



CLOSED CASE SUMMARY

ISSUED DATE: MAY 31, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0741

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Lawful and Proper)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Management Action)

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 she suffered an injury from Named Employee #1’s use of an LRAD. She contended that Named Employee #1’s use of this device constituted an abuse of his discretion and excessive force.

SUMMARY OF INVESTIGATION:

The Complainant filed a complaint with OPA in which she contended that Named Employee #1 (NE#1) misused a Long-Range Acoustic Device (LRAD) on her and other demonstrators. She said that, at the time, she and other demonstrators were peacefully gathering at a vigil in the vicinity of East Olive Way and East Denny Way. She said that approximately 10 patrol vehicles suddenly “rolled up” and that NE#1 unnecessarily used the LRAD on peaceful protestors. The Complainant asserted that she suffered a torn eardrum as a result of NE#1’s conduct and opined that the LRAD usage constituted excessive force. She further asserted that the use of the LRAD was an abuse of discretion on NE#1’s part. This investigation ensued.

As part of its investigation, OPA reviewed documentation generated by officers and Body Worn Video (BWV) that captured the use of the LRAD. NE#1 wrote that there were approximately 75-100 demonstrators gathered in the vicinity along with several accompanying vehicles. At one point, demonstrators surrounded the police vehicle containing the LRAD and in which NE#1 and two other SPD employees were seated. These demonstrators prevented the police vehicle from leaving the area. NE#1 issued two dispersal orders using the LRAD and went over the radio to call for backing officers. Other officers came to the scene and the crowd dispersed from around the police vehicle.

The BWV was consistent with the scene described by NE#1 in his report. The BWV showed demonstrators surrounding the police vehicle and the dispersal orders being issued. The BWV did not depict any demonstrators complaining of pain or disclosing injuries to the officers in the aftermath of the usage of the LRAD.

OPA further interviewed NE#1 and another supervisor, Witness Officer #1 (WO#1).



WO#1 told OPA that SPD purchased the LRAD in response to claims that the Department did not have the means to adequately communicate with demonstrators during the past summer's protests. The LRAD was selected because the PA systems ordinarily used by SPD were not effective because they were not loud enough, and the sound did not travel sufficiently. WO#1 said that the LRAD had an "alert" function, which is a loud noise that was purposed to cause discomfort to those in the near vicinity. However, this function was purposefully disabled in the LRAD that SPD purchased and could not be used. As such, the LRAD could not be weaponized. WO#1 explained that the LRAD had three sound settings: green, yellow, and red. For outdoor events, yellow was the preferred setting. WO#1 stated that he was not aware of the LRAD damaging the hearing of individuals when not used in the "alert" function.

NE#1 recalled the demonstration in question and using the LRAD. He said that he was in the front passenger seat of the police vehicle equipped with the LRAD. He stated that he directed that several dispersal orders be given to demonstrators who were surrounding the police vehicle and that the LRAD was used to do so.

NE#1 stated that the LRAD was obtained to make it easier to provide clear orders that were of a sufficient volume so that all demonstrators would be on notice of what was required. NE#1, like WO#1, pointed to shortcomings of SPD's normal PA systems. He said that, prior to purchasing the LRAD, SPD tried mounting a PA system on a patrol vehicle; however, this was difficult to transport and did not really work. As such, the LRAD was obtained.

NE#1 described that the version of the LRAD used by SPD was functionally a louder and more effective PA system. The LRAD dispersed sound in an approximately 30-foot cone. In addition, the LRAD was positioned on top of a vehicle and tilted upwards so that the sound was dispersed over the heads of anyone who might be standing in the vicinity. NE#1 explained that, at its highest level, the sound level emanating from the LRAD was 138 decibels. NE#1 said that, the further the sound traveled, the lower it became, with a reduction of six decibels for every doubling of distance. NE#1 indicated, as a comparison, that the decibel level from a patrol vehicle would be higher than the decibel level of an LRAD at six meters away. NE#1 noted that, while the LRAD could be weaponized to issue an "alert," SPD's LRAD was not programmed to do so and this function had been disabled.

NE#1 asserted that his use of the LRAD was appropriate under the circumstances and was not an abuse of his discretion. He explained that not using the LRAD may have necessitated the application of other more invasive force options to disperse the crowd. He further stated that it was not used as a force tool, especially since it was only activated at the yellow level.

NE#1 additionally told OPA that, given the newness of the LRAD, SPD did not yet have policy or training governing its usage. NE#1 said that such a policy and training was currently in development. NE#1 further explained that the current guiding documents for LRAD usage was its operating manual and other research performed by NE#1 and others.

OPA attempted to interview the Complainant but she did not respond to OPA. The Complainant additionally provided no evidence of where she was located when she was affected by the LRAD or concerning the injuries that she purportedly suffered. Such records would be relevant to establish the veracity of the Complainant's claims, particularly given the information provided by NE#1 regarding the decibel level emitted by the LRAD, how it was positioned, and the manner in which it disperses sound, all of which counter the assertion that it could cause a torn eardrum.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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.)

The Complainant asserted that NE#1 abused his discretion when he used the LRAD during this incident. For several reasons, OPA disagrees.

First, the Complainant’s account of what occurred is inconsistent with the facts. For example, the Complainant stated that the demonstrators were peacefully attending a vigil when the LRAD was used to disperse them without reason. However, the Complainant neglected to state, as the video confirms, that protestors had surrounded NE#1’s vehicle at the time the dispersal order was given. In some respects, the Complainant’s complaint would be more credible had she contended that it was unreasonable to issue the LRAD dispersal order when protestors were so close to the vehicle, but that is not what she said here.

Second, given the actual circumstances of this case – specifically, demonstrators surrounding the vehicle and preventing it from being able to move, it was appropriate to use the LRAD to issue the dispersal orders. This was the entire purpose of the LRAD – to provide clear and loud notice of the requirement to disperse.

Third, even had the Complainant been one of the demonstrators in the immediate vicinity of the vehicle, the cone of sound issued by the LRAD would have gone over her head. As such, even were the LRAD loud, it almost certainly would not have been of the level that could cause significant injury from two brief dispersal orders. To this point, the loudest level of the LRAD would have been 138 decibels (using the red setting); however, SPD used the yellow setting, which would have been lower. As NE#1 indicated, this sound would have been akin to emergency sirens. Again, while loud, this would likely not cause a torn eardrum in short durations. In any event, the Complainant did not provide any evidence that she did, in fact, suffer this injury.

Fourth and last, to the extent the Complainant’s filing of this complaint was purposed to prompt OPA to recommend that the LRAD be taken out of use, OPA declines to do so. The LRAD was put in place to respond to lessons learned from last summer’s protests and, specifically, SPD’s inability to communicate clearly with large crowds. The unique functionality of the LRAD allows the Department to do so effectively. Moreover, OPA is aware of no evidence – and this case is not convincing – that a non-weaponized LRAD can cause injuries to community members when used intermittently and at the yellow setting. To the contrary, the research cited to by NE#1 stands for the opposite proposition.

For all of 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

In assessing this allegation, OPA tends to agree with NE#1 that the use of the LRAD, in a non-weaponized state, does not constitute a use of force, let alone excessive force.

However, OPA takes this opportunity to issue a Management Action Recommendation to encourage SPD to promptly draft a policy surrounding the use of the LRAD. The policy should specifically preclude SPD from seeking to weaponize the LRAD, should provide for the appropriate use of the LRAD (when, how, where, under what circumstances), and should discuss when each level (green, yellow, red) should be used. Lastly, SPD should develop training for any officer who will be assigned to use the LRAD. OPA recommends that the Department work with the Accountability Entities to ensure that the policy and training addresses community concerns and reflects best practices and standards of constitutional policing.

Recommended Finding: **Not Sustained (Management Action)**