



## CLOSED CASE SUMMARY

ISSUED DATE: MAY 28, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0732

### Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	8.300 - Use of Force Tools POL –5 Use of Force – Oleoresin Capsicum (OC) Spray 3. Officers Will Use OC Spray...Only When...	Not Sustained (Lawful and Proper)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	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 Complainants alleged that the Named Employee used excessive force on the Subject.

### SUMMARY OF INVESTIGATION:

On November 27, 2020, officers, including Named Employee #1 (NE#1), were assigned to monitor a demonstration. The demonstrators began to interrupt the flow of traffic in the vicinity of Olive Way and Denny Way. At that point, an SPD supervisor issued a dispersal order, directing the demonstrators to get out of the public roadway. Officers made the decision to place one demonstrator who had refused to leave the roadway under arrest. As the officers attempted to do so, NE#1 exited his patrol vehicle and proceeded towards them. At the same time, a man – who appeared to be older and was using a cane – was proceeding towards where the arrest was occurring. The man – who is referred to here as the “Subject” – appeared to be older, was approximately 6’4” and 220 pounds, and was holding a cane in his hand.

The Subject was given multiple orders by another officer to stay back and did not do so. At one point, another officer placed his hand on the Subject to guide the Subject back. The Subject responded by yelling: “Don’t touch me.” NE#1 intercepted the Subject and took hold of his arm. NE#1 slowly escorted the Subject away from where the arrest was occurring and over to the sidewalk. NE#1 turned his back towards the Subject while the Subject yelled at him. NE#1 placed his hand on the Subject’s chest, holding the Subject back. NE#1 then began to proceed away from the Subject and back into the roadway. At that time, the Subject lifted his cane and struck NE#1 in the back with it. After being struck with the cane, NE#1 turned around, took a step towards the Subject, and deployed one burst of OC spray in the Subject’s face. The Subject bent over and covered his face with his hands. NE#1 then took hold of the Subject’s body and brought him down to the ground using a controlled takedown. The Subject was placed under arrest for assault.



Shortly after his arrest, the Subject was interviewed by an SPD sergeant concerning the force used. The Subject stated that he had no recollection of the incident because of previously diagnosed PTSD. He also did not recall whether he had a cane with him at the time of the incident.

OPA later received complaints from two Complainants, both asserting that NE#1 used excessive force. OPA attempted to contact both. Complainant #1 responded to OPA and said that they did not directly witness the incident but viewed what occurred on social media. This prompted Complainant #1 to initiate an OPA complaint. Complainant #2 did not respond to OPA.

OPA's investigation included reviewing Body Worn Video (BWV) – which fully captured the incident, as well as video posted on Twitter. OPA also reviewed the arrest documentation and use of force reports. Lastly, OPA contacted both Complainants (as discussed above) and interviewed NE#1.

NE#1 stated that, prior to directing the Subject back onto the sidewalk, he and other officers had requested that the Subject do so, and he did not voluntarily comply. As such, NE#1 physically intercepted him and walked him away. He said that, at this point, the Subject began yelling at him. He recalled thanking the Subject for his cooperation and turning away. He then felt something strike him in the back. When he turned around, he determined that the Subject had hit him with a cane and that the cane was still in the Subject's hand. As the Subject was still holding the cane and given that the Subject had just assaulted him, NE#1 utilized OC spray to prevent further assaultive behavior. He said that he took a step towards the Subject prior to deploying because his canister had a wide spray nozzle, and he did not want anyone else to be affected by the OC spray. He then took the Subject down to the ground and placed him under arrest. NE#1 opined that the force he used was consistent with policy.

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

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

##### ***8.300 - Use of Force Tools POL –5 Use of Force – Oleoresin Capsicum (OC) Spray 3. Officers Will Use OC Spray...Only When...***

SPD Policy 8.300-POL-5 governs the use of OC spray. The policy states that: "Officers will use OC spray, including in crowd management events, only when such force is objectively reasonable, necessary, and proportional." (SPD Policy 8.300-POL-5(3).)

From OPA's review of the BWV and assessment of the circumstances of this case, OPA finds that NE#1's use of OC spray was reasonable, necessary, and proportional, and, thus, consistent with policy.

It is undisputed that the Subject struck NE#1 with a cane. Moreover, it is clear that, in the aftermath of doing so and when NE#1 turned around to face the Subject, the Subject still held the cane in his hand. Given that the Subject had just committed an assault, NE#1 had the legal right to take him into custody. OPA finds that it was reasonable for NE#1 to have been concerned that the Subject would use the cane against to strike him and, accordingly, to utilize OC spray to prevent the Subject from doing so.

The use of OC spray was also necessary under the circumstances. Again, the Subject had already used the cane to assault NE#1 and may have done so again if given the opportunity. The use of OC spray to prevent this and to temporarily incapacitate the Subject was the best and least invasive force option available to NE#1 at the time.



Lastly, OPA finds that the OC spray deployment was proportional to the threat posed by the Subject, both given his earlier assault and because he continued to hold the cane. In reaching this finding, OPA notes that, while the Subject appeared to be older, he was of fairly large stature and had indicated his willingness to cause harm to NE#1.

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

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

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

**8.200 - Using Force 1. Use of Force: When Authorized**

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Whether force is reasonable depends “on the totality of the circumstances” known to the officers at the time of the force and must be balanced against “the rights of the subject, in light of the circumstances surrounding the event.” (SPD Policy 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

OPA further finds that the force used to take the Subject down to the ground and to place him under arrest was also consistent with policy. As NE#1 described, the force consisted of a controlled takedown. The Subject was not slammed to the ground or subjected to any other force that would have caused him serious injury.

Again, given the fact that the Subject had just struck NE#1 with a cane and committed an assault, NE#1 was entitled to use force to quickly take the Subject down to the ground to place him under arrest. The takedown used was reasonable, necessary, and proportional under the circumstances of this case.

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

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