



CLOSED CASE SUMMARY

ISSUED DATE: AUGUST 16, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2019OPA-0880

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	Allegation Removed
# 2	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force.	Sustained

Imposed Discipline

Written Reprimand

Named Employee #2

Allegation(s):		Director's Findings
# 1	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Lawful and Proper)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)

Named Employee #3

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)

Named Employee #4

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)

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 #1 abused his discretion and failed to de-escalate, which resulted in force being used on Subject #1. It was further alleged that Named Employee #2 used excessive force to arrest Subject #2 and that there was insufficient probable cause to arrest Subject #2 and Subject #3. Lastly, Subject #3 alleged that Named Employees #3 and #4 improperly groped a woman's breast during a demonstration.



SUMMARY OF INVESTIGATION:

This case stems from arrests and uses of force during a demonstration that occurred in Seattle on December 7, 2019. The demonstration was titled “MAGA March” and included protestors and counter protestors from both the right and left political ideologies. During much of the demonstration, as with other similar demonstrations that occurred in Seattle and across the country during this time period, SPD tried to separate and keep distance between the two group and to prevent violence.

The first incident discussed involved the arrest of Subject #1, which occurred after Named Employee #1 (NE#1) rode into him while on a bike. OPA evaluated whether NE#1’s actions unnecessarily escalated that incident, increasing the likelihood that force would be used and causing the need to arrest Subject #1. OPA further considered whether this constituted an abuse of NE#1’s law enforcement discretion.

The second incident surrounded the arrests of Subject #2 and Subject #3, which multiple Complainants alleged were unlawful. This incident also involved the force used by Named Employee #2 (NE#2) to take Subject #2 into custody, which was claimed to be excessive.

The third incident concerned an allegation by Subject #3 that Named Employee #3 (NE#3) and Named Employee #4 (NE#4) grabbed a female demonstrator’s breasts.

All of the above incidents were recorded, in part, by community members and those videos were reviewed by OPA as part of this investigation. In addition, the entirety of these incidents was captured on the involved and witness officers’ Body Worn Video (BWV).

ANALYSIS AND CONCLUSIONS:

Named Employee #1 – Allegation #1

5.001 - Standards and Duties 6. Employees May Use Discretion

As discussed more fully below in the context of Allegation #2, OPA finds that Named Employee #1 (NE#1) violated SPD’s de-escalation policy during this incident. Given that Allegation #1 covers this same conduct and decision-making, OPA believes that is duplicative and, as such, recommends that it be removed.

Recommended Finding: **Allegation Removed**

Named Employee #1 – Allegation #2

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

NE#1 was assigned to a bike squad that largely provided separation between opposing groups of demonstrators and worked to prevent physical conflicts from breaking out. During NE#1’s shift, a community member recorded him on video riding his bike directly behind people who were walking on the sidewalk. NE#1 pushed into the back of a male – later identified as Subject #1 – and a female. He then rode by, again pushing both individuals and causing the female to be pressed against the side of a building face first. Virtually immediately thereafter, two other bike officers rode up, took hold of Subject #1, and pushed him towards a building. He was then placed under arrest. The Complainants alleged that this arrest was prompted by NE#1’s unwarranted aggressiveness towards Subject #1.



As part of its investigation of this matter, OPA reviewed NE#1's BWV. It showed a group of demonstrators affiliated with the right-wing group walking down the street. Other individuals were walking behind them. Among those individuals was the female who was later pushed against the building. None of them were moving quickly, were making any statements towards the other demonstrators, or even appeared to be actively involved in the demonstration. At that time, Subject #1 could be seen on the BWV. He was walking behind the female. He was walking at a faster pace than the female and her companions. NE#1's BWV captured a Sergeant stating, while pointing at people walking down the street: "These guys, they don't get close to them." NE#1 then rode his bike on the sidewalk towards Subject #1, who was now next to the female. He rode into the female and Subject #1 with his bicycle, stating virtually instantaneously: "Seattle Police, coming through." The female said "sorry" as NE#1 continued to ride through them. He again said, "Seattle Police, coming through," and rode partially through them by creating a gap in between the female and Subject #1. As NE#1 rode his bike through that space, Subject #1 turned his body towards NE#1 with his arms lifted up. Two other officers – referred to here as Witness Officer #1 (WO#1) and Witness Officer #2 (WO#2) – were riding behind NE#1. Their BWV captured Subject #1 turning around with his arms raised. Those officers pushed Subject #1 against the building and placed him under arrest.

As part of its investigation, OPA interviewed NE#1's Sergeant. The Sergeant confirmed that he asked NE#1 to ensure separation between the opposing demonstrators. The Sergeant said that he believed the need to do so had some exigency because, in his perception, counter demonstrators were "closing quickly." The Sergeant specifically identified Subject #1 as one of those demonstrators. However, the Sergeant acknowledged that he did not perceive there to be an imminent risk of harm based on possible physical confrontation between the demonstrators. The Sergeant could not speculate as to why NE#1 did not ride on the street rather than the sidewalk.

OPA also interviewed NE#1. He detailed that his role at demonstrations as a bike officer is to escort compliant groups and to manage the movement of non-compliant groups. He said that bike officers would also prevent and, if necessary, break up fights between demonstrators.

NE#1 stated that, on the date in question, he was trying to prevent opposing demonstrators from getting to close to each other. He told OPA that, in this respect, he was carrying out direction provided to him by the Sergeant. He felt a sense of urgency based on what the Sergeant said. He explained that he rode up the sidewalk and saw a woman and Subject #1 walking. He believed it to be possible that they were purposefully trying to block him from riding towards the crowd and said that he had observed this blocking tactic be used on other occasions. He said that he started to put on his brakes and said "police, coming through." He anticipated that they would move but they did not. He said "police coming through" again and then rode through the female and Subject #1. At that time, he heard the female say "sorry." He also felt Subject #1 walk into his path. He then pushed Subject #1 away and rode past him and up the street.

When asked whether he had any reasonable alternatives other than riding through the female and Subject #1 on the sidewalk, NE#1 said that, until he saw the video of the incident, he thought that it was still open to traffic at the time. He did see other SPD employees riding their bikes on the street. NE#1 said that, while there had not been any fights between demonstrators up to that point, they had tried to get through police lines, and it was important to keep separation. He felt that there was an exigent need to do so. He did not feel that it was feasible to radio other units, bike officers or otherwise, to ask them to create the separation.



NE#1 told OPA that the Sergeant did not tell him to ride his bike into the female and Subject #1 and his order was to get around them and to stop them. Neither the female nor Subject #1 had committed any crimes prior to NE#1 making physical contact with them.

NE#1 did not believe that de-escalation was safe or feasible at the time he rode his bike into the female and Subject #1. He felt that this was the case because he needed to separate the demonstrators to prevent fights. NE#1 said that, right before the contact, the female and Subject #1 did not pose a physical threat to him. He said that he tried to slow the incident down by putting on his brakes to allow them to move out of his way. He asserted that the female and Subject #1 had enough time to move after his first warning if they had begun doing so immediately. However, after further questioning, NE#1 confirmed that Subject #1 did not have enough time to move based on the video. He told OPA that he did not give earlier commands because of the urgency of the situation. NE#1 did not believe that his actions made it more likely that WO#1 and WO#2 were required to use force.

“De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.” (SPD Policy 8.100-POL-1.)

The policy further instructs that: “When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.” (*Id.*) Officers are also required, “when time and circumstances permit,” to “consider whether a subject’s lack of compliance is a deliberate attempt to resist or an inability to comply based on factors” such as “mental impairment...drug interaction...[and/or] behavioral crisis.” (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident “when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.” (*Id.*)

The policy gives several examples of de-escalation, which include: mitigating the immediacy of the threat to give officers time to use extra resources and to call more officers or specialty units; and increasing the number of officers on scene to thus increase the ability to use less force. (*Id.*) Other examples of de-escalation include, but are not limited to:

- Placing barriers between an uncooperative subject and officers;
- Containing the threat;
- Decreasing exposure to the potential threat by using distance, cover and concealment;
- Avoidance of physical confrontation unless immediately necessary to protect someone or stop dangerous behavior;
- Using verbal techniques, such as “Listen and Explain with Equity and Dignity” (LEED) to calm an agitated subject and promote rational decision making;
- Calling extra resources, including CIT officers and officers equipped with less-lethal tools; and
- Using “any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject.

(*Id.*) De-escalation is inarguably a crucial component of the Department’s obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department’s policy and expectations.



In evaluating this allegation, OPA recognizes that there was a law enforcement interest in preventing the opposing demonstrators from getting too close to each other. OPA further recognizes that NE#1's decision-making resulted in force being used – albeit de minimis – by two other officers to take Subject #1 into custody. Lastly, OPA concludes that, based on Subject #1's actions that were perceived by WO#1 and WO#2 – him turning to face NE#1 and appearing to push NE#1 as he rode by – they had a lawful basis to take him into custody. The relevant questions for OPA are whether, under the totality of the circumstances, it was safe or feasible for NE#1 to engage in de-escalation, whether he did so here, and, if not, whether this was excused because any de-escalation would have compromised legitimate law enforcement priorities.

With regard to the first and second questions – whether it was safe or feasible to de-escalate and whether NE#1 did, in fact, engage in de-escalation – OPA finds that it was and that he did not. NE#1 expressed that there was a sense of urgency in preventing the demonstrators from getting too close to each other. The Sergeant agreed. However, neither could point to any imminent risk of harm. Notably, while tensions were high during the ongoing protests, there had been no violence and that violence would occur in the near future was speculative. Given this lack of imminency, NE#1 had time to de-escalate prior to using force – here, prior to running his bike into the back of the female and Subject #1. He did not do so.

Perhaps NE#1's biggest failure was the lack of any actionable warning to the female and Subject #1 prior to using force. The BWV showed that the first warning he provided to them that he was behind them was at the instant his bike made contact with their backs. They had no ability to move to the side, even had they been inclined to do so. Around a second later, NE#1 provided a subsequent warning. At that point, the female was already pushed against the wall and Subject #1 was turning to face NE#1. De-escalation requires trying to slow down a situation and evaluating whether an individual's non-compliance is deliberate or based on a lack of situational awareness. NE#1 did not do either here. Instead, he sped the situation up and gave the female and Subject #1 no opportunity to comply prior to running into and through them. Providing that warning and giving the female and Subject #1 even a few seconds to comply was both safe and feasible.

In evaluating whether de-escalation was safe or feasible, OPA also finds it significant that neither the female nor Subject #1 were running, shouting slogans that suggested their intent to engage with the other demonstrators, or were acting in any way violently at the time. Indeed, while Subject #1 was observed by OPA on BWV from earlier in the demonstration and was known by the officers, there was no indication that the female had any involvement. However, she was also the target of NE#1's actions and decision-making.

Lastly, there were other reasonable alternatives to NE#1 other than riding his bike into and through the female and Subject #1. Most notably, he could have ridden his bike on the street like a number of other officers, including the Sergeant. While NE#1 said that he did not recall the street being closed to traffic, his BWV from earlier in the demonstration indicates that he rode in the street on multiple occasions.

With regard to the third question – whether de-escalation would have compromised law enforcement priorities – OPA finds that it would not have. Even if there was a risk that Subject #1 could have advanced to the other demonstrators and caused a physical fight, that harm was not so imminent that NE#1 could not have taken several additional seconds to provide an actionable warning. Had he done so and had Subject #1 still not complied and moved out of the way, OPA would have found that further de-escalation was no longer safe or feasible. However, this did not occur here and, as a result, force was used both on the female and Subject #1. NE#1 ultimately did not take the steps needed to try to avoid this force.



For the above reasons, OPA finds that NE#1 did not take required steps to minimize the likelihood that force would be used. Instead, he engaged in actions that, instead of slowing the situation down and offering an opportunity for the female and Subject #1 to comply, sped the incident up and necessitated force. For these reasons, OPA finds that NE#1 acted contrary to SPD's de-escalation policy and recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #2 – Allegation #1

6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

As with the incident involving Subject #1, OPA received a number of complaints regarding the arrests of Subject #2 and Subject #3 and, specifically, concerning the force used by NE#2 to take Subject #2 into custody. These complaints largely stemmed from a viral video of the arrest of Subject #2 and Subject #3 that was taken by a community member.

This video showed NE#2 tripping over his bike, righting himself, and then advancing towards an individual wearing all black. NE#2 then grabbed onto the individual. At that time, another person wearing all black – Subject #3 – took hold of the strap of Subject #2's backpack and appeared to begin to pull him back. Other officers converged on Subject #3 and pulled him down to the ground. NE#2 and other officers also pulled Subject #2 down to the ground. The Complainants contended that this constituted excessive force and an unlawful arrest as Subject #2 was moving back and obeying police orders at the time. The Complainants also posited that NE#2 used force against Subject #2 due to embarrassment from tripping over his bike. The Complainants' conclusions were based solely on watching the approximately 20 second video posted on social media and without the benefit of any additional evidence, including officer statements and BWV.

As part of its investigation, OPA reviewed the relevant BWV. It indicated that officers, including NE#2, had separated two groups of demonstrators from each other. Officers pushed the group including Subject #2 and Subject #3 back several times. Eventually, the protest moved to the vicinity of Westlake Center. NE#1 and other bike officers again set up a line between the opposing demonstrators. The officers could be heard telling people to move back and away from the line. Subject #2 and others remained in the immediate vicinity of the bike line, chanting "fuck the Nazis" at the opposing demonstrators. While the other individuals with Subject #2 walked away from the line, Subject #2 turned towards it. Subject #2 was pushed back by an officer – referred to here as Witness Officer #3 (WO#3). Subject #2 turned and raised his hands. WO#3 pushed towards him again and Subject #2 pushed WO#3's bike away with his hand. While doing so, Subject #2 said to WO#3: "I'm going to beat the shit out of you."

Just seconds after the statement was made by Subject #2, NE#1 stated to WO#3: "Well, we got PC [probable cause to arrest] for that guy." WO#3 responded, referring to Subject #2: "He's gonna beat the shit out of me." NE#2 and WO#3 rode over to a supervisor and told him that there was probable cause to arrest Subject #2 for the threat. The supervisor responded: "Alright, we'll go in and arrest him." The officers slowly approached where Subject #2 was standing. They discussed his description and how they were going to effect the arrest. Approximately 46 seconds after the threat was made, NE#2 dismounted his bike and said "ready" twice prior to advancing towards Subject #2. That was the point at which the video cited by the Complainants began recording. WO#3's video captured him calmly saying "you're under arrest" to Subject #2. Subject #3 then grabbed Subject #2's backpack and officers took both to the ground.



In his arrest report for this incident, NE#2 noted the threat made to WO#3 as the legal basis for taking Subject #2 into custody. The report concerning Subject #3 indicated that he was taken into custody because he actively tried to prevent the arrest of Subject #2.

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed.

Based on OPA's review of the BWV, it is clear that there was probable cause supporting the arrest of both Subject #2 and Subject #3. With regard to Subject #2, he threatened to assault WO#3 while pushing WO#3's bicycle. Moreover, after being told he was under arrest, he physically resisted the officers' attempts to take him into custody. With regard to Subject #3, the BWV conclusively established that he tried to pull Subject #2 away from being arrested. This constituted obstruction.

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

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

Named Employee #2 – Allegation #2

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

As discussed above, the Complainants alleged that NE#2 used excessive force on Subject #2.

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.*)

In evaluating the totality of the evidence, OPA ultimately concludes that the force used by NE#2 was consistent with policy. At the outset, the BWV conclusively disproves that NE#2 used force against Subject #2 because of his embarrassment from tripping over his bike. Notably, it is evident that, prior to this occurring, NE#2 had already made the decision to arrest Subject #2 and expected to use some modicum of force to take physical control over him. The BWV also indicates that whether Subject #2 was moving back at the time he was taken into custody is irrelevant. First, he was moving back from NE#2 who was advancing towards him. Second, even if he was obeying police orders at that instant in time, the criminal act for which he was arrested had already been completed and he was not taken into custody for failing to back up.

OPA further finds that the force actually used was reasonable, necessary, and proportional under the circumstances. The force was reasonable as it was purposed to take Subject #2 into custody. Notably, at that time, Subject #2 had already pushed WO#3's bike and had threatened to physically assault him. As such, it was permissible to use physical force to restrain and secure Subject #2 in order to safely place him under arrest. The force was also



necessary as there did not appear to be any reasonably effective alternatives to grabbing onto Subject #2 and it was needed to effectuate the lawful goal of arresting him. Moreover, the force used to take Subject #2 down to the ground after Subject #3 tried to pull him away, as well as the control holds and body weight used to stop him from resisting arrest, were also necessary. Lastly, the force used was proportional to the need to arrest Subject #2 and the ongoing physical threat that he presented. OPA notes that neither NE#2 nor any other officers threw punches or used any other strikes at the Complainant. This is confirmed by BWV and the lack of any contemptuous or after the fact reporting by Subject #2. Lastly, the officers modulated and then ceased all force once Subject #2 was handcuffed.

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

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

Named Employee #3 – Allegation #1

5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy, and Department Policy

Subject #3 reported to OPA that he observed two SPD officers, later identified as NE#3 and NE#4, push a female demonstrator to the ground and grope her breasts. Subject #3 showed OPA a video of the alleged groping; however, the female was facing away from Subject #3 and the video did not conclusively establish that the acts alleged occurred.

OPA reviewed the BWV for both NE#3 and NE#4. The BWV indicated that the female was standing with other demonstrators when she began to approach the SPD bicycle line. She first paced in front of the line – approximately one foot back – and then directly approached the officers. She pushed into the officers, leaning the top of her body over the line. NE#4 pushed her back using an outstretched hand. She again quickly approached the line with both of her hands extended towards the officers. NE#3 and NE#4 both pushed her back and she fell to the ground in a sitting position. She got up and walked back into the crowd of demonstrators. Neither officers' BWV showed any evidence that they grabbed her breasts.

OPA also reviewed the BWV of a sergeant who was positioned behind NE#3 and NE#4. His BWV clearly showed the extent of the interaction between the female and the officers and confirmed that neither officer grabbed the female's breast.

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. Had either NE#3 or NE#4 grabbed the Complainant's breast, it would have constituted a violation of this policy. However, as indicated above, the evidence clearly proves that this did not occur.

As such, OPA recommends that this allegation be Not Sustained – Unfounded as against both NE#3 and NE#4.

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

Named Employee #4 - Allegation #1

5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy, and Department Policy



For the same reasons as stated above (see Named Employee #3 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

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