



## CLOSED CASE SUMMARY

ISSUED DATE: OCTOBER 2, 2020

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0323

### **Allegations of Misconduct & Director’s Findings**

**Named Employee #1**

Allegation(s):		Director’s Findings
# 1	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 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	Not Sustained (Lawful and Proper)

**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	8.200 – Using Force 1. Use of Force: When Authorized	Sustained
# 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	Not Sustained (Lawful and Proper)

**Imposed Discipline**

Disciplinary decision pending before the Chief. CCS will be updated when discipline is final.
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***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:**

Numerous Complainants alleged that the Named Employees used excessive force based on a video that captured them punching an individual who was on the ground.

**SUMMARY OF INVESTIGATION:**

This case arises out of the demonstrations that occurred within Seattle and across the nation in the wake of George Floyd’s murder by a Minneapolis Police Officer. These protests were unprecedented in scope and were directed at law enforcement. The specific case addressed here occurred on the evening of May 29, 2020, the first night of the protests. On that evening, some demonstrators engaged in significant property damage throughout the International District. The Named Employees were among officers who responded to that location.

**A. Incident and Arrest**

Based on discussions with an SPD Lieutenant, officers told a group of demonstrators that they were prohibited from walking down South Jackson Street. A male – referred to here as the Subject – was among that group. Despite the



officers' orders, the Subject attempted to walk down South Jackson Street and attempted to go past Named Employee #2 (NE#2) to do so. NE#2 pushed the Subject back, which caused the Subject to fall to the ground in a sitting position. NE#2 then began interacting with other demonstrators, explaining that they were not permitted to go down that street. At that time, the Subject walked behind NE#2 and down the hill towards the intersection.

Named Employee #1 (NE#1), who had also been telling demonstrators to walk up the hill, positioned himself on the sidewalk. The Subject walked backwards down the street, where he bumped into NE#1. He turned and he and NE#1 pushed into each other. NE#1 tried to block the Subject using his baton. The Subject appeared to grab the baton, causing it to move up. The Subject quickly moved around NE#1 towards a storefront. NE#1 followed the Subject and, while doing so, dropped his baton. The Subject appeared to go down to the ground on his own power and NE#1 got on top of him. An individual tried to pull the Subject away from NE#1 and NE#2, who had arrived to assist NE#1. Another officer pushed that individual away using his baton.

Both NE#1 and NE#2 told the Subject that he was under arrest, directed him to roll over, and instructed him to stop resisting and to give them his arms. NE#1 tried to physically roll the Subject over by using the Subject's backpack as leverage. At this point, a water bottle was visible in the Subject's right hand.

#### **B. Force Used**

NE#1 held onto the Subject's left hand and continued to try to roll him over, repeatedly telling the Subject that he was under arrest. NE#2 began to assist NE#1 and grabbed onto the Subject's right hand. NE#1, who was situated by the Subject's head, began moving his left arm across the Subject's body to roll him over. NE#2 pushed down on the Subject's head. At that time, the Subject moved his right hand, which was still holding the water bottle, up quickly towards NE#1's face. The water bottle appeared to strike NE#1. NE#1 responded virtually instantaneously, striking the Subject twice with a closed fist. Shortly thereafter, NE#2 punched the Complainant between six and eight times in the torso area.

The officers ceased using strikes and continued to attempt to shift the Subject on his stomach in order to handcuff him. The Subject did not comply. The Subject further rolled towards NE#2 and grabbed NE#2's hand. NE#1 used a knee strike to stop the Subject from doing so. The Subject then rolled over, keeping his arms underneath his body and preventing the officers from accessing his arms to place him into handcuffs. NE#1 then applied a cross-face (a technique where an officer uses the forearm bone to apply pressure against the face, which is purposed to gain compliance). Individuals in the crowd yelled that NE#1 was using a chokehold on the Subject. Ultimately, the cross-face was successful, and the officers were able to handcuff the Subject. After that time, no further force was used.

#### **C. OPA Complaint and Investigation**

Video of the arrest and force was recorded by community members and posted online. The video went viral, resulting in OPA receiving a number of complaints. OPA accordingly initiated this investigation.

As part of its investigation, OPA reviewed the use of force report and other documentation generated by the officers. OPA also reviewed the officers' Body Worn Video (BWV). OPA further reviewed multiple videos of this incident that were recorded by community members.



From OPA's review of the video, only two punches by NE#1 could be discerned. Given the limitations of the various camera angles, it was unclear whether the second punch actually made contact with the Subject. NE#1's first punch occurred approximately 0.5 seconds after he was struck by the Subject. NE#1 began the second punch one second later and it appeared to be concluded 0.5 seconds after that. Accordingly, both strikes used by NE#1 occurred within two seconds of him being struck with the water bottle by the Subject. From a review of both BWV and community member video, NE#2 appeared to punch the Subject between six and eight times. NE#2 began punching the Complainant approximately 2.5 seconds after the Subject struck NE#1 with the water bottle and threw his last punch six seconds after that.

OPA further conducted interviews of NE#1 and NE#2. OPA also attempted to interview the Subject, but he declined to participate.

### **1. NE#1's OPA Interview**

NE#1 recalled that he was given instructions by supervisors to prevent individuals, including the Subject, from walking down the hill. He and other officers gave those individuals multiple orders not to do so; however, the Subject deliberately failed to comply with those directions. NE#1 said that, at the time he made physical contact with the Subject, the Subject had attempted to quickly walk around multiple officers. He moved in front of the Subject to direct him up the hill and did so by extending his baton. NE#1 perceived that the Subject then punched him, which caused NE#1 to be disoriented. At that time, he developed probable cause to arrest the Complainant. Given the Complainant's behavior, he did not think that further de-escalation was safe or feasible.

NE#1 described that he tried to control the Subject, who was on the ground. The Subject continued to struggle against him. NE#1 recalled NE#2 coming over to assist. NE#1 said that he saw the Subject's hand swing up and NE#1 was struck by a water bottle. He did not know at the time whether the water bottle was frozen. NE#1 told OPA that he initially perceived the Subject striking him multiple times; however, after watching the video, NE#1 acknowledged that the Subject only did so once. NE#1 stated that he immediately punched the Subject two to three times. He believed that one of those was a glancing blow that did not make contact. The Subject did not complain of pain or injury and rolled over into a defensive posture.

NE#1 heard NE#2 tell the Subject to let go of his hand. Given the Subject's prior behavior and continued active resistance, NE#1 used one knee strike to his midsection. NE#1 said that this was consistent with his training. NE#1 and NE#2 were then able to roll the Subject over onto his stomach. At that point, the Subject "turtled" up by hiding his arms under his body, preventing them from being pulled out. NE#1 then used a cross-face to compel the Subject to release his hands. NE#1 said that this tactic, like the knee strike before it, was consistent with the training he received on how to handle this type of scenario. NE#1 told OPA that this was ultimately successful, and, with the help of other officers, they were able to handcuff the Subject. No further force was used.

NE#1 opined that all the force he used was consistent with policy and training and was also appropriate under the circumstances. With regard to the two to three punches, he did not feel that there were other equally effective force options available to him at the time given the circumstances he was faced with. He said that he did not have a Taser and that it likely would not have been appropriate or practical, the distance was too close for OC spray, and the use of a baton would not have been warranted.



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## 2. NE#2's OPA Interview

NE#2 recalled that, on the evening in question, there was widespread property damage throughout the International District. He noted that officers were significantly outnumbered by protesters. NE#2 received direction from a Lieutenant to prevent demonstrators from walking down South Jackson Street past 10<sup>th</sup> Avenue South. NE#2 saw demonstrators, including the Subject, walking down the hill. NE#2 informed them that they were not allowed to come down the hill and that they needed to move back. NE#2 reported that the Subject initially complied but then walked towards him in an apparent attempt to walk down the hill again. NE#2 used one hand to push the Subject back, which caused the Subject to fall to the ground in a seated position. NE#2 said that the Subject did not complain of pain at that time and did not appear to have suffered any injuries.

NE#2 turned his focus from the Subject and did not see him again until he heard a loud noise and saw NE#1 chasing the Subject and then trying to take the Subject into custody while on the ground. NE#2 moved quickly to the right side of where NE#1 and the Subject were situated, which caused other demonstrators to scatter. He saw that the Subject was resisting NE#1's attempts to take him into custody and NE#2 made the decision to assist NE#1. He noted that, at this point, both he and NE#1 gave multiple directions to the Subject to roll over and comply, but that he declined to do so. NE#2 perceived the scene to be chaotic and said that the officers were surrounded by demonstrators.

NE#2 tried to roll the Subject over by pulling on a backpack strap. This was unsuccessful. NE#2 perceived the Subject rolling over to his side and, in NE#2's opinion, the Subject's hip positioning suggested that he was preparing to try to escape or fight. NE#2 told OPA that, based on the Subject's ability to counteract the officers' actions using his bodyweight, NE#2 felt that the Subject might have training in martial arts or ground fighting. NE#2 said that he thought about using a cross-face at that time but decided against it. He then pushed down on the Subject's head, but this also did not force compliance. The Subject struck NE#2 with a water bottle. NE#2 did not know at the time whether it was frozen or not but knew that frozen water bottles were used as a weapon during some demonstrations. NE#2 said that the water bottle hit him in his right shoulder. He stated that, given the Subject's assaultive actions, he determined that force was appropriate to stop the Subject from engaging in further like behavior and to take the Subject into custody. NE#2 then punched the Subject six to eight times in the torso. NE#2 believed that, under the circumstances, this force was appropriate and consistent with policy.

NE#2 did not use any further strikes after this point. He continued to use control holds on the Subject to try to place him into custody and handcuff him. He observed some of the force used by NE#1 and believed that it was consistent with policy and training. He did not see the use of a neck hold/chokehold by NE#1. Ultimately, the Subject was handcuffed and was walked from the scene.

### **ANALYSIS AND CONCLUSIONS:**

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

##### **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.*)



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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.*)

When evaluating the force used by both NE#1 and NE#2, OPA reaches four common conclusions. First, the officers had the lawful authority to place the Subject under arrest. Second, the Subject attempted to flee from NE#1 and then physically prevented both NE#1 and NE#2 from controlling his body and taking him into custody. Third, prior to any strikes being used by the officers, the Subject struck at them with a water bottle. This appeared to have hit both officers, including knocking off NE#1’s BWV. Fourth, given the Subject’s actions, the officers were legally permitted to use force to prevent him from further attempts to strike them and to effectuate the Subject’s detention. At this point, however, OPA’s analysis of the propriety of the Named Employees’ force differs.

The video conclusively established that NE#1’s force was an immediate reaction to him being struck by the water bottle. Virtually instantaneously to being struck (within 0.5 seconds), NE#1 punched the Subject two consecutive times over the span of two seconds. Given the timing of the force and the video evidence, OPA believes it is clear that it was a reaction to the immediacy of the threat facing him. Once the punches occurred, the Subject did not make further attempts to strike the officers. Accordingly, NE#1 modulated his force and did not punch the Subject again.

OPA finds that this force was reasonable, necessary, and proportional under the circumstances. It was reasonable to punch the Subject twice to stop the Subject from striking officers with a water bottle. Notably, this was not a situation where the Subject was simply engaging in passive resistance, he had displayed an ongoing disinclination to comply with lawful orders and had expressed the intent to harm them. The punches were further necessary as there did not appear to be any other force options available at that time to NE#1 to stop the threat. As NE#1 described, he was not equipped with a Taser, the range was too close for OC spray, and a baton would have been too high level of a force tool. Lastly, NE#1’s force was proportional. He punched the Subject twice, one of which appeared to be a glancing blow. This was in direct response to the Subject hitting him with a hard object. The fact that NE#1 had a helmet on at the time does not change this conclusion. Indeed, it was very possible that the bottle could have hit NE#1 in the throat or another sensitive body part. NE#1 was permitted to ensure that this did not occur. OPA further notes that NE#1 ceased using force virtually immediately – within two seconds of the strike. He did not continue to punch the Subject once the active assault had subsided.

OPA reaches a similar conclusion for the knee strike and the cross-face. SPD trains officers on what force is appropriate when trying to control individuals on the ground. Relevant to this incident, the Department trains officers to use different force where an individual is aggressive versus where the individual is “turtled” (hands secreted under the body). In the first scenario, where an individual has turned to the officers, is grabbing onto them, or is trying to get up, officers are trained to use intermediate force, including knee strikes. In the second scenario, where officers cannot pull the individual’s arms out from under the body but the individual is not acting aggressively, they are trained to use a cross-face. Here, NE#1 used a knee strike when the Subject continued to struggle on the ground, was turned towards NE#2, and was grabbing NE#2’s hand. This was consistent with his training and within policy. Notably, he only did so once and changed tactics when the Subject turtled up. At that time and after the officers could not get the Subject’s arms out and behind his back, NE#1 used a cross-face. Once other officers came over to assist and they were able to secure the Subject together, NE#1 ceased using the cross-face and did not use any additional force. Again, this was consistent with his training and was within policy.



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For these reasons, OPA concludes that the force used by NE#1 was consistent with policy and recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

In considering the Named Employees' compliance with SPD's de-escalation policy, two separate points of time are relevant. First, prior to force being used. Second, at the moment that force was used.

As discussed above, the officers were informed by supervisors that demonstrators, including the Subject, were not to walk down the hill. This decision was made given the damage that had occurred that evening in the vicinity and SPD's desire to prevent further damage and harm to persons. OPA cannot say that this decision was unreasonable based on the circumstances of that night. While the Subject may not have liked this order, it was not illegal, and he was required to comply with it. However, he did not do so. When the Subject continued to walk down the hill even after being directed not to do so, the officers were permitted to prevent him from doing so. When he attempted to move past NE#1 and made physical contact with NE#1, the officers had probable cause to place the Subject under arrest. They were further not required at this point to engage in more de-escalation aside from the numerous directions they had already provided to the Subject and the time they had given him to comply. Accordingly, the decision to use force to prevent the Subject from walking down the hill and then the decision to take him into custody did not violate the Department's de-escalation policy.

Similarly, prior to striking the Complainant, both Named Employees gave him multiple orders to stop resisting, to roll over, and to give them his hands. He did not comply. They further tried to use low level force, including control holds and body weight, to try to gain compliance. At the time the Named Employees punched the Complainant, he had just struck them with a water bottle. Once he did so, de-escalation was no longer safe or feasible. In reaching this finding, OPA notes that the propriety of the force and whether the officers modulated their force is evaluated separately and does not bear on the determination of whether officers de-escalation prior to the force being used.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both NE#1 and NE#2.

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

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

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

When evaluating NE#2's force, OPA applies the same four conclusions of fact referenced in the context of NE#1 above. Given these conclusions, OPA similarly believes that NE#2's force was reasonable and necessary. NE#2 had the lawful authority to take the Subject into custody and, when the Subject physically resisted, to use force to do so. NE#2 also had the legal right to use force to prevent the Subject from continuing to strike him with a water bottle. Like with NE#1, NE#2 using a punch to do so was also necessary given the lack of other available force options. However, where OPA differs in its analysis of the force used by NE#1 and NE#2 is with regard to its proportionality.



When comparing the force used by NE#2 to that used by NE#1 – which was deemed proportional – OPA finds the timing of the force and the amount of force to be determinative. With regard to the timing, NE#1's force application lasted approximately two seconds and began only 0.5 seconds after the Subject swung the water bottle up towards him. In comparison, NE#2 began striking the Subject 2.5 seconds after the water bottle was swung and continued to punch the Subject for six seconds after that. From OPA's perspective, while the Subject remained resistive, the immediacy of the ongoing physical assault ceased within the first two seconds of the incident; however, NE#2 continued to punch the Subject afterwards.

With regard to the amount of force used, OPA again finds the contrast between the strikes used by NE#1 and NE#2 to be significant. NE#1 used two punches over two seconds immediately after he was struck with the water bottle. NE#2 used six to eight punches over six seconds and began doing so around 2.5 seconds after the water bottle was swung. OPA finds this amount of force, particularly given the quelling of the immediate assaultive behavior and the fact that two officers were simultaneously using force to control the Subject, to be excessive. Specifically, OPA finds that this force was not proportional to the threat facing the officers and was more than what was needed to fulfill NE#2's lawful purpose of taking the Subject into custody and protecting himself from harm. Moreover, OPA concludes that, unlike NE#1, NE#2 did not adjust and modulate his force when the Subject stopped trying to strike him and NE#1 with the water bottle. This is a requirement of SPD policy and plays a significant part in OPA's determination that NE#2's force was not proportional.

In reaching this finding, OPA notes that, had NE#2 used two strikes instead of six to eight, the force likely would have been consistent with policy given the totality of the circumstances. OPA recognizes that the Subject did present a threat of harm to the officers and consistently failed to comply with any of their orders, as well as that the situation that evening was chaotic with the officers being outnumbered by demonstrators. However, OPA and SPD have the requirement to critically examine force and officers have the responsibility to only use that force that is consistent with policy and proportional under the circumstances. Here, when evaluating the totality of the evidence, striking the Subject six to eight times simply did not meet these standards and, in OPA's estimation, was excessive. Accordingly, OPA recommends that this allegation be Sustained against NE#2.

Recommended Finding: **Sustained**

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

For the same reasons as stated above (see Named Employee #1 – Allegation #2), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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