



CLOSED CASE SUMMARY

ISSUED DATE: APRIL 29, 2021

FROM: DIRECTOR ANDREW MYERBERG
 OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0628

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Management Action)
# 3	8.300-POL-11 Use of Force – 40 mm Less Lethal Launcher 11. Preferred Target Areas for 40 mm LL Launchers Are:	Not Sustained (Lawful and Proper)

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, through his attorney, alleged that the Named Employee retaliated against him for speech criticizing the Department by shooting him with a 40mm “blue nose” foam-tipped round. He further alleged that this constituted excessive force and that the Named Employee violated SPD policies by targeting his torso rather than the ground.

SUMMARY OF INVESTIGATION:

This case arises out of demonstration activity occurring on July 25, 2020, in the general vicinity of the SPD East Precinct. On that date, and prior to the specific incident at issue in this case, a crowd of demonstrators gathered in the vicinity of the Youth Services Center (YSC) before moving to the East Precinct. While some members of the crowd demonstrated peacefully, others engaged in significant property damage including arson at the YSC, a Starbucks and an apartment unit, and the East Precinct. After an explosive device was detonated against the wall of the East Precinct, the SPD commander at the scene ordered the crowd to be dispersed and authorized the use of less lethal tools to do so.

The specific incident at issue here occurred at approximately 6:32 PM, after the dispersal order had been issued to the crowd. At the time, officers had recently conducted a push west on Pine Street toward Broadway and were returning to their previous position on 11th Avenue. To do so, they were walking backward. Named Employee #1 (NE#1), a SWAT officer, was equipped with a 40mm launcher and “blue nose” foam-tipped Less Lethal Impact Munitions (LLIMs). He was assigned to the police line and tasked with assisting patrol by deterring specific unlawful conduct.

BWV from NE#1 as well as other officers captured the incident. It showed him walking backwards while facing the crowd, which was advancing in time with the officer’s retreat. As officers encountered traffic control devices fixed to the street they would slow down, and the demonstrators gradually moved closer to them. NE#1 could be heard



relaying commands from supervisors to “dress the line” and watch out for obstacles. Also audible were chants and shouted statements from the crowd, including an individual stating “the only good cop is a dead cop” as well as the sound of at least one leaf blower.

BWV showed an individual, later identified as the Complainant, at the front of the line of demonstrators. He was shown carrying a leaf blower, which he pointed at the ground and toward officers, causing dirt and dust to blow towards them in a cloud. About 20 seconds after the Complainant first appeared on BWV, NE#1 moved to the front of the officer line and fired one 40mm LLIM at him.

BWV of another officer, a sergeant who was standing slightly offset from the line, also showed the moments before the deployment. In this video, the Complainant was clearly depicted pointing the leaf blower at officers’ faces and a dust cloud could be seen. All the officers were wearing gas masks although many had exposed skin on their arms, face, and neck. BWV depicted the Complainant crouching down while pointing the leaf blower at officers. As he stood up, NE#1 moved forward and fired the LLIM round. Since the Complainant was visible at the edge of the BWV capture, it was not clear based on the video exactly where NE#1 aimed the 40mm.

Later, the Complainant contacted OPA online. He alleged that NE#1 shot him with a rubber bullet from “less than 10 feet away” because he “disagreed with what [the Complainant] was saying.” He further alleged that NE#1 aimed at his center mass rather than “at the ground as is required by the training manual.” This investigation ensued.

OPA contacted the phone number the Complainant provided and spoke with his attorney. Through the attorney, the Complainant provided a description of himself, photos of his injuries, and an approximate time of the incident. He stated that, at the time, he had been telling officers on the line that they were “using excessive brutality and proving the point that they are an uncontrollable and unaccountable inherently violent police force that does nothing to keep the community safe.” He stated that no officer responded to him verbally. The Complainant also filed a tort claim with the City. In that claim, he alleged that NE#1 fired the LLIM at him because of his political speech.

The photos provided by the Complainant showed an abrasion to his right abdomen in the approximate vicinity of his abdominal muscles and lower ribcage. Another photo showed an abrasion, swelling, and bruising to the right arm.

OPA attempted to identify a use of force statement by NE#1 regarding this deployment. NE#1’s use of force statement from July 25 chronicled several deployments of less lethal tools but did not specifically describe his interaction with the Complainant.

OPA also inspected relevant training materials for the 40mm launcher. Those training materials showed that the legs and buttocks below the belt were described as “Zone 1” and marked in green. They also showed a “Zone 2” marked in yellow covering the abdomen below the chest. “Zone 3,” marked in red, included the head and neck. Among other “preferred targets” for the 40mm, training materials listed “large muscle groups,” although this term was not further defined. Another page in the training materials showed the effective range of the 40mm LLIM to be between 5 and 120 feet, with the optimum range between 10 and 75 feet. According to the manufacturer, the minimum safe range was 5 feet. Nothing in the training materials indicated that rounds should be aimed at the ground.

OPA interviewed NE#1. NE#1 stated that, based on his recollection, at the time this incident occurred officers had already pushed the crowd west on Pine twice, and numerous dispersal orders had been broadcast. The previous dispersals had been accomplished using blast balls, meaning that there was OC powder on the ground. He stated that



individuals, including the Complainant, were using leaf blowers to create clouds of OC and blow it back in the officers' faces. NE#1 characterized this as an attempt to assault officers. He stated that he had seen the Complainant doing so continuously for several minutes before he used the 40mm, and that it was consistent with similar tactics by others with leaf blowers. NE#1 said that this created an imminent risk to officers. He said that he chose to fire the 40mm rather than another tool like a blast ball, because the 40mm allowed him to target only the Complainant, and did not create a risk of incidental exposure to others who were not at the time assaulting officers.

OPA asked NE#1 about the allegation that he targeted a prohibited area of the Complainant's body or otherwise violated training in how he used the 40mm. NE#1 stated that he believed he had been about 15 feet away when he fired the round, which was a safe distance per training. He said that he aimed at the Complainant's thighs or legs but that, at the time, the Complainant was a "moving target." When asked specifically if he was supposed to aim the 40mm at the ground, NE#1 said that this was inconsistent with training and that he had been instructed not to try to "skip" rounds off the ground.

Regarding allegations of retaliation, NE#1 stated that he never heard anything that the Complainant said. He stated that, earlier that day, he had been near an improvised explosive when it went off and suffered hearing loss. NE#1 said that he decided to fire the 40mm at the Complainant because of his actions, which NE#1 characterized as assaults, and not because of any statements.

Finally, OPA went to the scene of the incident. Based on still BWV images and markings on the roadway, OPA estimated the distance between NE#1 and the Complainant at the time NE#1 fired his 40mm. The distance was approximately 12-13 feet.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - 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.*)

OPA finds insufficient evidence to determine that NE#1 targeted the Complainant because of his speech, rather than his actions. Under the policy above, a person's speech activities, *without more*, cannot alone form the basis for an officer to take law enforcement action. However, the fact that a person may be engaging in speech activities does not itself prohibit an officer from taking law enforcement action where necessary to accomplish a legitimate goal.

OPA finds that the evidence here shows that NE#1 did not base his decision to use force on the speech alone. OPA reaches this conclusion for three main reasons. First, BWV did not record any audible statements by the Complainant. While this alone is insufficient to show that NE#1 could not have heard the Complainant, significant crowd noise and the noise of the Complainant's leaf blower make that less likely. Second, BWV did record several other statements by crowd members critical of SPD as a whole and of NE#1 in particular. NE#1 did not use force against any of those persons, which reduces the likelihood that he chose to target the Complainant alone. Third, as



discussed below, OPA finds that NE#1 could have reasonably interpreted the Complainant's actions as threatening. While reasonable people might differ as to the decision to use force in response to this conduct, OPA does not find his justification to have been pretextual.

For the above reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #2

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 does not discount the potential risks involved to officers posed by individuals using leaf blowers. In at least some instances – and as described by NE#1 in this case, OPA has found evidence suggesting that people used leaf blowers to spray police lines with bear spray, which is significantly more hazardous to humans than the OC spray used by SPD. Moreover, where officers have used OC spray or other chemical agents to disperse a crowd or to target a specific individual, OPA finds that it constitutes a criminal act to then direct that back towards officers with a leaf blower. This is the case even if officers are wearing gas masks as OC spray can also affect skin that may be uncovered. There is no fundamental difference between that act and using the chemical agents directly on officers. Accordingly, OPA finds that there are situations in which targeting an individual using a leaf blower would be appropriate under the circumstances. Stated differently, it does not constitute a per se violation of policy to do so.

However, the simple act of possessing and using a leaf blower does not, under all scenarios, permit force to be used. Indeed, there must be some threat present to permit such force. Here, NE#1 articulated that the Complainant (and others) used the leaf blower to disperse OC spray power that was on the ground into the air and towards officers. NE#1 described that the Complainant caused the OC spray powder to be lifted off of the ground and then raised his leaf blower to blow it towards officers. NE#1 felt that this constituted an assault. He thus used his 40mm to target the Complainant to prevent him from continuing to engage in this activity.

From OPA's review of the BWV, the Complainant's acts appear to be consistent with what was described by NE#1. The Complainant used his leaf blower to raise dust from the ground and then lifted up his leaf blower to direct that dust towards officers. BWV clearly showed that the dust then moved towards and through the police lines. While it is impossible for OPA to assess how much OC spray powder was on the ground and the impact that such airborne powder would have had on officers who were predominantly wearing gas masks, it did constitute a threat that NE#1 was permitted to act on.



That being said, the use of leaf blower during demonstrations in Seattle is a new tactic and one that is not discussed – as far as OPA is aware – in any SPD training. Policy is similarly silent on how demonstrators using such devices should be handled and what force options, if any, are appropriate. OPA believes that developing training in this area would be beneficial to ensure that officers receive guidance on the threat level posed by leaf blowers, in what circumstances force may be used, and what level and nature of force may be applied. SPD should also make clear publicly what its engagement plan will be with leaf blowers so that demonstrators who choose to use them at protests in the future will be aware of the attendant risks of being subjected to force.

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

Named Employee #1 - Allegation #3

8.300-POL-11 Use of Force – 40 mm Less Lethal Launcher 11. Preferred Target Areas for 40 mm LL Launchers Are:

SPD Policy 8.300-POL-11(11) lists the preferred targets for the 40 mm LL Launcher: buttocks, thigh area, calf, and large muscle groups. SPD Policy 8.300-POL-11(11). The policy goes on to state that officers should collect the components of the expended 40 mm cartridge for submission as evidence. *Id.*

OPA finds insufficient evidence to suggest that the way NE#1 deployed the 40mm violated this policy. As a starting point, OPA could find no support in training materials to establish that officers should aim at the ground when deploying the 40mm LLIM. In addition, while the preferred target for the 40mm is the leg area, both training materials and the policy itself include “large muscle groups” including those on the abdomen as permissible, if secondary, targets. Finally, NE#1 appeared to be within the safe and effective range for the 40mm launcher, given OPA’s reconstruction of the incident after the fact.

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

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