



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 12, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0379

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	8.300-POL-11 Use of Force - 40 mm Less Lethal Launcher 7. Officers Will Only Use a 40 mm LL Launcher When Objectively Reasonable, Necessary, and Proportional.	Not Sustained (Lawful and Proper)
# 2	8.300-POL-11 Use of Force – 40 mm Less Lethal Launcher 11. Preferred Target Areas for 40 mm LL Launchers Are:	Not Sustained (Lawful and Proper)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The Complainant alleged that the Named Employee fired a 40mm less lethal launcher indiscriminately at protesters.

SUMMARY OF INVESTIGATION:

This case arises out of the demonstrations that occurred within Seattle and across the nation in the wake of the killing of George Floyd by a Minneapolis Police Officer. These protests were unprecedented in scope and were directed at law enforcement.

While interviewing the Complainant regarding a separate OPA investigation, the Complainant stated that he had seen an SPD officer firing indiscriminately at a crowd that was in the process of dispersing at the time. He said that the employee “randomly opened fire on people” and that this constituted excessive force. This OPA investigation ensued.

OPA examined third-party video of the incident identified by the Complainant. It showed that, on June 1, 2020, the fourth full day of protests, an officer dressed in SWAT gear discharged his 40mm Less Lethal Launcher (“40mm”).

The person filming could be heard to state that the officer was “not even looking at” his target. From this footage as well as department records, OPA identified Named Employee #1 (NE#1) as the officer in the video.

On that date, a large crowd had gathered at 11th and Pine in and around Cal Anderson Park. NE#1’s Use of Force report stated that the crowd eventually grew confrontational. NE#1 was assigned to the Chemical Agent Response Team (CART) supporting the officers conducting crowd control. CART, which is part of the SWAT team, is tasked with providing less-lethal munitions support in crowd control situations. At approximately 2100 hours, the incident commander declared a riot and issued a dispersal order.



NE#1's BWV indicated that, during the initial stages of the incident, he was stationed on the police line. During this time, BWV showed a large, hostile crowd and recorded numerous instances of objects being thrown at the police line, including glass bottles that audibly shattered, objects that appeared to be rocks or chunks of concrete, and gas canisters that appeared to have been initially deployed by police. At the time, the crowd was in contact with the police line, which was established behind metal fencing. While stationed on the line, NE#1 raised his 40mm several times. When he raised his launcher, it momentarily blocked BWV making it difficult to determine what he aimed at. However, based on viewing BWV and comparing it to NE#1's use of force (UOF) statement, OPA identified five instances where NE#1 appeared to fire his 40mm.

At approximately 2110 hours, NE#1 was stationed on the police line at 11th and Pine. BWV recorded incoming projectiles from the crowd. At that time, the incident commander ordered officers to push the crowd back using blast balls and CS gas. NE#1 deployed one CS gas canister. Simultaneously, other officers on the line were deploying CS and blast balls, moving the crowd back. NE#1 raised his 40mm. In his UOF statement, NE#1 noted that he threw the CS canister and then "covered" it with his 40mm. His stated reason was that, previously, he had seen individuals in the crowd run up to off-gassing CS canisters and throw them back at police. NE#1 stated that he saw an individual run up to the canister and pick it up, and that he fired once at the individual from approximately 40 feet away. NE#1 could not tell if he hit the individual, but the individual dropped the canister and ran back.

Due to crowd noise, OPA could not verify on BWV that NE#1 did fire based on the audio. However, shortly after he went up to the line with the 40mm raised, he could be seen to retreat and state "I'm out" while lowering his weapon. This is consistent with firing the 40mm, which carries a single round before it must be reloaded.

The second deployment occurred approximately five minutes later while NE#1 was still stationed on the Pine/11th line. The crowd, which had been moved back by the earlier deployment of CS and blast balls, was returning. NE#1's UOF report stated that he saw an individual run forward from the crowd with something in his hand and his arm "cocked back" to throw it. NE#1 stated that he fired his 40mm at the individual but could not tell if it hit. The individual threw the object at the line and ran back. BWV confirmed that NE#1 fired his 40mm, but due to the camera being obscured, the target was not visible.

The order was given to push the crowd west on Pine street. Shortly thereafter, NE#1 fired his 40mm a third time. In his UOF report, NE#1 stated that, as officers threw CS/OC canisters and blast balls to begin the push, an individual in the crowd attempted to pick an off-gassing canister up and throw it back at the officers. NE#1 fired his 40mm at the individual and stated that it appeared to hit, because the individual dropped the canister and ran. The BWV showed that NE#1, while standing on the left of the line, raised and fired his 40mm launcher, apparently toward a group of protesters. OPA was unable to determine with specificity which individual NE#1 targeted as the camera view was partially blocked, and the resolution was insufficient to differentiate between individuals.

NE#1 then moved towards the crowd. Bicycle officers rode forward to establish a mobile line, and NE#1 deployed an OC canister to keep the crowd from forming around the bicycle officers. In his UOF, NE#1 stated that he saw an individual move forward to throw something at the bicycle officers and fired his 40mm at that individual. He stated that he did not hit the individual, who was able to throw the object and then retreat. BWV confirmed that NE#1 moved forward with the bike officers, raised his 40mm, and appeared to fire once. As before, the positioning of the 40mm prevented OPA from clearly seeing the target.



BWV showed that NE#1 and other SWAT officers continued to move up in support of the mobile fence line formed by bicycle officers. There were numerous deployments of CS and OC canisters as well as blast balls, causing the crowd to fall back. NE#1's BWV contained audible sounds of shattering glass, and NE#1's UOF documented that he dodged multiple projectiles. During this time, NE#1 stated that he observed another individual attempt to throw an object at the bicycle line, which was moving toward the Broadway and Pine intersection. NE#1 indicated that he fell in behind the line and engaged the individual with his 40mm. He stated that he appeared to miss the individual, who threw the object and then ran back. Again, BWV showed NE#1 aiming and firing his 40mm but did not show the target. NE#1 reported, and BWV confirmed, that this was his final 40mm use that night.

OPA interviewed NE#1 about his use of the 40mm. NE#1 stated that he had been with the Department for 26 years and with SWAT for 10. He stated that he was trained on the 40mm, and OPA confirmed that he last received training on April 26, 2020. That training covered the capabilities and correct use of the 40mm. He said that on June 1, the night of the incident, he was using the foam-tipped "blue-nose" impact rounds, which are designed to cause pain and deter individuals from taking a hostile action without using more severe force. NE#1 stated that he has discretion to use the 40mm in crowd control situations and that, if he sees a threat to life-safety or imminent bodily injury, he may fire his 40mm without additional authorization.

NE#1 stated that, on the night of the incident, he fired his 40mm five times. He stated that each deployment was targeted at the specific person referenced in his UOF report, and that these individuals were throwing or attempting to throw projectiles at the police line with the intent to cause injury. NE#1 stated that firing his 40mm was reasonable given the dangerous situation and the fact that the individuals he targeted were throwing objects at the line when he did so. He said firing the 40mm was necessary to deter the conduct posing a danger to himself and other officers. He stated that it was proportional to the threat posed by the individuals, as well as the general hostility of the crowd.

In response to the specific allegation that NE#1 fired his 40mm indiscriminately, NE#1 stated that he fired a single round at each individual targeted. He noted that the individual in the third-party video appeared to be looking at him (NE#1), not the target he was shooting at, and so did not appear to be in a position to evaluate the force.

Finally, NE#1 noted that he did not attempt to recover the 40mm rounds or spent cartridges as set forth in policy. NE#1 stated that, given the situation (a moving engagement with hostile individuals in a crowd) and the amount of debris present in the roadway, it was not practical to recover his 40mm rounds. Similarly, NE#1 stated that, given the distance at which he was engaging individuals with the 40mm, it was not practical to render aid. He noted that in each case, he observed the individuals run back into the crowd without assistance or any apparent injury requiring immediate medical treatment.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.300-POL-11 Use of Force - 40 mm Less Lethal Launcher 7. Officers Will Only Use a 40 mm LL Launcher When Objectively Reasonable, Necessary, and Proportional.

SPD Policy 8.300-POL-11(4) states that officers may use a 40mm "when a subject poses an immediate threat of harm to any person" or to take into custody a person whose level of resistance is "likely to cause injury to the officer" or "if hands-on control tactics or other force options would be likely to cause greater injury to the subject than the use



of the 40 mm Less Lethal Impact Munition (LLIM).” (*Id.*) The decision to use the launcher must be reasonable, necessary, and proportionate under the circumstances of the incident. (*Id.*)

OPA was unable to conclusively reconstruct each of NE#1’s uses of the 40mm. This is because, when NE#1 fired the launcher, it obscured the camera of his BWV. Consequently, OPA cannot state with absolute certainty that, each time NE#1 fired, he fired at an individual actively throwing a dangerous object at the police line. That being said, OPA finds that the totality of the evidence yields the conclusion that he did not indiscriminately deploy his 40mm during this demonstration.

In reaching this determination, OPA notes that the BWV is inconsistent with NE#1 firing indiscriminately into the crowd. Each time NE#1 fired his weapon, BWV showed that he raised it, aimed, and fired. He did not repeatedly fire the 40mm in quick succession as would be expected if he were peppering groups of protesters. Moreover, on multiple occasions, BWV showed NE#1 raise his weapon without firing.

In addition, OPA finds it significant that, beside the account of the anonymous Complainant, there is no evidence contradicting the recitation of the force set forth in NE#1’s UOF report. NE#1 fired his single shot 40mm five times during this incident: three times at 11th and Pine, and twice while moving west on Pine toward Broadway. At most, the Complainant could have observed two of these deployments—the ones NE#1 made supporting the bike push west on Pine—given that he was standing inside Cal Anderson Park. However, based on BWV and third-party video, the Complainant was focused on NE#1, not the target he fired at some 40-100 feet away, and therefore OPA does not see how he could have meaningfully assessed whether NE#1 was targeting a protester throwing objects, or some other person. Ultimately, there is no video, including that provided by the Complainant, which indicates that NE#1’s force was indiscriminate and/or inconsistent with policy.

Given the above, OPA concludes that, when applying a preponderance of the evidence standard, NE#1 did not use excessive force when he utilized his 40mm. Again, in the absence of any evidence contradicting NE#1’s account in his report and based on the BWV that is not inconsistent with the report, OPA credits his assertion that it was reasonable, necessary, and proportional under the circumstances. Indeed, if the circumstances were as NE#1’s relayed them, the use of the 40mm – a targeted less-lethal tool purposed for exactly this type of situation – was appropriate and consistent with policy.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #2

8.300-POL-11 Use of Force – 40 mm Less Lethal Launcher 11. Preferred Target Areas for 40 mm LL Launchers Are:

SPD Policy 8.300-POL-11(11) lists the preferred targets for the 40 mm LL Launcher: buttocks, thigh area, calf, and large muscle groups. SPD Policy 8.300-POL-11(11). The policy goes on to state that officers should collect the components of the expended 40 mm cartridge for submission as evidence. (*Id.*)

In evaluating this allegation, OPA notes that, while the Complainant contended that NE#1 used his 40mm indiscriminately, the Complainant did not specifically allege that NE#1 targeted improper regions of individuals’



bodies. NE#1 denied that he did so and explained that, in each of his five deployments, he targeted the subjects' legs. Again, similar to OPA's conclusion in Allegation #1, there is no evidence contradicting NE#1's account.

In addition, OPA does not believe that NE#1 violated policy but not collecting the expended 40mm cartridges. OPA concurs that this would have been impracticable and an unrealistic expectation under the circumstances.

For the above reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**