



COMMUNITY OMBUDSMAN

OMBUDSMAN'S REPORT

Critical Incident

OMB08/0075

**OFFICER-INVOLVED SHOOTING
IN THE 600 BLOCK OF
VILLAGE LANE
ON JUNE 5, 2008**

Issued August 31, 2009

By

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Critical Incident Investigation & Findings

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EXECUTIVE OVERVIEW

On June 5, 2008, Boise Police Department (BPD) officers were summoned to an apartment complex on Village Lane to investigate possible drug use or trafficking. One officer observed suspicious behavior by a person driving on the main driveway through the complex. It appeared that the driver (the Subject), upon spotting a police car, backed out of sight and then fled on foot into a nearby apartment; the same unit that was the focus of the drug investigation.

Although the police were initially denied entry to the apartment by its female resident, she later relented and gave officers access inside. Once inside the apartment, officers discovered what appeared to be a freshly made hole in the ceiling of a bedroom closet. From there the Subject gained access to the attic, eventually making his way to the basement of the building. Once in the basement, the Subject hid in a hole in the concrete floor and covered himself with a large piece of plywood. The Subject had a soldering gun in his possession as he hid under the plywood. The soldering gun had a black-handled, pistol grip with two metallic cylinders extending from the grip in the same place where the barrel would be on a handgun.

The police received contradictory information from the resident of the first apartment and from a female friend of hers regarding the identity of the Subject. However, both persons mentioned by the women were known to have been involved in past criminal behavior and to have possessed firearms.

Once it was discovered that the ceiling of the first apartment had been breached and that the Subject was likely to be one of the two persons mentioned by the resident and her friend, the

BPD Special Operations Unit (SOU) team was called in to search the building. Their mission was to find the Subject and detain him. An SOU entry team attempted to follow the movements of the Subject through the apartment building's attic, one or more apartments, and into the basement. A BPD Patrol Police Service Dog (K9) and its handler joined the SOU entry team in searching for the Subject.

As the entry team was searching the basement, the Subject called out that he had a gun. The officers were unable to identify the specific direction from which the sound of the voice came. In an effort to make certain that the Subject was not hiding in the basement hallway, an officer lifted the plywood to look underneath. The Subject rose quickly from the hole underneath and pointed the soldering gun at two of the officers, Officer #1 and Officer #2. These two officers fired several three-round bursts at the Subject from their BPD-issued MP5 weapons. As a result, the Subject received multiple bullet wounds, but survived the shooting.

This use of deadly force by BPD officers was initially investigated by the multi-agency Ada County Critical Incident Task Force (CITF). Following the completion of the CITF investigation, both the BPD Office of Internal Affairs and the Office of the Community Ombudsman initiated their own independent investigations of the use of deadly force by BPD officers. The Office of the Community Ombudsman concluded that both officers' use of deadly force was reasonable and necessary. As a result, the ombudsman issued findings that exonerated both Officer #1 and Officer #2.

REASON FOR THE INVESTIGATION

The Boise City Code, § 2-22-04(H), gives the community ombudsman authority to conduct an independent investigation in the event that a critical incident occurs.

Critical Incidents

In the event that an employee of the Boise Police or the Airport Peace Officers Division of the Aviation and Transportation Departments is involved as a principal, victim, witness or custodial officer, where death or bodily injury results, the Community Ombudsman shall be notified immediately and shall act as an observer to any criminal, administrative or civil investigation conducted by or on behalf of the such Departments. The Office of Community Ombudsman may also conduct an independent administrative investigation into such a critical incident. The Community Ombudsman shall assess the conduct of the Boise City law enforcement officer or police employee in light of the facts discovered through the investigation, the law, and the policies and training of the relevant department, and shall further make recommendations for personnel action to be taken. The report of investigation and recommendations shall be given to the relevant Department Head for purpose of discipline and/or commendation when warranted, and for use in the development of the affected law enforcement officer or police employee's formal personnel evaluation. A law enforcement officer, police employee, or citizen may waive their personal privacy right.

The term, "critical incident" is defined in the subsections that follow the main text of the ordinance. Subsection "i" provides the definition that pertains to the present case:

Critical incidents include but are not limited to situations involving the following:

- i) Use of force or any other Department action that results in death or serious bodily injury. (Serious bodily injury is an injury that results in the subject being admitted to a hospital.)*

The ombudsman was appropriately notified of this incident and elected to conduct an independent administrative investigation into the incident.

APPLICABLE POLICY SECTION

The ombudsman's investigation focused on the use of deadly force by Officer #1 and Officer #2 on June 5, 2008. The BPD Policy and Procedures Manual in force at the time of this incident authorizes BPD officers to use force, including deadly force.

1.01.02 Authorization

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 INVESTIGATION

Ombudsman's Initial Investigation

On June 5, 2008, the ombudsman received notification that the SOU was being deployed at an apartment complex on Village Lane in connection with a barricaded subject. Later, that same afternoon, the ombudsman was notified that an officer-involved shooting had occurred at that location. The ombudsman responded to the scene of the incident and began the initial investigation. This investigation included the following steps:

1. Examining of the scene of the incident.
2. Photographing the scene and pieces of the evidence.
3. Attending periodic BPD updates and briefings regarding the incident.
4. Returning to the scene the following day for additional exterior photographs.

Other Investigations and Proceedings

The Ada County Critical Incident Task Force (CITF) conducted a criminal investigation of the incident. The CITF investigation was completed on September 11, 2008, and forwarded to the Twin Falls County Prosecutor's Office.

The Twin Falls County Prosecutor examined the investigation and met with officers who conducted the investigation. On November 24, 2008, the Twin Falls County Prosecutor issued a Press Release stating that he had concluded that the officers fired shots because they had a legitimate belief that their actions were needed to defend themselves and their fellow officers. For this reason, no criminal charges were filed against the officers in the incident.

Investigation by Office of the Community Ombudsman

During the course of the investigation, the following steps were taken:

1. A complete review was made of all reports, documentation, recordings, and evidence associated with the CITF investigation of the incident.
2. Personal interviews were conducted with Officer #1 and Officer #2, the two officers who fired their weapons during the incident.
3. Personal interviews were conducted with six BPD officers and two BPD supervisors who witnessed portions of the incident.
4. A personal interview was conducted with the Subject.
5. Personal interviews were conducted with three persons (non-police) who had knowledge of and/or had witnessed portions of the incident.

FACTS IN DISPUTE

After reviewing all available documents associated with this incident and analyzing the statements obtained during our interviews, it was determined that five issues of material fact were in dispute.

I. The Soldering Gun.

The Subject stated that he entered Witness #1's apartment, used his fist to create a hole in the

ceiling of the bedroom, traveled through the unfinished attic area to another apartment, and broke through the ceiling in the second apartment. After entering the second apartment, he left through the apartment door, jumped over a banister, and forced entry into a third apartment, which was located on the first floor. After barricading himself in one of the bedrooms, he attempted to break a hole in the wall but hit a two-by-four with his hand. He stated that he then looked around for an implement and found a soldering gun on the dresser. The Subject was clear that he acquired the soldering gun only for use as a tool to break through the wall, not as a weapon.

It is significant that, at the beginning of his interview, the Subject stated that he was under the influence of a controlled substance at the time the incident occurred. The Subject did not believe that being under the influence of a controlled substance affected his memory regarding the incident. There is no evidence in the record regarding the amount of the controlled substance that the Subject ingested, the time at which he ingested it, or the presence of any controlled substances in his blood at the time he was taken to the hospital after the shooting.

The photographic evidence obtained in the initial investigation by this office indicates that there was an empty plastic box for a soldering gun in Witness #1's apartment. The box was located only a few feet from the bedroom closet in which a hole had been made through the ceiling into the attic. Photographs show the case for a Weller Soldering Kit, Model 8200 PK, lying open on the bedroom floor. The photograph on the label inside the kit shows a soldering gun with a black pistol grip, a red trigger, and two silver-colored rods extending perpendicular from the pistol grip. Extending from the two rods is a copper-colored soldering tip. The soldering gun depicted in the photo on the kit has a rectangular, red label on the upper portion of the frame of the soldering gun. There are no photographs showing a similar container for a soldering gun in the bedroom of the third apartment that the Subject entered.

The photographic evidence from the area of the basement where the shooting took place

shows a soldering gun with a black pistol grip, red trigger, and two silver-colored rods lying on a plywood board at the end of the basement hallway. A close-up shot shows the top of the soldering gun with a rectangular red label on the side. A portion of the bottom of the pistol grip of the soldering gun is missing. Also missing is the copper-colored soldering tip.

A Supplemental Report in the CITF investigation indicates that the Twin Falls County Prosecuting Attorney requested close-up photos of the soldering gun. There are nine photographs attached to the Supplemental Report. These photographs indicate that the soldering gun was approximately 7.5 inches tall (from the bottom of the grip to the top of the frame) and 7 inches long (from the end of the silver-colored rods to the end of the frame). The rectangular red label on one side of the soldering gun clearly states, "Weller 8200-N 100/140 WATTS." The red label on the other side states, "Model 8200-N 120V 60 CY 1.2A, Weller Electric Corp., Easton, PA, U.S.A. U.S. Patent 2,699,195."

Based on the evidence in the record, the soldering gun found on the basement floor immediately following the shooting was manufactured by the Weller Electric Corporation. A red plastic case for the same model soldering gun was located in a bedroom inside Witness #1's apartment. There is photographic evidence substantiating the location of the case. There is nothing to indicate that the soldering gun was lying on the dresser in the third apartment that the Subject entered. For these reasons, the preponderance of the evidence indicates that the Subject found the soldering gun in the second bedroom of Witness #1's apartment. He picked it up and carried it with him throughout the time he was making his way through the rest of the apartment building, and eventually to the basement. There is no question that the Subject had the soldering gun with him when he was hiding in the hole in the cement underneath the plywood. The fact that the Subject did not have accurate recall of the location where he acquired the soldering gun is indicative of his diminished ability to recall the events leading up to the shooting and the facts of the shooting itself.

2. *The Manner in which the Subject Arose from Inside the Hole.*

The next issue is the manner in which Subject emerged from under the plywood. There is photographic evidence establishing the location of the hole in the concrete floor of the basement hallway, with respect to the stairway leading from the first floor to the basement and two doors leading to a large room where paint was stored for the apartment complex (the "paint room"). There is a small landing at the bottom of the stairs. To the left is a wall. To the right, or north, is the end of a hallway. Also to the right is the first door to the paint room. Turning 180 degrees from the bottom of the stairs, the hallway leads to the second paint room door. It also leads to a second hallway that runs perpendicular to the first hallway.

The hole in the concrete is in the first hallway. It was covered by a large piece of plywood (8 feet by 3 feet and 6.5 inches). There was a second piece of plywood, the same size as the first, further down the hall. The Subject was lying in the hole under the first piece of plywood. The hole in the cement had been covered in this manner for some time prior to the day of this incident. Before entering the basement, the officers had not been told about the hole in the concrete floor, or the fact that there was a "false floor" of plywood in the hallway.

The Subject indicated that he was lying on his back in the hole, with his face up against the plywood. The Subject said that he used his right hand to push the plywood up far enough to brace himself with his other hand. He said that he was holding up the plywood the whole time with either his arm or his hand. After he pushed himself up to the point that he could brace himself with one hand, he had to stand up. He held the plywood sheet up so that it would not fall back on him. He then pushed the sheet over. He said that he was standing straight up before the officers shot him.

The Subject indicated that, as he was lying in the hole underneath the plywood, his head was closest to the bottom landing of the stairs and his feet were pointing down the hall, away from the bottom of the stairs. The Subject also described his position with respect to what he saw as he came out of the hole. He said that it was dark and that the only lights he saw were lights from guns. He said that the lights were "up and to the right" and that he believed they

were coming from the stairs. To his left side, the Subject thought there was another exit. He could not recall; but he thought there were steps out to where the officers' cars were parked. The Subject also stated that, when he stood up after the plywood was lifted, he did not turn in either direction to face the officers. According to the Subject, the officers were right in front of him.

If the Subject was lying on his back under the plywood, his recollection of his location, relative to the stairs and the door into the paint room, are accurate. The stairs would be on his right and the door to the paint room on his left.

According to the officers who were in the basement at the time, Officer #1 and Officer #2 were standing in the doorway to the paint room and both of their MP5 weapons had tactical lights attached to them that were on at the time. Two or three other officers were standing at the bottom of the stairs.

According to those officers who were in a position to see the plywood immediately before the Subject emerged, one officer exchanged a non-verbal signal with Officer #2 and then lifted up the plywood. The officer lifting the plywood was at the bottom of the stairs, while Officer #2 and Officer #1 were side-by-side on the other side of the plywood, positioned in the doorway to the paint room. The officer who lifted the plywood reached across, grabbed the other side of the sheet, and pulled the far side of the plywood up and towards him. The rising piece of plywood temporarily obstructed his view and the view of the officer next to him at the bottom of the stairs.

Since the Subject and the hole in which he was hiding were covered with a plywood sheet, none of the officers in the basement knew how the Subject was positioned under the plywood. The first officers to see the Subject, after the plywood was moved and before the first shots were fired, were Officer #1 and Officer #2. Both officers said that the Subject rapidly and unexpectedly emerged from the hole in the concrete. Both Officer #1 and

Officer #2 perceived that the Subject was facing them when he emerged, holding what they thought was a handgun in his right hand, with it pointed directly at them.

The Subject's assertion that he was on his back immediately before he rose from the hole is not consistent with the statements of the officers in the area who saw the Subject emerge facing the paint room door where Officer #1 and Officer #2 were positioned. In addition, if the lights seen by the Subject on his right side were from the weapons held by Officer #1 and Officer #2, that would imply that the Subject either turned around 180 degrees as he stood up, or was not lying on his back and already facing such that the paint room door was to his right.

Based on the preponderance of the evidence, I find that, when the Subject rose from the hole in the concrete as the plywood was lifted, he was facing in the general direction of Officer #1 and Officer #2, who were standing in the doorway to the paint room, opposite the landing at the bottom of the stairs.

3. Announcements Regarding Police Presence and the Officers' Descent into the Basement.

There are also factual disputes concerning whether the officers called out to the Subject before the police K9 was sent into the basement and whether the officers were physically in the basement at the same time that the K9 was searching. The Subject was specifically asked whether he heard an officer yelling announcements before the K9 was sent down. The Subject said that he did not. He said that he heard the officers yelling to each other and giving commands to the dog. The Subject further stated that when the dog stopped and scratched the third time, the officers told the Subject to come out with his hands up. He said that when the dog stopped and scratched, he assumed that the officers knew where he was hiding. The Subject said the officers told him to come out slowly, and that they wanted to see his hands. Later in the interview, he said that he never had the opportunity to follow those directions.

In contrast to the Subject's description, the entry team officers provided a different account of what occurred. One officer stated that the entry team formed at the top of the stairs. He said that, before the search, the K9 handler yelled announcements into the basement from the top of the stairs. Then the handler sent the dog to the bottom of the stairs and let the dog work. At this point the officers lost sight of the dog. After some time the officers heard the sound of scratching. The handler then called the K9 back and downed the dog at the bottom of the stairs. After the dog was downed, the entry team moved down the staircase.

Another officer on the entry team recalled that the officers opened the door to the basement stairs and determined that they needed to see what was down there. The K9 was sent down after the usual announcements had been made. The officers could hear the dog running around and scratching; but they did not hear the dog bark. Before the officers went down the stairs, the handler ordered the dog to go into a "down" position. Other members of the entry team who were interviewed gave similar accounts of the dog being sent down the stairs to search the basement before any officers went down.

Officer #1 said that, if the Subject had been in the paint room, the storage units, or the hallway, he (the Subject) would have been able to hear the K9 handler's announcements. Officer #1 further stated that anyone in the north side of the basement would have heard the announcements. He said that, as the handler was making one of the announcements, he gave the dog a command to bark to show that there really was a K9 involved in the search. After making the announcements, the handler sent the dog down twice. The officers could hear the dog barking and scratching.

The K9 handler said that, after the entry team had searched the first floor apartment and discovered the hole leading to the basement, they went to the door to the basement stairs. They opened the door; and the handler made announcements similar to the ones he had given before the dog had entered the first floor apartment. He said something like, "This is the Boise Police Department. We're going to use a police dog to search for you. Suspect inside: please call out loudly to me right now." He said that he waited for a response and then

added, "If you do not (call out right now) it (the police dog) will bite you when it finds you." The handler said that he made the announcement at the top of the stairs at least twice and that, in response to these announcements, no sound was heard from the basement. The handler felt that he allowed a reasonable amount of time for anyone in the basement to hear him and respond. In his opinion, the Subject had plenty of time to surrender. It was the handler's belief that, had the Subject surrendered at that time, no force would have been necessary and the Subject could have been taken safely into custody.

The handler said that, after making the announcements and waiting for a few moments, he sent the K9 down the stairs into the basement. The dog disappeared from view. After five to ten seconds, the dog barked in an alert mode. The handler encouraged the dog to keep trying to find the person. After a short time, the dog came back and popped his head around to look at the handler. He told the dog to go back and search again. The dog disappeared from view and began alert barking again. This time, the handler heard some scratching. After barking and scratching for a few minutes, the dog came back into view. The handler told the dog to go back and search again. The dog disappeared a third time and began barking again.

The handler said that he then told the entry team that it seemed like the dog had located someone in the basement but was unable to get to that person. The handler thought that whoever the dog had found was probably behind something. The handler then gave the dog a "down" command. The dog then lay down where it was and was quiet.

The testimony of the officers who were participating in the search is persuasive. Two of the officers stated that the dog was sent down the stairs to the basement as a forward scout. The dog went down the stairs alone in order to determine if the Subject was in the basement. If the dog had been able to obtain access to the Subject, he probably would have bitten him. The handler, who was an experienced dog handler, made announcements to this effect in each area into which the dog was sent, including the basement. Three other officers confirmed this. It is possible that the Subject did not hear the announcements, chose to

ignore them, or, in the aftermath of what happened moments later, forgot that the statements were made.

Although the Subject thought that the officers were in the basement with the dog, he may have based this assumption on the fact that he could hear their voices. Because he could hear their voices, he thought they were physically in the basement. Without visual contact, he had no way to know whether they were at the top of the stairs or were already in the basement. Since the Subject could not see what was happening and was under the influence of a controlled substance, his statement is less credible than the statements of several police officers who were conducting a methodical search using protocols designed to maximize the safety of all persons involved.

Based on the preponderance of the evidence, I find that, prior to sending the K9 to search the basement, an announcement was made that the police were present and that a police dog was about to be sent into the basement. This announcement was repeated at least once. The evidence also supports the conclusion that the Subject was given sufficient time after each announcement to make his presence known and surrender to the police. Furthermore, I find that the K9 went alone to search and was not accompanied by any officers until after it had been ordered three times to search the basement.

4. *The Subject's Statement Preceding the Shooting.*

The next issue is whether the Subject yelled to the entry team members that he had a gun. There are conflicting statements regarding what the Subject said while he was lying underneath the plywood. The Subject stated that he was lying underneath the plywood and heard the K9 walking over him. He also heard the K9 scratch the plywood. When the dog stopped and scratched on the board, the Subject thought the officers knew exactly where he was. He then heard the footsteps of the officers as they walked over the plywood.

During his interview, the Subject was directly questioned regarding whether he had said anything prior to the shooting. The Subject responded that he said that he did not want to go to jail. He said that he repeated this several times; however, he was not sure the officers heard him. The Subject specifically denied having said anything about having a gun.

In contrast to the Subject's account, the members of the entry team who were in the basement stated that that they heard the Subject say that he had a gun. Each of the seven officers interviewed, all of whom were either on the stairs or in the basement at the time, reported that they heard one of the following:

- "I've got a gun. I've got a gun."
- "I have a gun and I am going to f***ing use it."
- A muffled voice said, "I've got a gun."
- An angry, loud male voice shouted that he had "a f***ing gun."
- "I have a gun."
- A loud, male voice stated, "I have a gun."
- A muffled voice said, "I got a gun, mother f***er. I got a gun."

The entry team members who were in the basement were not the only ones to hear a statement regarding the gun. An officer who was outside the north exterior door to the paint room heard the K9 handler give commands to his dog and then heard someone shout, "I have a gun." Yet another officer who had been assigned to cover the north corner of the building where he could see the exterior door and several windows of the paint room reported that he heard an unknown voice say that he had a gun. A member of the Tactical Medical Team who was standing across the street from the north paint room door said that he heard a male yelling that he had a gun.

Immediately after the Subject yelled that he had a gun, a member of the entry team relayed this information to the incident commander by radio. Concerned that this message might not have been received at the command post, this officer went up the basement stairs and

conveyed the information again. Numerous officers and members of the Tactical Medical Team heard the announcement over the radio. This radio transmission was made prior to the sound of shots being fired from the basement.

Nine officers and one paramedic heard a male voice yell that he had a gun. Three of the ten persons who heard the statement, heard it while standing outside the building. This indicates that the Subject's voice was loud enough to carry outside. It is noted that there is some variation regarding the exact wording used; however, variations in eye witness accounts of violent or traumatic events are quite normal. All the witnesses testified to the same substance of the statement. In addition, after the Subject made the statement, an officer conveyed the information by radio. This radio transmission was heard by a number of witnesses.

For these reasons, it is found that, although the Subject denies ever making such a statement, the preponderance of the evidence supports the conclusion that the Subject did yell that he had a gun.

5. *The Shooting:*

The final, and most important factual issue in dispute is the issue of what occurred in the last moments before the shooting, and at the time the shots were fired. The Subject stated that he responded to the officers' commands to come out slowly. He stated that when he reached a standing position, he said, "F**k you." After he said these words, the officers began firing their guns. This version of events contrasts sharply with the events related by the officers who witnessed the shooting. All of these accounts are summarized below.

The Subject

In his interview, the Subject described how he came out from under the plywood. He said that the police had no communication with him until they found him. According to the

Subject, when the dog was scratching on the plywood board, the police were yelling at him, "Come out. Come out." The officers told the Subject to come out with his hands up. They told him to come out slowly, and that they wanted to see his hands up.

The Subject stated that he was lying on his back in the hole, with his face just under the plywood. He said that he pushed the plywood up with his left hand, and braced himself with his other hand. He then pushed himself up to a standing position, and pushed the sheet of plywood over. He said that he was standing straight up before the officers shot him. The Subject said that he had the soldering gun in his left hand at his side. According to the Subject, the officers said, "Get on your hands and knees." The Subject said, "F**k you," and put his middle finger up. At that point, according to the Subject, the officers started shooting. The Subject believes that he lost consciousness about a minute later.

Officer #2

Officer #2 said that the officers noticed the plywood lying on the floor; but Officer #2 did not know it was covering anything. After they heard the voice, they breached the door to the paint room. They wanted the team out of the hallway for safety reasons. Officer #1, Officer #2, two other officers, and the K9 went into the room and stayed there until after the shooting.

The decision was made to check under the plywood because the officers wanted to make sure that there was no space underneath it where someone could be hiding. They had to clear the space under the plywood before they could clear the hallway.

Officer #1 and Officer #2 were standing together in the doorway of the paint room. It was a narrow space because the door frame was still in place. Officer #1 was to the left of Officer #2. Across the hall from Officer #2 were three other officers.

As the officers prepared to clear the space under the plywood, Officer #2 got into position to cover any void that might be under the plywood sheet. Officer #2 then gave a nod to the officer who was to lift up the plywood. The nod was to indicate that Officer #2 was ready. The other officer reached across, grabbed the far edge of the plywood, and began to pull the plywood back toward himself. As the officer was pulling up, he was shielding his own view of what was underneath. The plywood had come up an inch or two when it popped up and the Subject came out screaming. He was pointing what Officer #2 took to be a gun straight at Officer #2.

When Officer #2 first saw the Subject, he saw his upper torso and what he took to be a gun in his hand. Officer #2 said that the Subject was like a jack-in-the-box; he came out of nowhere. Officer #2 did not recall seeing the Subject's lower extremities. The object that Officer #2 took to be a gun was in the Subject's right hand and pointed straight at Officer #2; and the Subject was getting closer. Officer #2 had never been that close to somebody who was pointing a gun at him. Officer #2 was afraid for himself and for Officer #1, who was standing right next to him. They were both just a few inches from what Officer #2 thought was the muzzle of a gun held by the Subject.

In response to what he saw, and to protect himself and Officer #1 from being shot, Officer #2 fired his MP5 at the Subject. At this point, Officer #2 was bumped by Officer #1 as Officer #1 repositioned himself. Officer #2 got bumped either right before or during the first round of shots that he fired. There was a slight pause between Officer #2's first and second trigger pull. During that pause, Officer #2 was repositioning himself.

Officer #2 had no doubt that it was a gun in the Subject's hand and was absolutely certain that he was about to be shot. After Officer #2's first trigger pull, the Subject was still standing. The first three rounds fired by Officer #2, which occurred with the first trigger pull, did not seem to change anything. The Subject was still coming up and toward Officer #2. He appeared to be coming up and at Officer #2 after Officer #2's first trigger pull. Officer #2 assumed that he (Officer #2) had already been shot by the Subject, but just could

not feel anything yet. He knew from his training that it is not uncommon for a person who has been shot to be unable to feel the rounds striking.

Officer #2 then squeezed the trigger two more times in succession. The Subject did not start falling backward until after Officer #2 had fired the third burst. At that point, the Subject stopped moving forward and began to move or fall back. Eventually, the Subject fell onto the floor on his back. Officer #2 does not remember seeing the Subject's legs, just his upper torso and what he took to be a gun.

Officer #1

Officer #1's account of the shooting provides additional details and is consistent with that of the other officers. After hearing the Subject state that he had a gun, the entry team officers elected to move out of the hallway. Officer #1 and three other officers, including Officer #2, went into the paint room. Two officers moved back to the landing at the bottom of the stairway, while the remaining members of the team remained on the steps.

By this point, the officers had established vocal contact with the Subject, but did not know where he was. They also knew that there appeared to be an unsecured space under the plywood on the floor. The entry team leader decided to clear the space under the plywood before they continued their search for the Subject down the hallway. The plan was to pull up the plywood and send the dog down into the space beneath to see if Subject was there.

Officer #1 was standing beside Officer #2 in the paint room doorway, opposite the bottom of the basement stairs. The two officers were staggered, but were close together. Officer #2 gave a nod to the officer on the other side of the hall, next to the stairs, who was going to pull up the plywood. The nod meant that Officer #2 was ready to cover the area under the plywood when it was lifted. As the officer started to pull the sheet of plywood up, the Subject immediately stood up. He emerged from the space underneath. His upper body was upright; but Officer #1 could not tell if he was crouching in the hole.

The Subject was not very far away from Officer #1. Officer #1 estimated that the Subject was approximately three feet from him. As the Subject came out from under the plywood, the Subject said that he had a gun. The Subject had what Officer #1 thought was a handgun in his right hand. As the Subject came up, he was facing south-southwest, and was trying to turn to move north. His left arm was higher than his right arm; and in his right hand he had what Officer #1 thought was a handgun.

Officer #1 looked at the Subject's face. He looked angry rather than scared. The Subject had an expression that said to Officer #1, "We're going to fight." Officer #1 thought that the Subject had an automatic pistol in his right hand. There were two silver rods; and Officer #1 thought it was a handgun. He was convinced that he was going to be shot because the Subject was close to him and because of the Subject's aggressive demeanor. Officer #1 told himself that he was going to be shot and that he would have to fight through it. He feared for his own life. He also feared for the lives of Officer #2 and the other officers who were in close proximity.

Officer #1 started shooting at the Subject in order to stop the Subject either from shooting him (Officer #1) or one of the other officers. Officer #1 stopped shooting when the Subject had fallen completely back and he perceived that the Subject was no longer an immediate threat.

Other Officers in the Basement

There were six officers in the basement at the time of the shooting; however, not all of the officers saw what happened during the final course of events leading to the shooting. Those officers who witnessed what occurred described the events as follows.

The officer who lifted the plywood (this was not either Officer #1 or Officer #2) said that he was crouched in the hallway right next to the bottom landing of the stairs. He was close enough to the plywood that he could reach across the sheet and pull it up toward himself. He

used hand signs to signal to the other officers that he was going to raise the sheet of plywood. Officer #2 was providing cover. Officer #2 was in the doorway to the paint room opposite the stairs and was positioned up against the wall with his head sticking out the doorway. Officer #2 gave a nod to indicate that he was ready and the other officer began lifting the piece of plywood.

As the officer was pulling the sheet of plywood up, the Subject "popped up" and "came out hard." This officer was surprised because he had not expected the Subject to be right under the plywood. As the Subject came up, he was yelling that he had a gun and that he was going to kill them.

The officer who lifted the plywood saw that the Subject was holding what he thought was a gun. This officer perceived that the Subject was pointing what he took to be a gun toward Officer #1 and Officer #2. He feared for their lives. He then heard shots, a burst of gunfire. As the officer described it, the Subject continued to pop up and the rounds kept being fired. It was this officer's perception that the Subject had shot back at Officer #1 and Officer #2 and, had the officer who lifted the plywood been able to safely do so, he would have fired at the Subject with his own weapon.

After a very brief time, the Subject moved back a significant distance in the hallway and fell down. The Subject was talking, moving around, and was half sitting up. The officer saw what he thought was a semi-automatic handgun lying on the floor of the hallway.

There was another officer positioned to the right of the one who lifted up the plywood. This officer's assignment was to cover deep into the hallway for unknown threats. He said that, when the plywood was lifted, one side swung up and towards the officer who lifted it. This temporarily shielded both officers' views of what was under the plywood. As the plywood swung up, the officer to the right of the one doing the lifting heard the Subject say, "I got a gun." This officer could tell that the voice came directly from under the plywood. The voice was no longer muffled. At the same time, the officer saw, in his peripheral vision, Officer #1

and Officer #2 jerk back. He then heard gunfire and, when he first saw the Subject, the Subject was out of the hole in the concrete and lying face up on the floor of the hall. The Subject's feet were closest to the stairs and his head was farthest from the stairs.

One of the entry team officers had gone back up the basement stairs to relay information over the radio that the Subject had stated that he had a gun. As this officer was coming back down the stairs, he saw Officer #2 "kind of react" and "flinch real quick." This was followed by the sound of four gunshots. He also saw brass being ejected out of one of the officers' weapons. It was quiet in a microsecond. This officer did not know who had fired besides Officer #2. He saw the Subject lying on his back. He saw the hole and the exposed sewer pipe inside it. He saw the Subject wearing white sweatpants and no shirt. He also saw what he took to be the Subject's weapon. It looked to him like a two-shot Derringer pistol.

Conclusion

The Subject describes a scenario in which the SOU officers entered the basement with the search dog, and saw the dog scratch the plywood board. Based on this, the Subject concluded that the officers knew where he was and ordered him to come out. The Subject denies ever having yelled to the officers that he had a gun.

The Subject then describes pushing the plywood up, coming out of the hole, and standing straight up with the soldering gun in his hand and his hand at his side. He denies ever having pointed the soldering gun at the officers. According to the Subject, the officers told him at some point to get on his hands and knees. The Subject also says that, at the point that he was standing straight up, he raised his middle finger at the officers and said, "F**k you." According to the Subject, the officers' response was to shoot him.

The Subject's account of the shooting is not credible. As was noted earlier, a clear preponderance of the evidence indicates that the Subject yelled that he had a gun. Witnesses outside the building heard a voice yell that he had a gun. The Subject makes an assumption

that the officers knew that he was under the plywood. The overwhelming evidence indicates that the officers were not in the basement when the dog was sent down, and did not see the dog scratch the plywood.

The only indication that the officers had regarding the Subject's location was the fact that they heard his voice when he yelled that he had a gun. The diversity of opinions regarding the Subject's location based on the officers' only contact with him indicates that none of them had any idea that he was in a shallow hole underneath the plywood. The dog's handler only noticed the fact that there were plywood sheets on the floor in the hallway just moments before it was decided to look under the plywood. One officer thought there might be a subterranean tunnel under the plywood, another thought the voice might be coming from inside the walls, and another officer thought that the voice was coming from the storage lockers.

As one officer stated, the situation was a "tactical nightmare." There were potential threats from numerous unknown and un-cleared areas of the basement. The officers had no diagram of the basement. They needed to regroup toward the end of the hallway nearest the stairs in order to obtain enough cover so that they could clear the hallway and begin negotiations.

When the officer lifted the plywood, his plan was to send the K9 into what he thought might be an underground tunnel or crawl space. None of the officers who were in the immediate area, including Officer #1 and Officer #2, expected the Subject to pop out of a shallow hole in the concrete like a "jack-in-the-box." Officer #1 and Officer #2, who were providing direct cover as the plywood was lifted, both saw the Subject come up quickly with what they took to be a gun pointed at them. The Subject was approximately three feet away from them. Seeing this, both officers expected to be shot. Officer #2 believed he had been shot and wondered why he could not feel the bullets hitting him.

Officer #2 fired one burst of three shots from his MP5. At about the same time, Officer #1 was repositioning himself and bumped into Officer #2. The Subject continued to come

toward the two officers. Officer #2 repositioned and fired two more bursts. Officer #1 fired his MP5 four times, each a burst of three rounds. When the Subject began to fall back, the officers stopped firing.

The officers' accounts of the events leading up to the shooting are credible. Their statements are internally consistent. They are also consistent with each other, as well as consistent with the broader overview of the events. It is specifically noted that the substance of each officer's testimony underscores the officers' truthfulness. Each officer told his account from a slightly different perspective; and each officer remembered details that were unique to his own experience of the events. Only two officers, the officers who fired the shots, actually saw the entire chain of events as the Subject emerged from the hole. The other officers only spoke about what they actually saw and heard.

For the reasons stated above, the officers' accounts of the events leading up to the shooting are found to be true and correct. In addition, the accounts of Officer #1 and Officer #2 are found to be true and correct accounts of what occurred when the plywood sheet was lifted, when the Subject emerged from the hole, and when the shots were fired.

WHAT THE INVESTIGATION FOUND

Based on a preponderance of the evidence, I have issued the following findings of fact.

On June 5, 2008, three BPD officers went to an apartment complex on Village Lane to investigate concerns that one of the tenants, Witness #1, was involved in the illegal use or sale of controlled substances. Witness #1 had moved into the apartment complex approximately one month before the incident occurred. The officers were told that a trash bag had been found that morning in the hallway outside Witness #1's apartment. The trash bag contained baggies with a white, powdered residue inside. The officers were asked to determine if the white powder was an illegal substance.

When the three officers arrived at the apartment complex, they met with apartment staff members in the main office. After being briefed on the situation, two of the officers left to go to a maintenance building where the trash in question had been stored. As one of the officers drove his BPD patrol car to the maintenance building, he encountered a maroon Suburban driving towards him on the same driveway. When the driver of the Suburban (later identified as the Subject) saw the patrol car coming towards him, he put the Suburban in reverse and drove quickly backward. The Subject parked the vehicle, got quickly out, and ran towards the building in which Witness #1's apartment was located. The BPD officer parked his police car, got out, and looked inside the Suburban.

A staff member from the apartment complex was walking toward the building where Witness #1 lived about the same time that the Subject and the police officer encountered each other in the driveway. The staff member hailed the officer and indicated that he had seen the Subject going into Witness #1's building.

Two BPD officers went to Witness #1's apartment. They spoke to her, as well as to another female who was with her. After a period of time and ongoing discussions with the two women, Witness #1 allowed the police to enter her apartment. Witness #1 and her female friend, who had also been in the apartment, each identified the person the police were looking for as a different person. Witness #1 identified the person as the Subject, while the other woman identified the person as someone else. The police thought that both persons named had been armed and involved in criminal activity in the past.

When the police entered the apartment, they did not locate the Subject. However, they did find a hole in the ceiling of a bedroom closet. There was insulation and other debris below the hole, indicating that it had been recently created. The hole provided access to the attic area of the apartment building, which, in turn, provided access to other apartments and areas of the building.

By this time, a BPD supervisor was on scene and made the decision to activate the SOU. Once the SOU assembled at the site, they were briefed on the situation. Following this, an SOU entry team entered the apartment building and began conducting a search for the Subject. The entry team discovered that the Subject, whose identity at that time was not definitively known to them, had forced entry into an apartment on the first floor.

Following announcements that a police dog was about to be sent inside the apartment and after hearing no response to those announcements, the K9 was sent into the apartment. Once the dog indicated that no one was inside, the entry team went into the apartment and found that a bedroom door had been barricaded. The police K9 was sent into the bedroom, but did not locate anyone. The entry team then went into the bedroom, searched it, and discovered a newly-created hole in an interior wall. The hole was large enough for a person to climb through the hole and drop into the basement.

Meanwhile, the Subject, who had gained access to the building's attic by breaking a hole through the closet ceiling in Witness #1's apartment, had crossed the attic from one end of the building to the other and broken through the ceiling into another second-level apartment. The Subject stayed in that apartment for some time, watching the actions of officers outside the building as they set up a perimeter and began their search for him. After some time, the Subject left this apartment through its front door, went downstairs and forced entry into a third apartment on the first floor of the building. Once inside this apartment, the Subject placed a barricade against the door of a bedroom, created a hole in the wall, and dropped into the basement. After entering the basement, the Subject concealed himself in a shallow hole in the cement floor of a hallway located to the right of the bottom of an interior flight of stairs. The hole had been created some months before to provide access for plumbing work and was covered with plywood. The Subject was lying in the hole underneath the plywood.

Once the SOU entry team found the hole in the apartment wall leading to the basement, they found the interior stairway leading down to the basement. The police K9 handler called down the stairs and said that it was the Boise Police. The officer said that a police K9 was

being deployed and ordered anyone in the basement to verbally call out. The announcement was repeated for a second and, perhaps, third time. Time was given after each announcement during which any person in the basement could have made his or her presence known to the police.

Following these announcements, the K9 was sent down the stairs and told to search the basement. Once the dog reached the bottom of the stairs and turned right into the hallway, the handler could not see the dog. However, the handler heard the dog give a characteristic bark that is used to indicate that the K9 has detected the presence of a person inside the search area. Based on the fact that no one called out or screamed from the basement, the K9 handler determined that the K9 was unable to gain access to the person it had detected. The dog returned to the bottom of the stairs and the handler commanded it to search again, which it did with the same result, only this time the handler heard the sound of the dog scratching on something. When the dog returned to the bottom of the stairs after this second search, the handler ordered it to search for a third time. Again the dog barked its alert and the handler ordered the dog to lie down where it was.

After the dog's third search and alert, the entry team began to move down the stairs and into the basement. The basement stairs lead to a landing and a hallway to its right. There were two locked doors in this hallway, one of which was just opposite the landing at the bottom of the stairs. These doors provide access to a paint room. Some of the entry team members broke out the center of one of these doors, the one just opposite the bottom of the basement stairs, and searched the paint room. The hallway to the right of the landing also leads to a second hallway that provides access to tenant storage units and a crawl space underneath a portion of the building. As the entry team made its way down the stairs and into the basement, none of the officers on that team had a diagram of the basement's layout, nor had they been told that there was plywood covering a hole in the concrete floor of the basement's hallway.

Once down inside the basement, the entry team began searching the basement area. One officer noted that the plywood lying on the hallway floor did not appear to be supported by solid flooring underneath. Shortly thereafter, a male voice shouted that he had a gun, but the officers in the basement were unable to determine the direction from which the voice came. A member of the entry team conveyed this information over the police radio. In reaction to the sound of the voice, the entry team officers stationed themselves where they had cover until they were able to make certain that the hallway was safe.

The first step in clearing the hallway was to determine what was underneath the plywood. One officer began lifting the sheet of plywood nearest to the landing while three other officers provided cover. One of these officers was on the landing next to the officer lifting the plywood. The other two officers, Officer #1 and Officer #2, were in the doorway to the paint room, just opposite the landing. As the officer lifted the plywood, the Subject arose from the hole in the cement and pointed the soldering gun in the direction of the Officer #1 and Officer #2. As previously stated, the K9 handler had previously announced the presence of the police and ordered anyone in the basement to make themselves known. These announcements took place immediately before any officers went down into the basement, and just a few minutes before the plywood was lifted and the Subject rose from the hole with the soldering gun in his hand.

Officer #2 pulled the trigger once on his 9 mm MP5 firearm. It was set to release a three-round burst for every pull of the trigger. At nearly the same time, the Officer #1 pulled the trigger on his 9 mm MP5, also set to fire three-round bursts. The Subject continued pointing the soldering gun at the two officers. Both Officer #1 and Officer #2 fired again. In total, Officer #2 pulled the trigger on his MP5 three times and Officer #1 pulled the trigger on his MP5 four times. Between the two officers, seven trigger pulls were made. This should have caused the firing of 21 rounds. However, the CITF investigators found 20 spent 9 mm shell casings and one live 9 mm round in the area after the shooting. Since nine rounds were missing from the magazine of Officer #2's MP5 and twelve were missing from Officer #1's

MP5, the logical conclusion is that one of the two officers ejected a live round from his weapon at some point during the incident.

As Officer #1 and Officer #2 were firing their last three-round bursts, the Subject fell backwards onto the second sheet of plywood on the floor of the hallway. Other officers on the entry team cleared the area around the Subject of weapons, and searched him.

Ada County paramedics, who had been positioned near the building, entered the basement through the exterior door to the paint room and provided medical assistance to the Subject. Officer #1 and Officer #2 were escorted from the scene by uninvolved BPD officers and sequestered at another location until they could be contacted by CITF investigators. The Subject was transported by paramedics to a local hospital. The Subject, who had been struck multiple times by bullets and/or fragments, survived the shooting and was ultimately released from the hospital.

OMBUDSMAN'S ANALYSIS

As noted above, BPD policy (§ 1.01.02) authorizes an officer to 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.”

The evidence clearly supports the conclusion that, while still lying hidden under a sheet of plywood, the Subject shouted out that he had a gun. Both Officer #1 and Officer #2 heard this. Just moments later, both officers were confronted by the Subject as he emerged from under the plywood holding a pistol-shaped object in his hand and pointing it at them. As a result, Officer #1 and Officer #2 each concluded that they faced the imminent danger of death at the hands of the Subject.

Given the totality of the circumstances, I find that any reasonable officer with similar

training and experience would have concluded that his or her life was in immediate danger. Therefore, I find that the use of deadly force against the Subject by both Officer #1 and Officer #2 complied with the restrictions placed by BPD policy on the use of such force.

OMBUDSMAN'S POLICY FINDINGS

Officer #1

Use of deadly force (PM § 1.01.02) **EXONERATED**

Officer #2

Use of deadly force (PM § 1.01.02) **EXONERATED**



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