



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 7, 2020

FROM: DIRECTOR ANDREW MYERBERG
 OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0553

Allegations of Misconduct and the 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)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	14.090 - Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls Consistent with Title 8 - Use-of-Force a & b	Not Sustained (Lawful and Proper)
# 2	15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a General Offense Report	Not Sustained (Training Referral)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	8.300-POL-7 Use of Force – Specialty Unit Weaponry 3. Officers in Specialty Units Shall Use Their Weaponry in a Manner That is Objectively Reasonable, Necessary, and Proportional	Not Sustained (Lawful and Proper)

Named Employee #4

Allegation(s):		Director’s Findings
# 1	8.300-POL-7 Use of Force – Specialty Unit Weaponry 3. Officers in Specialty Units Shall Use Their Weaponry in a Manner That is Objectively Reasonable, Necessary, and Proportional	Not Sustained (Lawful and Proper)

EXECUTIVE SUMMARY:

The Complainant, who is the brother of the Subject in this case, alleged that the Named Employees used excessive force against the Subject when the Complainant and the Subject attempted to leave a demonstration.

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. While most demonstrators protested peacefully, some demonstrations, especially during the early days of the protests and during nighttime hours, devolved into violence, property destruction, and looting.



The specific incident at issue in this case occurred on May 30, 2020, at approximately 2:52 p.m., in the vicinity of Westlake Park and 4th Avenue. According to the Complainant, he and his brother – referred to here as the “Subject” – were participating in peaceful protests and, in the minutes leading up to the incident, approached a mobile fence line made up of bicycle officers. The Complainant and the Subject requested to be allowed to pass the mobile fence to use a restroom. The Complainant stated that officers refused to allow him or the Subject to pass through the line. He stated that one of the Named Employees, Named Employee #1 (NE#1) “became agitated” and “shoved” the Subject in the chest. The Complainant stated that he and the Subject “[felt] violated and demanded an explanation.” At that time, the Complainant alleged that “[o]fficers picked up their bicycles and shoved aggressively and then pepper sprayed [the Subject and the Complainant] in the face and then shot at close range with rubber bullets.” The Complainant stated that, at no time, did he or the Subject “produce any weapons” and that the incident generally constituted excessive force.

OPA located Department records and Body Worn Video (BWV) that documented the incident. At the time, the Named Employees were operating as part of a bicycle squad that formed a mobile fence line across 4th Avenue. NE#1, a bicycle line officer, was stationed at the right side of the police line and stood immediately next to the wall of the Macy’s store on that block. Named Employee #2 (NE#2) operated as a “linebacker” – an officer who stands behind a bicycle line and is responsible for maintaining situational awareness, spotting potential threats, and supporting the line officers. Named Employees #3 and #4 (NE#3 and NE#4), who were assigned 40mm Less-Lethal Impact Munitions (“40mm”), were also tasked with backing the line and supporting Patrol. The 40mm fires a foam-tipped “blue nose” projectile to a range of over 100 feet. It is designed to induce a subject with a weapon to drop that weapon or to prevent the subject from approaching officers or others and causing harm. The 40mm “blue-nose” projectile impacts with significant force but is designed to cause pain and bruising rather than penetrating injury. Officers are trained to target the lower body, upper body (shoulders/chest), center mass, and head (in that order) to reduce chances of injury.

Body Worn Video

OPA viewed BWV from the Named Employees, as well as from other officers stationed nearby. BWV from NE#1 and NE#2 contained the most complete picture of the entire incident. It showed that, in the minutes before the incident, NE#1 and the other officers were ordered to establish a line across 4th Avenue and to not allow anyone to pass going north. BWV indicated that the officers took up this position, and, although they allowed people to pass them going south, they turned away several individuals who were attempting to go north. It appeared during OPA’s review that officers were attempting to permit entry to the protest area on 4th Avenue while directing exit elsewhere.

At approximately 2:51 p.m., BWV showed two individuals, ultimately identified as the Complainant and the Subject, approaching the line without slowing down as if to pass through. NE#1 directed the Subject to stay back. The Subject responded that NE#1 “just let like 15 fucking people pass through” and continued forward. NE#1 stated that people were being allowed to go “that way,” pointing east. He placed his hand on the Subject’s chest and attempted to move him back. The Subject told NE#1 to “get [his] fucking hand off me.” BWV showed the Subject becoming escalated and shoving NE#1’s hand off while shouting.

During this interaction, NE#2 approached NE#1 and the Subject. NE#2 displayed his OC spray canister and directed the Subject to “move back.” The Subject raised his hand and appeared to try to brush away or grab at the OC canister. When the Subject did so, NE#2 deployed OC spray at the Subject. The Subject retreated about ten feet and



shouted: “get the fuck off me.” BWV then showed him reaching into his belt area. The Subject yelled that he was “going to spray your bitch ass.” He further produced a canister of OC spray. The Subject attempted to spray the line of officers and, when this was unsuccessful, threw the canister towards them. NE#2 deployed OC spray at the Subject again but, given the distance, it did not appear to actually reach him.

Contemporaneously, NE#3 and NE#4, the backing officers who were armed with 40mms, moved in to provide additional support. When the Subject raised his OC spray canister and pointed it towards NE#1 and NE#2, NE#3 and NE#4 fired multiple 40mm less lethal projectiles at the Subject’s lower body. The Subject subsequently retreated.

The entirety of the force used by the Named Employees was specifically directed towards the Subject. No one else in the crowd appeared to be affected at that time by either OC spray or 40mm foam tips.

Several individuals who witnessed the interaction with the Subject began verbally engaging with NE#1 and other officers. These interactions were tense but peaceful. After approximately 20 minutes, the Subject returned to the incident scene. He attempted to approach NE#1’s position on the line and another protester held him back. The Subject and the other protester engaged in a heated dialog. The Subject told a group of protesters that officers had shot him and pepper sprayed him because he was trying to leave to use the restroom.

NE#1 advised NE#2 that the Subject had returned. NE#2 went to notify a supervisor. NE#2 informed the supervisor that the Subject attempted to take his pepper spray earlier and stated his intent to make an arrest. The supervisor consented. NE#2 then returned to the line and told nearby officers that they would be arresting the Subject. He stated “let’s BLAM him” (BLAM stands for “Bike Line Arrest Movement” – a trained tactic in which a bicycle line will separate an arrestee from the rest of the crowd to facilitate arrest).

Upon NE#2’s prompting, NE#1 and the other bike officers at that section of the line picked up their bicycles and pushed the crowd back using the BLAM tactic as trained. NE#2 pulled the Subject behind the line and took him to the ground. During this time, the Subject could be heard stating that he was just “trying to leave.” NE#2 completed handcuffing the Subject and took him to a nearby police van for transport to a precinct.

Use of Force and Arrest Reports

As required by policy, NE#2, NE#3, and NE#4 completed Use of Force Reports for the incident. NE#2 noted in his report that, about 40 minutes before the incident, supervisors ordered his squad to form a line on 4th Avenue and not to allow anyone to move north of the line. He stated that a dispersal order was given to the crowd at 2:42 p.m.

NE#2 recalled that the Subject came up to him, screamed at him, and pushed him. He stated that he displayed OC spray in an attempt to make the Subject voluntarily back away, and he considered this to be a form of de-escalation. He stated that the Subject then attempted to take his OC spray, which, in connection with the Subject pushing back against NE#1, led NE#2 to believe that the Subject would assault officers. He then sprayed the Subject to create space and prevent him from being assaultive. The Subject then produced his own can of OC spray, threatened to spray officers, and then threw the can at the line. NE#2 reported that SWAT officers (NE#3 and NE#4) fired their 40mm, which caused the Subject to leave. NE#2 reported that the Subject later returned and was arrested.

NE#3 wrote that he first noticed the Subject when the Subject began yelling at officers on the line. He saw the Subject lunge toward an officer (NE#1) and observed that officer push the Subject away. NE#3 saw another officer



(NE#2) use OC spray and saw the Subject fall back. He stated that he saw the Subject retrieve an item from his waistband and he thought it was going to be a gun. He heard members of the crowd yelling “don’t do it.” NE#3 recognized that the Subject had raised an OC canister at officers, and, at that point, NE#3 fired his 40mm at the Subject’s lower body area. He believed that he hit the Subject eight times and missed twice.

NE#4 recorded that he saw the Subject become irate and yell at officers on the line. He then saw the Subject move back and retrieve something from his waistband. In response, NE#4 stepped up to the line, raised his 40mm and aimed it at the Subject. When he saw the Subject raise his OC canister, NE#4 fired the 40mm at the Subject. He stated that he did so to prevent the Subject from assaulting officers.

NE#2 also completed an arrest report. This report was largely consistent with BWV and the associated Use of Force Reports. In the arrest report, NE#2 stated that the Subject “grabbed [his] pepper spray and attempted to rip it from [his] hand.” This was consistent with oral information provided by NE#2 during the arrest screening process. The arrest report also indicated that, when the Subject was searched incident to arrest, officers recovered a piece of sharpened metal in the shape of an arrowhead attached to a wooden handle.

Subsequent to the incident, the Subject’s brother—the Complainant—filed this complaint. OPA interviewed the Complainant and summarized his statement after he declined to be recorded. In his statement, the Complainant stated that the Subject attended the George Floyd protest on May 30. According to the Complainant, at approximately 1450 hours, the Subject approached the bicycle line where he asked an officer to be let out to use the restroom. The Complainant alleged that, on hearing the Subject’s request, the officer shoved and then pepper sprayed the Subject for no reason. The Complainant said that the Subject then pulled out his own pepper spray “because he had a right to defend himself against officers.” The Complainant stated that he had video of the incident but declined to provide it to OPA. He verified what the Subject was wearing at the time, which matched the appearance of the Subject on the BWV.

OPA interviewed NE#2. He stated that, at the time of the protests, he was assigned to a bicycle squad. He said that, on May 30, he observed mass protests as well as several incidents of violence and destruction, including violence directed at police. NE#2 recalled that he was a “linebacker” for the bicycle squad. He explained that when forming a fence line, bicycle officers keep their hands on their bicycles. Accordingly, linebackers are tasked with monitoring the situation, deploying less-lethal tools, and making arrests where needed.

NE#2 stated that his attention was drawn to a disturbance between NE#1 and the Subject. When the Subject refused to move back and struck NE#1’s hand, NE#2 displayed his OC canister as a warning and told the Subject to move back. The Subject made what NE#2 described as a “swiping motion” at the OC spray, and NE#2 sprayed the Subject. NE#2 clarified that he did not view BWV before writing his incident report and that he inadvertently wrote that the Subject “grabbed” the OC canister. He said that it would have been more accurate to state that the Subject “grabbed at” his OC canister.

Regarding the decision to arrest the Subject, NE#2 explained that he based his probable cause determination on the Subject’s obstruction of NE#1 (refusing to move off of the line when directed), and the Subject’s assaultive behavior (shoving NE#1, attempting to spray the officers, and throwing his own OC canister at the line). NE#2 stated that the attempted theft of his OC canister was part of, but not the sole justification for, the arrest. He told OPA that he used the theft of pepper spray language in his report and in briefing the sergeant because it was how he recalled the incident at the time.



After conducting the interview of NE#2, OPA determined that it was not necessary to also interview NE#1, NE#3, or NE#4 since all their actions were fully captured on BWV.

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 subject, 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’s use of force against the Subject did not violate policy. At the outset, OPA notes that NE#1 used only de minimis force to move the Subject back for safety reasons. In addition, NE#1 did not use force on the Subject during his arrest (NE#1’s sole task was to push the crowd back with his bicycle).

At the time the Subject first approached the line, he was significantly escalated and in direct contact with NE#1. OPA finds on review of BWV that there was no record of the Subject asking to use the restroom or to be allowed to peacefully depart the protest. Rather, he approached the line with the intent to pass through and, when told he could not, began shouting profanity. At no time in this interaction did the Subject clearly state that he was trying to leave peacefully, and there was no way for NE#1 to have intuited that this was his objective.

Given the circumstances, including the presence of other individuals at the scene, NE#1’s decision to use force to create space was reasonable. The danger that the Subject could have breached the bicycle line and— if followed by others — potentially collapse the officers’ formation was not remote. Precisely this happened on multiple occasions during the protests, leading to significant uses of force that officers could and should reasonably seek to avoid when possible.

It was also necessary to create space with the Subject to ensure that neither the Subject, nor any other individuals who became escalated by the Subject’s angry outburst, could break the police line. Finally, the de-minimis force used (a push to the chest) was proportional to the threat of escalation that the Subject posed by attempting to pass through the line and then refusing to leave.

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

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

Named Employee #2 - Allegation #1



14.090 - Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls Consistent with Title 8 - Use-of-Force a & b

SPD Policy 14.090-POL-10 states that deployment of OC spray or blast balls shall have the primary objective of defending the officer, defending another, or preventing significant destruction of property. (SPD Policy 14.090-POL-10). The policy further states that individual officers may deploy OC spray or blast balls “at the specific suspect(s) who are posing a threat” and that if feasible, officers must provide a verbal warning prior to deployment. (*Id.*) Finally, the policy states that when feasible, officers will provide aid to subjects exposed to OC and/or blast balls and will request medical assistance when subjects complain of continued effects from OC or blast balls. Officers will request medical assistance when a subject appears to have been injured. (*Id.*) An officer’s decision to deploy OC or blast balls must be consistent with Title 8 – Use of Force. (*Id.*)

OPA finds that NE#2’s decision to deploy OC spray was consistent with the objectives detailed in this policy and did not violate SPD’s general force policy. First, BWV showed that NE#2, a linebacker, responded to the escalating altercation between the Subject and NE#1. NE#2 displayed his OC canister as a non-verbal warning; however, this was ineffective.

The decision to subsequently deploy OC spray was reasonable, necessary, and proportional under the circumstances. Apart from the concern that the Subject might push through the bike line, OPA notes that, when NE#2 displayed his OC canister to induce the Subject to back off without additional force, the Subject swiped or grabbed at it with the apparent intent of taking it from him. This rendered NE#2’s decision to deploy OC spray rather than allow the Subject to take it from him reasonable. It was also necessary to prevent the Subject from continuing to struggle with NE#1, as well as to prevent him from obtaining a weapon to use against officers. Finally, it was proportional to the escalating danger the Subject posed when he continued to resist being moved back by responding with force.

Finally, OPA finds that no medical assistance was requested or practical. The Subject moved back from the line and then produced a canister of OC spray with which he attempted to assault the officers and then threw at them. He subsequently fled the scene. There was no opportunity to render aid or call for assistance, and none was sought.

OPA notes that the assertion that the Subject was merely defending himself is unavailing. Indeed, the BWV indicated that he was aggressive from the outset and there was no support for his and the Complainant’s claim that he was simply asking to use the bathroom or to pass by. To the contrary, it appeared that the Subject had the intent to engage in a confrontation with officers.

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

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

Named Employee #2 - Allegation #2

15.180 - Primary Investigations 5. Officers Shall Document all Primary Investigations on a General Offense Report

SPD Policy 15.180-POL-5 requires that officers document all primary investigations on a General Offense Report. Even where victims of crime refuse to cooperate and to give a statement, officers are still required to document that



fact in a report. (SPD Policy 15.180-POL-5.) Lastly, the Department's expectation, which has been clearly conveyed to officers, is that this report will be completed prior to the end of their shift on the date of the incident.

OPA finds that NE#2's stated justification for the arrest did not exactly match what occurred on BWV. Specifically, the BWV showed that the Subject attempted to knock away or grab at NE#2's OC spray, but that he did not, in fact, grab it.

While either conduct would have provided probable cause to arrest the Subject, it is important for reports to be accurate, particularly when the details of the crime can be material to the charges brought. That being said, NE#1 took responsibility for the inconsistency, and OPA notes that the difference between "grabbed" and "grabbed at" turns on a single word. Given that NE#2's error was minor and there is no indication that it was purposefully inaccurate, OPA recommends the below Training Referral.

- **Training Referral:** NE#2's chain of command should ensure that he accurately documents critical aspects of incidents in the future. This training should be documented, and that documentation retained in an appropriate database.

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

Named Employee #3 - Allegation #1

8.300-POL-7 Use of Force – Specialty Unit Weaponry 3. Officers in Specialty Units Shall Use Their Weaponry in a Manner That is Objectively Reasonable, Necessary, and Proportional

SPD Policy 8.300-POL-7(3) states that specialty unit weapons are to be used in a manner that complies with SPD's use of force policies. The policy incorporates SPD Policy 8.200(1) by reference and requires that the force used by officers be reasonable, necessary and proportional. (See SPD Policy 8.200(1).)

OPA finds that the decision by NE#3 and NE#4 to deploy their 40mm was reasonable, necessary, and proportional and therefore, did not violate policy. At the time they did so, they observed the Subject into his waistband while members of the crowd shouted: "don't do it." The officers believed that the Subject was attempting to access a weapon and they were permitted to use force to prevent him from doing so. This analysis does not change because the weapon the Subject pulled out was OC spray. Indeed, it was also reasonable to use force to prevent the Subject from deploying OC spray at the officers.

The use of the 40mm was further necessary to stop the Subject from carrying out his threat. At the time NE#3 and NE#4 fired, the Subject had just stated his intent to assault officers — presumably because he was angry that he had just been sprayed himself. Moreover, it was necessary to use force to prevent this because verbal directives — both from the officers and from the crowd — were unavailing.

Finally, the use of the 40mm was proportional. Indeed, at the time NE#3 and NE#4 fired they believed that he could be about to access a firearm. Even when he pulled out an OC canister, the use of the 40mm was proportional to the need to prevent the Subject from harming not only the officers immediately in front of him but also other members of the crowd.



For these reasons, OPA recommends that this allegation and the one below be Not Sustained – Lawful and Proper as against both NE#3 and NE#4.

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

Named Employee #4 - Allegation #1

8.300-POL-7 Use of Force – Specialty Unit Weaponry 3. Officers in Specialty Units Shall Use Their Weaponry in a Manner That is Objectively Reasonable, Necessary, and Proportional

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

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