)
45:50 male "Okay."
45:54 C "Gosh darn, I was trying to look. I thought it was her friends."
45:58 O4 "You heard us yelling, 'Boise Police?'"
46:00 C "No, we didn't."
46:01 O4 "Be quiet."
46:02 male "Ma'am, who else is in the house?"
46:03 C "Okay, sir."
W1 "Just me and him." (speaking in background)
46:06 C "Can you let me up, please?"
46:07 C "My hand."
46:08 O3 "If you move again, I'm going to stick this Taser up your ass -"
46:10 C "Okay."
O3 " - and pull the trigger."
46:11 C "I'm sorry."
46:12 O3 "Do you understand it?"
46:13 C "Yes, I do. I do, sir."
O4 (unintelligible)
46:14 O3 "Do you feel this?"
46:15 C "Yes, sir."
46:16 O3 "Do you feel that? That's my -"
46:17 C "Okay,"
O3 "- Taser up your ass."
46:18 C "Okay."
46:19 O3 "So don't move."
46:20 C "I'm trying not to."
46:21 C "I can't breathe."
46:22 O4 "Stop moving."
46:23 C (cries out)
O3 "Seriously ..."
46:25 C "Okay, sir...pick me up."
46:27 O3 "Do you want another Taser deployment on you?"
46:29 C "No sir, I'll stop."
46:31 C "I can't breathe. Stop, stop, sir."
46:33 C "I can't breathe. Just let me up."
46:34 O3 "...or another one?"
46:35 C "I just want to breathe."
C "Okay, sir."
46:36 O3 "I'm going to give you another one if you move again."
46:38 C "Okay. Can I just breathe?"
O3 "I have not searched you. I fear for my safety."
46:40 O1 "If you're talking, you're breathing."
46:41 C (scream)
46:42 C "Okay, stop, stop."
46:43 O3 "Then stop moving."
C "Okay."

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46:45 O3 "I don't, I fear for my safety. I have not searched you, sir ... "
46:49 C "Okay, I'm just trying..."
O3 "I fear for my safety."
C "...trying to be good."
46:50 O3 "If you move again, I will deploy this Taser."
46:52 C "I promise I'll be good."
46:53 O3 "Do you understand, sir?"
46:55 C "I promise I'll be good."
46:54 male (unintelligible and as if from some distance)
male "You're good."
46:57 male "Search the house."
46:58 C "Okay, can I get up? Can I get up?"
47:00 C "I can't breathe."
47:01 male "Relax."
47:02 C "Okay, sir."
male (speaking in background)
47:03 C "I can't breathe."
47:06 C "Sir, I can't breathe." (grunt)
47:08 C "Okay. I need to, swear to God."
47:10 O3 "Now do you feel this in your balls?"
47:11 C "I do, sir."
47:12 C "I'm not going to move. I'm not gonna move."
47:13 O3 "Now I'm going to tase your balls if you move again."
47:15 male (unintelligible)
O3 "Will you please cooperate with us?"
47:20 C "I am."
47:21 O3 "I fear for my safety."
47:22 C "I just can't breathe. Okay, I'm sorry."
male "The backyard's clear. I've already done all that."
47:25 male "She said he is by himself."
Male "Back here
male "...to your left."
Male "I've already cleared that. Yes."
C (sigh)
47:31 male "Roll to your other side."
47:32 C "Okay."
C "Gosh darn." (under his breath)
(several people talking)
47:37 C "Her friends were out there trying to get in, sir. Ask her."
47:43 O4 "Sergeant enroute?"
47:46 C "Geez, I'm not kidding at all."
47:49 female "[call sign] ... with one." (in background)
47:53 C "We couldn't hear ya."
47:54 O4 "You could hear me."
47:55 C "I promise, I promise, swear we couldn't."
48:01 O3 "Paramedics, non-code."

**TRANSCRIPT OF AUDIO RECORDING
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48:04 C "Man." (under breath)
48:06 male "[call sign]..."
48:07 female "[Officer #2]..."
48:11 male "Paramedics non-code to our location."
48:14 O3 "Okay, I'm going to take this Taser out of your ass hole now. Are you going to fight with me?"
48:17 C "No, not at all, sir."
48:18 O3 "Okay."
48:19 O4 "Is this your wallet that's in this jacket?"
48:20 C "Yes, ma'am, it is."
48:21 O3 "So far, for the last two minutes, he's been cooperative. But then, my Taser's in his ass."
48:26 C "Shoot, I thought it was ... I'm not kidding you."
48:28 O4 "You heard me yelling, 'Boise Police?'"
48:30 C "I swear I didn't, ma'am."
O4 "Whatever."
48:31 C "We thought it was her friends that was been going up and down the street."
48:35 male "Bullshit."
48:37 O4 (unintelligible)
male "What's that?"
48:38 O4 "You want to roll him over and sit him up"
48:39 O4 "Hey, I'm going to sit you up. What's your first name?"
48:41 C "It's [The Complainant's first name]."
O4 "What?"
48:42 C "[The Complainant's first name]."
O4 "[The Complainant's first name]."
48:43 male "... Okay, [The Complainant's first name]."
O4 "Roll over and put your knee right up and sit up."
48:45 C "What do you want me to do?"
48:46 O4 "Put your knee up right there and sit up."
48:48 C "Okay."
male (unintelligible)
48:49 O4 "Sit up."
48:51 O4 "Sit up."
male (speaking in background)
48:52 male "...behind you, [Officer #1]."
48:58 O4 "This is what happens when you resist."
49:00 C "I wasn't resisting."
49:01 O4 "That's what happens when you don't open the door."
male (discussion regarding medications possibly taken by the Complainant)
49:15 C "...her friends were driving down the street."
49:18 O4 "Hey, hey. Talk to me."
49:19 O4 "Where's the wallet in here?"
49:20 C "...zipper on the inside."
(several people speaking)

**TRANSCRIPT OF AUDIO RECORDING
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(sounds consistent with the recording officer walking)
(child singing)

49:36 male "What happened after that?"
(sound of W1 speaking)
(sound of W1 speaking fades)

50:03 O1 "Boyfriend girlfriend from what I can understand. We got here and we walked around. Didn't hear anything...ring the doorbell and I can hear 'em fighting behind the door and she's like, "Come in," and he's like screaming, "Stay out," and I start wailing on the door and every time I kicked the door, I would get it open that far and he slams it shut before I can get an arm in it to keep the door open. So, [Officer #4] and I, we're fucking just kicking the shit out of this door and we get it that far open and he slams it shut. So, finally when [Officer #3] got here, when I got one kick in and he come and hit it after that, we were able to drive the door open and him back into the hallway, pin him down, and tase him."

50:47 O1 "As far as I know, he's the boyfriend that she didn't want to spend any time with. I'm not sure who the med units are here for. Is it for his nuts?"

51:00 O1 "Oh, I'm 15, yeah."
Male "14."
End



July 20, 2009

TO: Pierce Murphy
Community Ombudsman

FROM: Michael Masterson
Chief of Police

MEMORANDUM RE: OMB #09/0014

I and the office of Internal Affairs have met and reviewed the investigation you conducted into the actions of officers and the subsequent Taser deployment on February 14, 2009. My response and recommendations are included in this memorandum.

Officer #3's Actions

- BPD concurs that Officer #3's actions violated Department policy. We have sustained a policy violation for Conduct Unbecoming and the officer has been disciplined.

Officer #4's Representation of the incident

- Officer #4's interpretation of the incident was not consistent with the investigation by the Department. Officer #4 has been counseled on this issue.

Officer #10's Actions in the Use of Force investigation

- The BPD completed a separate investigation into the actions of Officer #10. Officer #10's investigation of the incident was found to be sub-standard and did not meet policy requirements. Officer #10's conflicting statements and erasure of the recording of the follow up interviews were also found to be violations of Department policy. Discipline has been administered to the employee for these violations.

Use of Force Investigation Policy

- An internal review concurred with the need to further codify the actions that supervisors need to take in conducting these investigations. A request for additional policy requirements has been submitted to committee and will result in significant investigation changes. Additionally all line supervisors are receiving additional training in this area.

Positional Asphyxia

Boise Police Department

- While we have provided training to sworn personnel on positional asphyxia in the past year this incident has shown that we need to expand that training to cover a greater number of situations. BPD will develop and administer this additional training over the next 6 months.

Conclusion

- I am very appreciative of the officers' selfless response to this call and their attempts to protect what they believed to be a kidnapping or assault victim at the time of call. The improper actions which were taken following the contact are not representative of our Department or the past conduct of the involved officers. I will work to ensure that rare aberrations in conduct such as this incident are eliminated and that we provide the professionalism expected and deserved by the citizens we serve.