



CLOSED CASE SUMMARY

ISSUED DATE: MAY 3, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0673

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	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics	Not Sustained (Lawful and Proper)
# 3	8.400 - Use of Force Reporting and Investigation 1. Officers Shall Document in a Use-of-Force Report All Uses of Force Except De Minimis Force	Not Sustained (Training Referral)
# 4	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	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:

It was alleged that Named Employee #1 used excessive force, failed to de-escalate, did not properly report his force, and was unprofessional.

ADMINISTRATIVE NOTE:

During the pendency of this investigation, Named Employee #2 left the employment of SPD. OPA contacted him to obtain a written statement and he initially agreed but subsequently withdrew that agreement as he did not feel that he could comply with the timeframe in which OPA requested the statement. As such, Named Employee #2’s portion of the case remains open as OPA is continuing to obtain his interview.

In addition, the OIG did not certify this case as thorough because OPA did not obtain Named Employee #2’s interview in a timely fashion. The OIG certified the case for timeliness and objectivity.

SUMMARY OF INVESTIGATION:

The Complainant initiated a complaint with OPA concerning an incident that occurred between one of her employees and the Named Employees on September 23, 2020. The Complainant did not witness the incident and relayed to OPA what her employee – who is referred to here as the “Subject” – told her about it. She said that demonstrators were



walking down the street in front of her business and were being followed by officers. She recounted that the following then occurred:

All seemed peaceful until one of the bike cops grabbed a man from the sidewalk and threw him to the ground. My employee was standing a few feet from this. She could see they were hurting this person who was, like her standing on the sidewalk, not in the protest march and had done nothing to the police or anyone else. She spoke out and said, 'Stop, you're hurting him.' She was instantly thrown by one cop, landing on the bike of another cop. Then the cop who knocked her down punched his bike on top of her. She was left with head to toe bruises. She cried out for her mom."

The Complainant felt that this incident exemplified insufficient training provided to officers. As part of her complaint, she posed the following question: "Why would a cop need to assault a person who has not committed a crime or even threatened violence?"

As part of its investigation, OPA reviewed Body Worn Video (BWV), reporting completed by the Named Employees and other officers, and interviewed Named Employee #1 (NE#1).

OPA determined that, during the demonstration on September 23, 17 arrests were made, and demonstrators engaged in property damage and other criminal activity in multiple areas. An officer – referred to here as Witness Officer #1 (WO#1) – decided to effectuate the targeted arrest of a demonstrator who had been previously observed engaging in criminal activity. Officers, including the Named Employees, began directing the crowd to move back. WO#1 documented that there was debris in the road that had been placed there by demonstrators that made it difficult for the officers' bicycles to proceed. WO#1 wrote that, as he rode towards the individual, he collided with another person who was in the crowd. That person fell to the ground and this caused WO#1 to fall off of his bicycle and onto the person. The person rolled onto his back and said something along the lines of: "What the fuck?" The person then kicked WO#1 in his left shin. WO#1 placed the person under arrest for assault.

As this occurred NE#1 and Named Employee (NE#2) rode towards where WO#1 was making the arrest. NE#2 could be heard exclaiming: "You've got one by himself, go!" As they biked forward, items were thrown in the road, including at them. When they arrived, there were a number of demonstrators in the immediate vicinity of where the arrest was occurring. NE#2 made physical contact with an individual who was standing in between him and where the arrest was occurring. While not entirely clear on NE#2's BWV given his proximity to the individual, NE#2 appeared to grab on to him and push him. The contact was clearer on the video of another officer – referred to here as Witness Officer #2 (WO#2). WO#2's BWV indicated that NE#2 grabbed onto the individual's clothing and pushed him, causing them both to come into view of WO#2. While still holding onto the individual, NE#2 put him down on the ground. During this time, officers could be heard directing the crowd to move back repeatedly.

At that time, the Subject was standing on the sidewalk with her hands cupped over her mouth. She appeared to be yelling something, but what she was saying could not be discerned by OPA on the BWV and it was unclear who she was speaking to. The BWV showed that the Subject advanced towards the individual who was on the ground with her arms out and positioned downwards while saying: "He's not doing anything."

BWV then showed NE#1 grab the Subject arm and pull her to the side. As she was swung to the side, she fell down over the individual who was on the ground and into a bicycle. NE#1 quickly moved towards the individual who was on



the ground and appeared ready to go hands-on as if to arrest that individual. While she was on the ground, the Subject stated to the officers: "What the fuck are you doing?" NE#2 told her to move back. She was lifted up by another demonstrator and was walked from the scene. The individual who was on the ground also got up and walked away. Neither she nor the individual on the ground were arrested.

After both the Subject and the individual who was on the ground walked away, NE#1 and NE#2 discussed what occurred. NE#1 asked NE#2 if he was "good." NE#2 responded: "Yeah, I'm good...I thought that guy tried to come up on him." NE#1 stated: "Well, I wasn't sure if you were going to arrest him or not."

NE#1 did not complete a use of force report concerning the force he used on the Subject and it was not investigated by a supervisor.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

As indicated in SPD Policy 5.001-POL-6, "[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment." This policy further states that "[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed." (SPD Policy 5.001-POL-6.)

In assessing NE#1's force, OPA must consider the facts and information known to him at the time and must apply a reasonable officer standard. OPA is further precluded from applying 20/20 hindsight. These considerations are particularly important under the specific facts of this case.

Immediately prior to using force, NE#1 observed WO#1 struggling with an arrestee. NE#1 rode towards him while demonstrators were throwing objects into the street, including nearly striking officers. When NE#1 advanced off of his bicycle, he was in the midst of demonstrators and officers. The situation was chaotic. He saw NE#2 push the individual to the ground and believed that NE#2 was in the process of arresting the individual. He then observed the Subject advance towards the individual and NE#2 with her arms out and saying that the individual did not do anything. NE#1 believed that the Subject was about to attempt to de-arrest the individual, which was a tactic he had observed on numerous occasions during the months of demonstrations. He used force to pull the Subject away that caused her to fall down over the individual.

In hindsight, it is unlikely that the Subject was intending to de-arrest the individual. Certainly, this is what she stated after the fact and her shock that she had fallen to the ground based on police action was palpable. In addition, it did not appear that she was part of the protest when viewing the totality of the video evidence. However, OPA does not think a reasonable officer in NE#1's place would have or could have known this. Moreover, and as stated above, applying such hindsight analysis is prohibited.

Ultimately, the question is whether NE#1 violated policy when he pulled the Subject, who he reasonably believed was about to interfere in an arrest, causing her to fall to the ground. When applying the requisite standards under SPD policy, OPA finds that he did not. To the contrary – and again considering the information available to NE#1 at the time, the totality of the circumstances facing him, and the time he had to make a decision – OPA finds that his force was reasonable, necessary, and proportional. This is the result even if OPA does not like the outcome of this



incident and the fact that the Subject fell to the ground. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #2

8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics

“De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.” (SPD Policy 8.100-POL-1.)

The policy further instructs that: “When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution.” (*Id.*) Officers are also required, “when time and circumstances permit,” to “consider whether a subject’s lack of compliance is a deliberate attempt to resist or an inability to comply based on factors” such as “mental impairment...drug interaction...[and/or] behavioral crisis.” (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident “when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.” (*Id.*)

De-escalation is inarguably a crucial component of the Department’s obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department’s policy and expectations.

OPA’s decision on this allegation is governed by the same analysis from Allegation #1, above. At the time he made physical contact with the Subject, NE#1 believed that NE#2 was effectuating the arrest of the individual who was on the ground and he saw the Subject advance towards both the individual and NE#2 with her arms extended. NE#2 explained during his OPA interview that, at this point, he did not believe that de-escalation was safe or feasible as he felt that the Subject was going to imminently intervene in the individual’s’ arrest. He noted that, by pulling her out of the area, his intent was to create more space for the arrest to be completed safely.

Again, when evaluating this incident from the perspective of NE#1 and without applying 20/20 hindsight, OPA does not find that he failed to de-escalate. OPA concludes that NE#1’s perception that he did not have time to do so was reasonable under the circumstances. Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #3

8.400 – Use of Force Reporting and Investigation 1. Officers Shall Document in a Use-of-Force Report All Uses of Force Except De Minimis Force.



As indicated in SPD Policy 5.001-POL-6, “[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment.” This policy further states that “[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed.” (SPD Policy 5.001-POL-6.)

When reviewing the video, OPA concludes that the force should have been reported as Type I. While the pulling of the Subject from the area may have been de minimis, it was done with enough momentum that it caused her to trip over the individual on the ground and fall into a bicycle. In OPA’s perspective, this was Type I force as it was a: “Controlled placement/takedown that...causes/is likely to cause transitory pain or disorientation.”

At his OPA interview, NE#1 stated that he felt that the force was de minimis. He said that it could have been a Type I if the Subject felt transitory pain; however, he noted that there was no way he could have known this as she did not complain of pain.

While OPA finds that the force should have been reported as Type I or, at the very least, screened with a supervisor, OPA recognizes how fast this situation evolved and that it was a chaotic event. Moreover, from OPA’s analysis of the cases that flowed from the recent demonstrations, it was not always clear that such force was reported and that there was consistency in how to document borderline Type I force. Accordingly, OPA recommends that NE#1 receive retraining rather than discipline.

- **Training Referral:** NE#1’s chain of command should review the BWV of his force and discuss with NE#1 how it should have been reported. The chain of command should make sure that he, and other officers in the unit, are properly identifying and reporting Type I force moving forward. 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 #1 - Allegation #4

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 at all times.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers.” (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.*)

This allegation is premised on the same conduct underlying Allegation #1 and Allegation #2. As OPA does not Sustained those findings, OPA reaches a similar conclusion here. Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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