



CLOSED CASE SUMMARY

ISSUED DATE: MARCH 31, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0495

Allegations of Misconduct & 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 (Management Action)
# 2	14.090 Crowd Management 10. b. Officers Will Provide Aid to Subjects Exposed to OC and/or Blast Balls, if Feasible	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	6.010 Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Unfounded)

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 an officer shot a stun grenade that exploded and harmed a protestor. Further, the Complainant alleged that, when an additional protestor came to the injured protestor’s aid, he was arrested by another officer.

ADMINISTRATIVE NOTE:

During the course of drafting this DCM, OPA determined that the decision to make the arrest of the Subject requires further investigation. A new investigation will be initiated against an unknown SPD employee to assess whether the decision to arrest the Subject constituted an abuse of discretion.

ANALYSIS AND CONCLUSIONS:

I. Narrative of Incident

The incident at issue occurred during the protests following the killing of George Floyd by a police officer in Minneapolis. There had been many protests in the incident area over the previous months, including a large and violent protest that occurred that day. Tensions were high between the police and the protestors. On this particular day, the crowd of protestors had been moving around the Capital Hill area. There were reports of protestors



damaging property near the East Precinct. Officers tried to push the crowd away from the precinct, but some protestors kept coming back towards that location. This incident occurred during one of these pushes.

Body Worn Video (BWV) of the incident showed a line of officers trying to push the crowd westbound away from the precinct. Named Employee #1 (NE#1) stood near the line of officers. A water bottle was thrown at the line of officers from the sidewalk nearby where a group of protestors were standing. An officer gave instructions to the police line to keep pushing the crowd. The group of protestors on the sidewalk refused to move back.

Approximately 13 seconds after the water bottle was thrown, NE#1 deployed a blast ball towards the sidewalk where the projectile came from. The blast ball detonated in open space in between people walking on the sidewalk. Witness #1 was standing in the group on the sidewalk and fell to the ground from an injury sustained to her leg after the blast ball detonated. It appeared that this was caused by shrapnel from the blast ball after it exploded.

The Subject, who was with Witness #1 at the time, tried to shield her as she was on the ground. He was ordered to move by an officer. When the Subject refused to move, an officer took him to the ground and gave him instructions to place his hands behind his back. The Subject was arrested and handcuffed.

II. Witness Interviews

The Complainant was interviewed by OPA about the incident. She indicated that she was not present at the incident, but saw videos posted on Witness #1's social media account. She stated that there was approximately one to two minutes of footage total. The Complainant said the videos showed that Witness #1 was at the protest with two other individuals – the Subject and Witness #2. She further explained the video showed Witness #1 on the ground as projectiles were thrown into the crowd of protestors. Witness #1 screamed in pain from being hit with a projectile. Witness #2 and the Subject tried to shield Witness #1 as officers tried to move forward and push the crowd away from the precinct. The Subject and Witness #2 tried to pick Witness #1 up off the ground, but officers held onto the Subject and would not let him go.

III. Named Employee Interview

When OPA interviewed NE#1, he said that several dispersal orders had been given to the crowd. However, he explained that, whenever the officers pushed the crowd away and walked back to the precinct, the protestors would follow them. NE#1 stated that he deployed the blast ball because he saw an object thrown towards the line of officers from the sidewalk area. He did not know what object was thrown, but believed it was a bottle of some sort. NE#1 indicated that he decided to use the blast ball because he had no other available means to stop the crowd from throwing objects.

NE#1 said that he saw the blast ball land on the sidewalk but did not see if it hit anyone. NE#1 could not recall if he deployed the blast ball at a particular individual or at an area in which the threat had come from. NE#1 was not aware that anyone had been injured after deploying the blast ball.

NE#2 resigned from SPD during the pendency of this investigation and declined to be interviewed by OPA. He wrote a statement after arresting the Subject indicating that the Subject had used his body to shield Witness #1 and refused to move when ordered by an officer.



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

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.*) An officer’s decision to deploy OC or blast balls must be consistent with Title 8 – Use of Force. (*Id.*)

Under Title 8 Use of Force, force used by officers must 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.*)

NE#1 made the individual decision to deploy the blast ball towards the crowd on the sidewalk approximately 13 seconds after seeing an object thrown from that area at the line of officers. NE#1 rolled the blast ball underhand towards an open area on the sidewalk in between demonstrators. NE#1 could not identify whether he was targeting a specific demonstrator and explained that he could not remember whether this was the case during his OPA interview months after the fact.

When evaluating this use of force, OPA finds the recent order by U.S. District Judge Jones finding the City to be partially in contempt of a prior order to be instructive. In that order, Judge Jones evaluated blast ball deployments that he perceived to be improper. Judge Jones specifically identified deployments that were not directed at or in the vicinity of a threat. Importantly, Judge Jones held that these deployments were, as such, clearly indiscriminate. Lastly, Judge Jones noted that, in both cases in which he deemed a blast ball deployment to be improper: “the officers stood a great distance from protestors, used overhand throws, and threw blast balls deep into a crowd.”

After applying this analysis to the facts of this case, OPA does not believe that NE#1’s deployment violated policy or, for that matter, Judge Jones’s order. First, NE#1 deployed the blast ball in the vicinity of where the bottle came from and in a close temporal proximity to the throwing of the bottle. The crowd in that area was moving slowly but had remained fairly static. Thus, it was not unreasonable to believe that the bottle thrower was still in that vicinity. Second, the deployment was, unlike those found improper by Judge Jones, underhand and at a relatively close distance from the crowd. Third, the deployment was not deep into the crowd and, to the contrary, was rolled into an open space on the sidewalk.

What is indisputable is that Witness #1 suffered an injury from the deployment. Indeed, not only was this captured on video, but the nature of her injury was also consistent with being struck with shrapnel from a blast ball. What is



also indisputable is that, as these protests have clearly shown, blast balls are dangerous and, as indicated by Judge Jones, they have the highest likelihood of causing indiscriminate harm.

The more cases OPA has evaluated as a result of these protests the more OPA feels that the harm caused by blast balls outweighs their benefit as a less-lethal tool. This is particularly concerning where, as here, a deployment appears consistent with policy and law, but still results in a problematic outcome, including a significant injury. Moreover, this is not an anomaly, as OPA has seen numerous cases stemming from these protests where in policy blast ball deployments in which officers acted completely consistent with their training still caused injuries to individuals. OPA has issued a number of Management Action Recommendations concerning blast balls that are purposed to prevent situations like this where demonstrators, who are not actively engaging in violence, may be subject to harm.

For these reasons, OPA herein amplifies its previous Management Action Recommendations and recommends that, unless SPD can show compelling evidence that blast balls can be used in a safe, non-indiscriminate manner that takes into account how blast balls functionally deploy and largely eliminates the risk of harm to non-violent parties, this tool be banned in its entirety. OPA reaches this conclusion based on the belief that, even if its outstanding recommendations concerning blast balls are all implemented (i.e., no overhand throws or deployments at persons unless an imminent harm to person standard is met), there is no guarantee that bad outcomes will not still result.

While this may not provide the desired remedy for Witness #1, OPA hopes that this will reduce, if not prevent, similar occurrences in the future.

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

Named Employee #1 - Allegation #2

14.090 Crowd Management 10. b. Officers Will Provide Aid to Subjects Exposed to OC and/or Blast Balls, if Feasible

SPD Policy 14.090-POL-10 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.

When asked whether he provided medical assistance to Witness #1, NE#1 explained that he did not know that she was injured and could not see her on the ground. He explained that he rolled the blast ball into what appeared to him to be an open area and he was unaware that it affected anyone when it deployed. Lastly, he stated that, from a review of BWV, the crowd circled around Witness #1 and, as such, his view was blocked.

After watching the BWV, OPA concurs that NE#1's view of Witness #1 was blocked and that there was no indication, from his vantage point, that Witness #1 was on the ground and injured. As NE#1 was not aware of Witness #1's condition, he cannot be faulted for failing to provide her with medical attention. As such, OPA recommends that this allegation be Not Sustained – Unfounded.

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



Named Employee #2 - Allegation #1

6.010 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.

In the arrest report for the Subject, NE#2 wrote that officers were trying to move the crowd when they came upon the Subject, who was "using his body to shield [Witness #1] from being hurt." NE#2 described that, just prior, Witness #1 had fallen to the ground for unknown reasons. NE#2 wrote that the Subject refused to move when ordered to do so by officers and that the Subject needed to be pulled away. NE#2 said that the Subject was "passed off" to NE#2 by another officer who was on the line. NE#2 did not effectuate the arrest but was assigned the report. Based on the information available, OPA struggles to understand why this arrest was made. While the Subject had remained in the area after a dispersal order had been given, he was moving. In addition, at the time of his arrest, he was not willfully disobeying orders to engage in malfeasance, but was trying to shield Witness #1, who was on the ground and injured, from further harm. Given this, the Subject should not have been arrested and, even if there was technically probable cause because of the failure to disperse, OPA would have found that it constituted an abuse of discretion on the part of the arresting officer.

The above being said, NE#2 is not the officer against whom this policy violation should be alleged. As he indicated in his report, another officer made the arrest and passed the Subject onto NE#2. NE#2 does not know the exact reasons for why the arrest was made and there is no indication that he spoke to the arresting officer about this. The information included in the report constitutes NE#2's opinion for the reasons behind the arrest. As such, OPA recommends that this allegation be Not Sustained – Unfounded as against NE#2. However, OPA will be continuing to investigate the decision to make the arrest by an unknown SPD officer and will issue findings in a separate DCM.

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