



## CLOSED CASE SUMMARY

ISSUED DATE:      DECEMBER 7, 2020

FROM:             DIRECTOR ANDREW MYERBERG  
                      OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER:     2020OPA-0420

### Allegations of Misconduct and the Director’s Findings

**Named Employee #1**

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	Not Sustained (Lawful and Proper)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

**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	Not Sustained (Lawful and Proper)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

### EXECUTIVE SUMMARY:

The Complainant alleged that the Named Employees used unnecessary force and acted unprofessionally during a May 31, 2020 protest.

### ANALYSIS AND CONCLUSIONS:

**Named Employee #1 - 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***

OPA received a complaint concerning SPD enforcement activities at a demonstration. The Complainant asserted that two officers – later identified as Named Employee #1 (NE#1) and Named Employee #2 (NE#2) – improperly pepper sprayed a man and were goading protesters. This investigation ensued.

During its investigation, OPA determined that, on May 31, 2020, NE#1 and NE#2 were assigned to the area of 5<sup>th</sup> Avenue and James Street to keep protesters from entering the freeway and traveling against traffic on one-way streets. At a certain point, SPD supervisors ordered NE#1, NE#2, and other officers to form a bicycle line to keep a group of protesters from traveling southbound on 1<sup>st</sup> Avenue from Cherry Street. NE#1 and NE#2 were standing next to one another. As indicated on Body Worn Video (BWV), NE#2 noticed a small open area between a column and a store front, so he moved his bike to block it. An unknown male passed by NE#1 and NE#2, breaking off from the



larger group of protesters and approaching the bicycle officers with his hands up. He attempted to walk through the alcove, but NE#2 blocked his path. The male grabbed NE#2's bicycle seat in attempt to move it and began to push NE#2. NE#2 pushed the male back while telling him to move.

Shortly thereafter, the male quickly advanced towards NE#2 and tried to grab his hands. As the male approached, NE#1 shouted at him to "get back" and applied a short burst of OC spray directed at the male's face. In his use of force report, NE#1 later documented that providing a warning was not feasible because of how quickly the incident unfolded and was also not safe given the male's actions. After NE#1's deployment of OC spray, two other protesters began to rush the bicycle line. NE#2 also deployed OC spray, causing the individuals to stop rushing towards them. This second deployment stopped when the individuals ceased advancing towards NE#1 and NE#2. Other protesters then began throwing projectiles at officers.

This incident was recorded on BWV. The BWV was consistent with the account documented by the officers in their use of force reports. Although the Complainant referenced also possessing video in her original contact with OPA, she did not respond to multiple requests for an interview and for more information regarding the video footage. The Complainant did not ever provide the video footage to OPA and was not ultimately interviewed given her lack of cooperation.

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). It 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.*) SPD Policy 8.300-POL-5(3) states that officers may use OC spray for crowd dispersal or protection only when such force is objectively reasonable, necessary, and proportional. The elements for whether force is reasonable, necessary, and proportional are set forth in SPD Policy 8.200-POL-3. Lastly, SPD Policy 8.300-POL-5(8) instructs, that, when using OC spray, it should be directed at the specific subjects who are causing a threat and the officer should minimize exposure to other individuals.

Based on review of the BWV, the evidence establishes that NE#1 and NE#2 deployed their OC spray to defend themselves and each other. Indeed, at the time of the deployments, the male pushed NE#2, other demonstrators advanced towards them, and projectiles were thrown in their direction. These uses of force were reasonable under these circumstances. The officers' uses of force were also necessary. NE#1 and NE#2 repeatedly attempted to use verbal commands to gain compliance but, in both instances where OC spray was deployed, the protesters refused to comply. Moreover, the force appeared to be of a reasonable degree and seemed not more expansive than necessary. To this end, both deployments of OC spray were terminated when the threat dissipated. Lastly, the uses of force were proportional given that the male had assaulted NE#2, was advancing again towards him, and other demonstrators quickly approached the line. Given this, it was appropriate to use OC spray towards the specific individuals presenting threats towards the officers.

The BWV clearly indicated that neither NE#1 nor NE#2 provided a verbal warning prior to deploying OC spray. However, such a warning is only mandated when it would be safe or feasible. Here, both officers expressed that the circumstances facing them – including the threat of bodily injury posed to them by the male and other individuals and



the dynamic and fast-paced nature of the interaction – caused the issuance of a warning to not be safe or feasible. Based on a review of the BWV, OPA agrees and does not find that the failure to provide the warning violated policy.

Lastly, while the Named Employees did not determine whether the targets of their OC spray were injured and/or required medical assistance, it was not possible for them to do so as those individuals fled post-deployment. As such, the officers did not violate this portion of the policy.

For the above reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper as to both Named Employees.

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

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

***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.*)

The BWV captured both Named Employees using profanity throughout their interaction with protesters. However, the officers’ use of such language was related to the directions they provided and admonitions to individuals to stay back and away from them. In this respect, the profanity appeared to be employed to add a level of seriousness and urgency to the directives the officers were providing, not to disrespect or insult the individuals. OPA notes that, as currently written, SPD does not bar profanity altogether. It only prohibits profanity utilized as an insult. As OPA does not find that this was the purpose of the profanity here, OPA declines to conclude that it, standing alone, constituted a violation of policy.

Lastly, there is no evidence to support the Complainant’s claim that Named Employees were telling protesters to “come and get it” or that they were attempting to goad protesters in any way. To the contrary, the Named Employees were trying very hard to get the demonstrators to move away from them and to not engage in a conflict with them.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as to both Named Employees.

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

**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***



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

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

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

***5.001 Standards and Duties 10. Employees Shall Strive to be Professional***

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

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