



## CLOSED CASE SUMMARY

ISSUED DATE: NOVEMBER 5, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0606

### Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 – Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Unfounded)
# 2	8.200 – Using Force 2. Use of Force: When Prohibited	Sustained
# 3	5.001 – Standards and Duties 6. Employees May Use Discretion	Sustained
# 4	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Sustained

**Imposed Discipline**

Suspension Without Pay – 7 Days

***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:

It was alleged that Named Employee may have violated the law and SPD policy when he rolled his bicycle over the head of the Subject. It was further alleged that the Named Employee’s decision-making may have been unprofessional and constituted an abuse of his discretion.

### SUMMARY OF INVESTIGATION:

#### **A. Incidents of September 23, 2021**

On September 23, 2021, there was a demonstration in Capitol Hill. A number of SPD officers were assigned to work that evening, including Named Employee #1 (NE#1). At the time, NE#1 was a patrol officer; however, he deployed with a bicycle during the demonstration. NE#1 was bicycle trained.

As the evening progressed, the demonstration was declared an unlawful assembly. SPD officers were instructed to disperse the crowd. NE#1 was involved in the dispersal and, during that time, both of the wheels on his bicycle became flat. As NE#1 could no longer ride his bicycle, he walked with it for the remainder of his time at the demonstration. At one point, NE#1 was involved with other bicycle officers in actively moving the crowd back. As he walked forward, he approached the Subject who was lying on the ground. NE#1 stepped over the Subject and rolled both wheels of his bicycle over the Subject’s head, which was protected by a hard hat.



Video of this circulated on social media and, after becoming aware of the incident, the Department's Force Investigation Team (FIT) commenced an investigation. OPA contemporaneously commenced an administrative investigation and, later, referred this incident for criminal investigation.

The video posted on social media showed NE#1 walking forward quickly with his bicycle on his right side. He was pushing the bicycle as he moved. The Subject was lying with his feet and ankles on the sidewalk and the remainder of his body across the road. His head, with a white helmet on it, was facing the camera. NE#1 approached the Subject, and the video showed that he rolled the front wheel of the bicycle over the Subject's head. NE#1 did not appear to make any attempt to lift the bicycle to move it over the Subject or to move around the Subject. At the time, there appeared to be two other bicycle officers several feet to NE#1's left. No officers could be seen to NE#1's immediate right at the time he first made contact with the Subject. The first contact made a visible impact with the Subject head, causing the head to move down and to the side. NE#1 then rolled the back wheel over the Subject's head. This appeared to push the head down and caused the helmet to partly come off. NE#1 then formed a mobile fence line with other officers and moved and lifted his bicycle up and forward to push a demonstrator back.

There was additional video also posted on social media that showed different angles of the incident. The video described above was the clearest view. One of the other videos, which was longer, provided some additional context of what occurred prior to NE#1 approaching the Subject. It indicated that, approximately two seconds before NE#1 reached him, the Subject laid down in the street and in the direct path of the officers.

## **B. Criminal Investigation and Charging Decline**

The criminal investigation into this matter was conducted by the King County Sheriff's Office (KCSO). The assigned KCSO Detective reviewed video, including Twitter video and Body Worn Video (BWV). The Detective attempted to interview the Subject and NE#1. Both declined, with NE#1 invoking his right under the Fifth Amendment. For his part, the Subject stated the following: "I have decided not to interview. I have no interest in criminal charges being pressed on anyone. I do not recognize the legitimacy of any U.S. court or police department. I want a more stable and peaceful world, not revenge."

The Detective assessed the potential crimes at issue, deeming assault in the fourth degree as being the only one applicable to this case. In reaching this finding, the Detective placed significant weight on the fact that the Subject did not suffer any "bodily harm" from NE#1's conduct, citing to both the photographs of the Subject from that evening and the Subject's subsequent statement made on social media. With regard to assault in the fourth degree, the Detective felt that he could not evaluate it on its merits based on the video as he did not have NE#1's interview.

The Detective reasoned that the officers, including NE#1, had a legal right to move the Subject out of the street and were permitted to use force, if appropriate and necessary, to do so. The Detective further opined that, based on his review of the video, NE#1 purposefully stepped over and rolled his bike over the Subject. The Detective said that, even if this was the case, rolling a bicycle tire over someone would not necessarily be expected to cause someone pain. He distinguished this from kicking someone on the ground or a forceful downward push of the bicycle. The Detective noted that NE#1 might have several defenses against a conclusion that he engaged in assault. The Detective explained that the Subject laid in front of NE#1 and directly in NE#1's path two seconds prior to contact being made and that there may have been a number of reasons why NE#1 felt obligated to continue forward in that direction and in line with the group of officers he was with. The Detective also believed that NE#1 could make the argument that he was not focused on the Subject and was, instead, looking beyond him and to where he was moving. The Detective lastly



speculated that, due to the Subject's frequent involvement in the protests and other situations in which he had purposefully obstructed officers for the purpose of being arrested, that the Subject may have expected or sought to be arrested. The Detective reasoned that, as such, NE#1 could argue in his defense that the contact that occurred may not have necessarily been "unwanted," as would be required to prove assault. While recognizing that NE#1's decision-making was problematic, the Detective concluded that there was not probable cause to find that NE#1 engaged in an assault.

While no probable cause was found, the case was referred to the City Attorney's Office (CAO) for a charging decision consistent with established processes. After reviewing the case for nearly two months, the CAO declined to prosecute. In reaching this decision, the CAO cited the Subject's failure to cooperate with the prosecution. The CAO did not provide any further reasoning concerning why they felt that they could not proceed without the Subject given the existence of the video.

### **C. Interviews of Named Employee #1**

The same day that the CAO declined to file charges, NE#1 was interviewed by FIT. He was subsequently interviewed by OPA on April 30, 2021.

NE#1 provided substantially similar testimony to both FIT and OPA. He recalled that he was assigned to work at a demonstration that occurred after a Kentucky grand jury issued its findings into the fatal shooting of Breonna Taylor by police officers. He said that he was aware that officers in Kentucky had been shot during protests that had occurred there earlier that day. He was told by a supervisor that this occurred while the officers had been pushing the crowd back and he said that he was particularly on guard because of this. NE#1 told OPA that the officers followed the demonstration as it proceeded. There was intelligence provided to the officers that the demonstrators could turn and attack the following police vehicles as had occurred in another state. The plan was for the police bicycles to remain back and move in if needed. Eventually, the demonstrators began moving items into the roadway. Officers, including NE#1, formed a line and began proceeding towards the crowd. Some people within the crowd threw rocks at the officers and continued to move items into the street.

He stated that the protest became more unruly as it went on and, eventually, a Captain gave the order to disperse the crowd. Officers began to do so, and the crowd moved back towards Cal Anderson Park and the East Precinct. While there, a demonstrator struck an officer in the back of the head with a baseball bat. The crowd continued to be unruly, with one demonstrator throwing what appeared to be a firework at officers who were in the precinct sally port. The bicycle officers, including NE#1, emerged from the sally port, and again tried to move the crowd. At that time, NE#1 rode into a hole on the road and noticed that his rear tire popped. He determined that there was no way to get it fixed and did not want to leave the other officers. He tried to keep riding his bicycle until he noticed that the front tire was also flat. He then decided to begin walking with his bicycle. Again, he did not feel that it was an option for him to walk away at that time. He lost his squad but hurried forward and caught up with another group of officers. Together, they began to move forward in a line to push the crowd back. NE#1 moved forward while wheeling his bicycle as fast as he could in order to keep up.

At that time, NE#1 noticed the Subject lay down in the street. When this occurred, NE#1 thought that he needed to stay on his line and could not move as it might confuse the officers following behind him. NE#1 believed that he could step over the Subject and lift his bicycle while doing so. He proceeded forward and felt that he did, in fact, lift the bicycle over the Subject. He had no further interaction with the Subject that evening.



He ultimately returned to the South Precinct where he got a call from a supervisor. That supervisor asked him if he had run his bicycle over anyone. NE#1 recalled stepping over the Subject but denied running over anyone. The supervisor told him to wait at the precinct until he was contacted by another supervisor. That second supervisor told NE#1 that there was going to be a FIT investigation into this incident. He went to the FIT office where he watched the Twitter video. He said that, in his opinion, the video looked “horrible.”

OPA asked NE#1 about what his intent was when he stepped over the Subject. NE#1 affirmed that he meant to lift the bicycle over the Subject. NE#1 stated that the bicycle was heavy, but he confirmed that he was strong enough to lift it. He said, however, that a bicycle with two flat tires was hard to maneuver. NE#1 stated that, based on his training, he did not feel that he could move to either side and around the Subject. He explained that, had he deviated from his training, he could have confused the other officers behind him, and that demonstration management often proceeded most smoothly when training was complied with. Also informing his decision to not go around the Subject was his belief that he could just step over him with the bicycle.

When shown the Twitter video, NE#1 contended that he did not intend to make contact to the Subject with the bicycle. He said that, at the time he was stepping over the Subject, he was looking at other demonstrators who were approaching him. He recalled that, at this moment, he was: “moving and repositioning to then grab [his] bicycle by the back seat post, move it around in front of [his body] and protect [himself].” When asked about the Twitter video showing significant clearance on his right side, he said that this was not what he remembered perceiving at the time.

#### **ANALYSIS AND CONCLUSIONS:**

##### **Named Employee #1 - Allegation #1**

##### ***Allegation #1 – 5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy***

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. It was alleged that NE#1’s conduct may have constituted a criminal assault.

In assessing whether NE#1 committed a crime, the KCSO Detective determined that there was insufficient probable cause. In making this decision, he relied on three main factors: (1) the difficulty of proving that NE#1 had the intent to harm the subject particularly given his potential alternate explanations; (2) the fact that NE#1 had the legal authority to use some force at the time; and (3) that the Subject did not consider himself a victim and did not want NE#1 or anyone else to be prosecuted.

Of these three, OPA places less significance on the latter two than the Detective. First, that NE#1 could have used force to move the Subject would not provide any justification for striking him purposefully with the bicycle. Second, that the Subject did not want to cooperate and was not seeking a prosecution does not, by itself, alter the determination of whether or not NE#1 engaged in criminality. However, with regard to the first factor, OPA agrees that if criminal intent could not be established, it would prevent criminal charges from being brought against NE#1.

In evaluating NE#1’s intent, the Detective noted that he did not have the benefit of speaking with NE#1, but the Detective opined on what some of NE#1’s various defenses could be surrounding his actions. NE#1 made many of those same arguments at his OPA interview.



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In this case, where both the Detective and the CAO determined that there was an insufficient basis to criminally charge NE#1, OPA believes that, while not prohibited, it is limited from reaching a contrary decision. OPA finds the decision of the CAO to be particularly significant given that it assessed the same video as viewed by OPA and it did not feel that it could file charges. Given this, and based on the totality of the evidence, OPA ultimately defers to the determinations of the Detective and the CAO and recommends that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

**Named Employee #1 - Allegation #2**

**8.200 – Using Force 2. Use of Force: When Prohibited**

SPD Policy 8.200-POL-2 governs when force is prohibited.

NE#1 told OPA that he intended to proceed on his same route after seeing the Subject lay on the ground and that he intended to step over the Subject and lift his bicycle while doing so. In addition, when stepping over the Subject, he intended to shift his bicycle to be in a position to allow him to make contact with the demonstrators who were approaching him. To this end, the video was clear that, immediately after stepping over the Subject, NE#1 was confronted by a demonstrator and swung his bicycle forward to move that individual back. While admitting that the Twitter video looked “horrible,” NE#1 denied that he intended to make any contact to the Subject with the bicycle and that this was completely inadvertent.

OPA believes that the decision to step over the Subject, rather than to go around him, was a bad one. The video indicates – despite NE#1’s recollection – that there was more than enough room for NE#1 to have stepped to one side or the other to make sure that he avoided the Subject. Moreover, while NE#1 denied that he intended to make contact with the Subject, the video is compelling evidence to the contrary. Again, when looking at the video, there is no indication that he ever lifted the bicycle while walking over the Subject. This is compared to immediately afterward when he moved past the Subject and lifted up the bicycle to push another demonstrator back. Given this, OPA finds that, as determined by the KSCO Detective, the contact with the Subject was intentional.

OPA does not need to establish criminal intent on NE#1’s part to find that his force – rolling over the Subject with the wheels of his bicycle – was impermissible. OPA only needs to show that it was an intentional act on NE#1’s part, regardless of whether he meant to cause harm to the Subject. Moreover, OPA does not see any credible assertion that rolling over a prone person lying on the ground with the wheels of a bicycle – flat or not – is appropriate force under SPD policy. There is no legitimate law enforcement need to use such force. It did not serve to move the Subject and the Subject posed no appreciable risk to NE#1 at the time. Indeed, NE#1 did not make either argument.

Instead, NE#1 simply claims that it was an unintentional act. OPA does not believe that NE#1’s recollection of this event is the result of dishonesty on his part. For reasons unknown to OPA, NE#1 clearly feels that he did not intentionally strike the Complainant. However, such a belief, even if convincingly articulated and strongly held by NE#1, cannot serve to overcome the clear video evidence in this case.

When assessing the video, OPA is left with no possible conclusion other than that NE#1 intentionally rolled his bicycle over the head of the Subject. This was force without any legal authority underpinning it and, in this respect, it was improper and prohibited under SPD policy. Accordingly, OPA recommends that this allegation be Sustained.



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Recommended Finding: **Sustained**

**Named Employee #1 - Allegation #3**

***5.001 – Standards and Duties 6. Employees May Use Discretion***

As indicated in SPD Policy 5.001-POL-6, “[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment.” This policy further states that “[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed.” (SPD Policy 5.001-POL-6.)

As discussed more fully above, OPA finds that NE#1’s decision to step over the prone Subject with his bicycle rather than stepping around him led to the force that was used and to an incident that was significantly damaging for the Department. The video showed that NE#1 had significant room to his right and that he could have easily stepped around the Subject and moved back onto his line. While OPA appreciates NE#1’s concern that he wanted to keep the line together and did not want to confuse the officers behind him, avoiding potential harm to a person on the street in front of him strongly outweighed that interest.

Given that OPA finds that NE#1’s decision-making here was so deficient as to violate policy, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

**Named Employee #1 - Allegation #4**

***5.001 – Standards and Duties 10. Employees Shall Strive to be Professional***

SPD Policy 5.001-POL-10 requires that SPD employees “strive to be professional at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (SPD Policy 5.001-POL-10.) The policy further states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*) Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

In OPA’s estimation, this incident was extremely harmful for the Department at a time when its legitimacy was being questioned by many in the community. The video of NE#1 rolling his bicycle over the Subject’s head added to and amplified this criticism of the Department. Given the public outcry after this incident, NE#1’s actions clearly diminished public trust and confidence in him and in SPD.

As such, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**