



## CLOSED CASE SUMMARY

ISSUED DATE: MARCH 14, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0533

### 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	6.010-POL - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Lawful and Proper)
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)

#### Named Employee #2

Allegation(s):		Director’s Findings
# 1	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 14. Retaliation is prohibited	Not Sustained (Training Referral)

***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 the Named Employees used excessive force when arresting him at a demonstration and that the arrest itself was improper. The Complainant and other individuals also alleged that the Named Employees’ conduct, and that of other officers, may have been retaliatory. OPA lastly alleged that Named Employee #1 may have made unprofessional statements.

### ADMINISTRATIVE NOTE:

The OIG certified OPA’s investigation as objective and timely, but not as thorough. With regard to thoroughness, the OIG opined that OPA did not fully address allegations made by complainants that, throughout the day, officers used force and engaged in other actions in order to retaliate against them.

As a general matter, OPA saw no evidence of widespread retaliation throughout that date. However, for two main reasons, OPA chose to focus its examination of retaliation to the arrests of the Complainant and the individuals with him. First, the arrest and force used on the Complainant were the central issues to the complaint and, thus, what OPA concentrated on. Second, OPA simply did not have the resources to analyze every use of force and



officer/demonstrator interaction that occurred to determine whether there was any evidence of possible retaliation. While perhaps this would have been optimal, OPA does not have the staff to do so, particularly given the hundreds of other protest and non-protest cases OPA was required to work on simultaneously.

**SUMMARY OF INVESTIGATION:**

This case arises out of the demonstrations that occurred within Seattle and across the nation in the wake of the killing of George Floyd by a Minneapolis Police Officer. These protests were unprecedented in scope and were directed at law enforcement.

**A. Incident, Body Worn Video, Photographs, and Arrest Report**

The specific incident evaluated here occurred on August 16, 2020. On that date, a group associated with the Every Night Direct Demonstration (ENDD), a direct-action protest group, held a demonstration near the Seattle Police Officers' Guild (SPOG) headquarters. Previous demonstrations involving ENDD were known to have resulted in significant property damage as well as injuries to officers. The demonstration group began gathering in Hing Hay Park at approximately 7:00 PM and marched toward the SPOG office. The group, which included individuals carrying fireworks and other flammable material, ultimately attempted to break the windows of an SPD patrol vehicle and ignite it. Members of the demonstration group also threw rocks, bottles, and improvised explosives at officers. Shortly after these incidents, the demonstration was declared a riot and officers began dispersing the crowd. During and after the dispersal, the crowd split up into smaller groups, some of which continued to attempt to damage property. SPD radio records reflected that, around this time, a sergeant suggested over air that officers attempt to detain individuals or small groups of demonstrators who were continuing to engage in illegal behavior.

Named Employee #1 (NE#1) and Named Employee #2 (NE#2) were assigned as bicycle officers under the command of Sergeant #1. NE#1, NE#2, and Sergeant #1 observed a group of four individuals dressed in all black and walking through a parking lot toward the southwest corner. That area of the parking lot was enclosed to the south and west sides. When the individuals reached the southwest corner, the Named Employees observed them begin spray painting the building. Sergeant #1 directed officers, including NE#1 and NE#2, to intercept and arrest the four individuals. Body-Worn Video (BWV) of the officers captured the incident as it occurred.

NE#1's BWV showed him and the other members of his squad entering the parking lot. It also showed the four individuals. Three of the individuals appeared to be actively spray painting the building wall, while a fourth stood by and was apparently uninvolved. NE#1, NE#2, Sergeant #1 and the rest of the squad rode in the direction of the four individuals. The officers could be heard shouting "get on the ground." Three of the individuals appeared to begin running away from officers.

NE#1 dismounted his bicycle and approached on foot at a run. He contacted one of the individuals, who was later identified as the Complainant in this case. The Complainant was wearing a helmet, goggles, and balaclava and a t-shirt and jeans. When NE#1 contacted the Complainant, he pushed the Complainant into the wall of a nearby building. The Complainant could be heard shouting profanity at NE#1 and BWV recorded that the Complainant punched NE#1 at least once in the face with his right hand. NE#1 pushed the Complainant to the ground. During this interaction, BWV showed that a can of OC spray was knocked to the ground and was lying next to where the Complainant was taken down.



As NE#1 took the Complainant to ground, BWV recorded that he punched the Complainant at least five times with a closed fist in the head and neck area. The BWV showed that, at the same time as NE#1 did so, the Complainant continued to struggle and appeared to strike NE#1 at least once more in the face with his hand. NE#1 could be heard shouting to the Complainant to stop resisting. BWV recorded him saying during the struggle: “you punched me in the face, motherfucker.”

During the time that NE#1 was engaged with the Complainant, NE#2 moved in to assist. NE#2 knelt near the Complainant’s right shoulder and head and struck the Complainant once with a closed fist in the right side of the face. This occurred at roughly the time that NE#1 was struggling with the Complainant and attempting to gain control of him after taking him to the ground, and virtually simultaneously to NE#1 punching the Complainant. NE#2’s BWV showed that the Complainant had his arms raised, presumably to block NE#1’s punches and positioned in a manner to potentially to strike NE#2 as well. NE#2 did not strike the Complainant further although he did attempt to grab the Complainant’s arm and shoulder. BWV showed that the Complainant was rolling over toward the fallen canister of OC spray and reaching out to grab it as NE#2 tried to grab his shoulder. Both officers shouted at the Complainant to lay on the ground and to stop resisting.

BWV from a third officer – Witness Officer #1 (WO#1), captured the Complainant and the officers struggling over the OC canister. NE#1 and NE#2 were both attempting to grab the Complainant’s arms. BWV showed that the Complainant was able to grasp the handle of the OC canister at approximately the same time as NE#1. NE#1 then squeezed the handle, spraying the Complainant with OC. The Complainant released the canister and NE#1, NE#2, and the third officer were able to gain control of the Complainant and take him into custody.

A third-party video posted to Twitter captured this incident and was consistent with the incident as described above. Notably, it showed that one of the four individuals did not run when the other three did and may not have been part of the same group. Otherwise, the video captured substantially the same conduct as did the officers’ BWV. Given that the video was taken from a distance, it did not clearly show the force, including the Complainant punching NE#1 multiple times or the exact number of times NE#1 or NE#2 punched the Complainant.

OPA viewed post-arrest photographs of NE#1 and the Complainant. Photos of NE#1 showed redness around the left eye and cheek consistent with being struck in the face. He also had bloody scratches on his knees consistent with wrestling on the parking lot blacktop. The Complainant had similar abrasions on his elbows. Photographs of the Complainant’s face showed swelling and redness around his right eye.

NE#2 also completed an arrest report about the incident, the relevant sections of which were largely consistent with the BWV. In his arrest report, NE#2 wrote that he and the bicycle squad observed: “3 people moving through a parking lot just to the South of us that were apparently from the riot group.” NE#2 further documented that the individuals “moved to the S/W [sic] corner of the lot. The area had no egress and demonstrated to us that they had no intention of leaving the area. They appeared to be spray painting the building.” NE#2 wrote that he and the squad gave orders to stop, and that the three individuals instead attempted to flee.

Regarding the Complainant’s arrest, NE#2 wrote that, when he went to assist NE#1 with taking the Complainant into custody, he saw the Complainant “actively punching [NE#1] in the face and grabbing at his face.” He also documented that the Complainant was resisting and attempted to grab at the canister of OC, and that the Complainant continued to resist until NE#1 pepper sprayed him.



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## **B. OPA Interviews**

### **1. Complainant**

The Complainant filed one of several written complaints with OPA. In his complaint, he denied punching any officer and asserted that he “flailed [his] arms.” Admitting that his recollection was fuzzy, the Complainant alleged that he was not actively resisting at the time NE#1 or NE#2 used force. When contacted by OPA, the Complainant declined to participate further in the investigation.

### **2. Witness Employees**

OPA interviewed Sergeant #1 and WO#1. Sergeant #1 described violent clashes with ENDD demonstrators throughout the day and evening ultimately culminating in a crowd dispersal order. He stated that, after the dispersal order, the crowd broke up into small groups. One of the incident commanders directed sergeants and officers to make arrests for criminal behavior. It was during this time that Sergeant #1 and his squad observed three individuals in the parking lot (including the Complainant), dressed in the same manner as the demonstrators who had earlier been dispersed (i.e., black clothing, masks, helmets and goggles). Sergeant #1 said that when he and his squad shouted at the individuals to stop and get on the ground, they began running. He stated that the initial verbal detention of the three individuals was based on suspicion of criminal mischief. Once the demonstrators began to run, there was probable cause to arrest them for obstruction.

WO#1 stated that he recalled being told that the Incident Commander had authorized arrests of demonstrators seen breaking the law. He said that Sergeant #1 pointed out a group of three individuals in a parking lot. The officer said that when he saw them, they appeared to be in the process of “tagging” the building wall.

In describing the arrest of the Complainant, WO#1 said that NE#1 ran past him and pushed the Complainant into the wall. He said that he saw the Complainant subsequently go to ground and that he observed either NE#1 or NE#2 punch the Complainant. He did not recall seeing the Complainant punch NE#1 or NE#2. He recalled that the Complainant rolled over and attempted to grab at the OC spray can. WO#1 then moved in to assist. WO#1 did not witness any other force used on the Complainant after NE#1 deployed OC spray.

### **3. Named Employees**

Finally, OPA interviewed the Named Employees. NE#1 stated that he had probable cause to arrest the Complainant and the other two individuals for obstruction based on them ignoring officer commands to stop and instead running away. He also stated that he had probable cause to arrest for criminal mischief and failure to disperse. He stated that the sergeant directed him and the other bicycle officers to make the arrest, which informed his decision to take action.

Regarding the force used, NE#1 stated that he pushed the Complainant into the wall, which he believed to be composed of “bricks,” with both hands. This caused the Complainant to stop running. NE#1 stated that the Complainant then punched him in the face. He stated that the Complainant punched him at least four times before and during the time that he was on the ground. NE#1 stated that the Complainant’s written claim of “flailing” his arms was false. NE#1 stated that the Complainant attempted to grab the fallen OC canister during the fight and that



this caused NE#1 to spray the Complainant with OC from approximately 10 inches away. NE#1 felt that the entirety of his force was consistent with policy.

NE#1 also stated that he used profanity during his interaction with the Complainant. He asserted that his use of profanity was both an exclamation of his perception of the events, as well as a statement purposed to notify the other officers about the reasons why he used a high level of force (punching) in the fight with the Complainant. He also stated that, in his experience, using such language can dissuade individuals from continuing their actions. NE#1 stated that he did not believe his use of profanity escalated the incident beyond where it already was, and that it was not directed as an insult or intended to demean. He stated that he believed others who had been in high-stress situations, including fights, would understand his use of profanity.

OPA also interviewed NE#2. NE#2 stated that he believed he had probable cause to arrest the Complainant and the other individuals for criminal mischief and obstruction. He further stated that he was directed to do so by Sergeant #1 and that his conduct was consistent with the general instructions to arrest lawbreakers by incident commanders. NE#2 said that, when he first contacted the Complainant, he saw the Complainant “actively punching” NE#1. He stated that he recalled punching the Complainant twice. NE#2 told OPA that, after he punched the Complainant, the Complainant stopped trying to punch NE#1. He also stated that he did not believe the Complainant was “flailing” his arms at the time and felt that the Complainant was, instead, deliberately fighting with NE#1. He believed that his use of force was reasonable, necessary, and proportional given the circumstances.

#### **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. Officers shall only use “objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective.” 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 Complainant, in light of the circumstances surrounding the event.” (SPD Policy 8.050.) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative to the use of force appeared to exist” and “the amount of force used was reasonable to effect the lawful purpose intended.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

OPA finds that NE#1 used force in three discrete instances: pushing the Complainant into the wall of the building, punching him approximately five times in the head and chest area, and spraying him with OC spray during the struggle over the OC canister. OPA examines each in turn.

At the time NE#1 pushed the Complainant, he had probable cause to arrest the Complainant and the right to use appropriate force to do so. The video indicated that the Complainant fled the scene and that he continued to do so despite being given multiple orders to stop by individuals clearly identifiable as SPD officers. This being said, of all the force used by NE#1, OPA finds the push to have been the most concerning. This is primarily due to the fact that, as opposed to when the other force was used, at the moment of the push, the Complainant was not actively assaulting NE#1 or other officers.



While OPA finds that force in the form of a push was reasonable, OPA assesses whether it was necessary or proportional. OPA recognizes that NE#1 had limited alternatives to take the Complainant into custody. This was particularly the case as the Complainant was actively fleeing and was not obeying officer commands to stop. OPA also recognizes that NE#1 had a legitimate law enforcement need to take the Complainant into custody quickly, particularly given that the Complainant was with two other individuals, and to prevent him from having the opportunity to fight with NE#1 and other officers. This supports the finding that a quick push to stop the Complainant's momentum and to take him under control was necessary.

However, not all pushes are created equal and NE#1's push here must have been proportional to the threat posed by the Complainant and the need to arrest him. In this particular case, the push was fairly significant, even if it did not cause the Complainant to appear to suffer any injuries. This is the closest question for OPA in this case. On one hand, NE#1 had no evidence that the Complainant was armed or that he was planning to harm officers. Moreover, as indicated above, the Complainant was being sought for misdemeanor crimes, which relatively lessened the need to arrest him. On the other hand, the Complainant was running from officers and had not complied with multiple orders to stop. Those actions, in and of themselves, presented a potential danger to NE#1 and other officers that he was permitted to use force to prevent. Moreover, NE#1 did not know for sure whether or not the Complainant had a weapon or other means of causing him harm.

While a close call, and even though OPA has concerns with this force, OPA concludes that, when assessing and balancing all the evidence, the push did not violate policy.

OPA has significantly less difficulty finding that the punches and OC spray were consistent with policy. With regard to the punches, the BWV showed that, prior to NE#1 striking the Complainant, the Complainant yelled "fuck you" and hit NE#1 in the face. Moreover, the Complainant continued to strike and attempt to strike NE#1 when they went down to the ground. The evidence disproves the Complainant's assertion that he was just "flailing" his arms and, instead, clearly indicated that he was purposefully hitting NE#1. Given this, NE#1 was allowed to use commensurate force to stop the Complainant from assaulting him and to take the Complainant into custody. This includes using strikes to the Complainant's face and body. OPA further does not find the number of strikes – approximately five – to have been excessive. Again, during the totality of this time, the Complainant continued to fight with and tried to harm NE#1. This was not a case in which the Complainant was simply non-compliant or passive (*compare to 2020OPA-0323*), he was an active aggressor. Further, this analysis does not change simply because NE#2 was in the immediate vicinity and also struck the Complainant. Both of the officers had an independent justification to do so and, in reality, neither officers' force actually stopped the Complainant from engaging in his assaultive conduct.

The BWV also established that the Complainant reached for the OC canister and appeared to attempt to deploy it. Given this, NE#1 was warranted in spraying the Complainant to prevent him from doing so. Notably, this deployment was effective in that it largely caused the Complainant's resistance to cease and allowed NE#1 and NE#2 to modulate their force and then stop using force altogether.

For the above reasons, and even though OPA maintains concerns with the push, OPA concludes that the totality of NE#1's force was consistent with policy. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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





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

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

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.

OPA finds that NE#1's arrest of the Complainant was based upon probable cause and, consequently, did not violate policy for three main reasons.

First, OPA notes that the decision to arrest appears to have been made Sergeant #1, not NE#1, although NE#1 did in fact conduct the arrest. NE#1 was entitled to rely on Sergeant #1's direction in this respect. Moreover, the arrest was also consistent with direction provided by the Incident Commander.

Second, the Complainant engaged in conduct that could reasonably have been believed to meet the elements of Criminal Mischief. See RCW 9A.84.010. That statute makes it a gross misdemeanor for a group of three or more persons to use or threaten force against a person or property. *Id.* Here, the Complainant was seen with at least two others in what appeared to be apparent preparation to commit acts of vandalism by spray-painting a wall. While this is, at best, a minimal degree of property destruction, it still arguably falls within the ambit of the statute.

Third, by the time NE#1 contacted the Complainant and attempted to take him to ground, NE#1 also had probable cause to arrest for obstruction. Here, the probable cause determination is significantly simpler. It is a gross misdemeanor to "willfully hinder[], delay[], or obstruct[] any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020. Among other conduct, attempting to flee when ordered to stop is grounds to arrest for obstruction. Given that BWV recorded the Complainant and others running despite lawful commands to stop, there was justification for NE#1 to arrest and, consequently, his doing so did not violate policy.

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 #3**

**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." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers" whether on or off duty. (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.*)



OPA finds that NE#1's use of profanity constituted a technical violation of the professionalism policy. OPA reaches this conclusion based on the fact that NE#1 referred to the Complainant as a "motherfucker" when exclaiming about being punched. However, OPA does not believe that a Sustained finding is appropriate for a two main reasons. First, while NE#1 did use profanity when referring to the Complainant, he did so as part of an overall statement concerning being struck in the face that was contemporaneous to him being hit. Second, the statement did not appear purposed to insult the Complainant, but rather to express NE#1's frustration and anger about being hit.

For these reasons, OPA recommends that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1 should receive retraining and counseling concerning his use of profanity during the incident. While his reaction may have been understandable, the use of the term "motherfucker" when referring to the Subject was improper. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**

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

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

NE#2 struck the Complainant while the Complainant was actively fighting with NE#1. NE#2 explained that he did so because he saw the Complainant punch NE#1 and wanted to prevent any further assaultive behavior. While NE#2 believed that he may have punched the Complainant twice, the BWV made clear that he threw one punch.

For predominantly the same reasons as discussed above (*see* Named Employee #1 – Allegation #1), OPA finds that this force was consistent with policy. Again, the punch was reasonable to effectuate the arrest of the Complainant and to stop him from further striking NE#1. It was necessary as there were no less-lethal tools that would have been equally effective, and the Complainant was continuing to punch NE#1 even though NE#1 was punching him in return. It was further proportional as the force used by NE#2 was equal to that being used by the Complainant himself.

As noted above, this analysis does not change simply because NE#1 was simultaneously using force. Indeed, the Complainant continued to fight them both regardless.

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 14. Retaliation is prohibited***

SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-14.) SPD employees are specifically prohibited from retaliating against a person who engage in activities including, but not limited to, "oppos[ing] any practice that is reasonably believed to be unlawful or in violation of Department policy" or "who otherwise engages in lawful behavior." (*Id.*) Retaliatory acts are defined broadly under SPD's policy and include "discouragement, intimidation, coercion, or adverse action against any person. (*Id.*)





After examining evidence in this case, including BWV and arrest statements, OPA found insufficient evidence to determine that the decision to arrest the Complainant and the other individuals, as well as to use force against them, was premised solely on the fact that they engaged in protected demonstration activity. Rather, as discussed above, there was indisputable probable cause to arrest and the arrests were consistent with directions and guidance provided by Sergeant #1 and the incident commanders. While reasonable minds could differ as to whether the law enforcement action taken was a prudent use of resources at the time, OPA's investigation did not find sufficient evidence to determine that it was retaliatory.

In reaching this finding, OPA notes that several of the officers, including NE#1, made questionable statements in the lead-up to the arrests. For example, NE#1 said, after identifying the Complainant and the other individuals were potentially about to tag the building and prior to the arrests: "we're going to get somebody" and "we're going to make some arrests." As the officers biked towards the Complainant and the other two individuals, who were fleeing, WO#1 yelled "taggers!" Shortly thereafter and right before he got off his bike and started running, NE#1 exclaimed: "you can't outrun a bike!"

OPA does not find that these statements, in and of themselves, necessitate a finding that the officers engaged in retaliation. This is particularly the case when evaluated with the rest of the evidence. However, the comments were juvenile, unnecessary, and disappointing, and raised the specter of retaliation being present. This was a self-inflicted wound could have been and should have been avoided and that cannot be repeated.

Accordingly, OPA issues the below Training Referral to the entirety of the Named Employees' unit.

- **Training Referral:** The chain of command for the Community Response Group should watch with their officers the portion of the BWV prior to the arrest of the Complainant. The chain of command should specifically focus on the statements made by the officers, including NE#1 and WO#1, and discuss whether this is how it wants its officers to behave and speak while taking law enforcement action, particularly in the demonstration context. The chain of command should make clear that such comments, even if not intended maliciously, can serve to undermine public trust and confidence. Future comments will be looked at critically by OPA, and hopefully by the chain of command as well. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**