



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 2, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2018OPA-0178

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy	Not Sustained (Unfounded)
# 2	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 3	8.300 - Use of Force Tools 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection...	Allegation Removed
# 4	8.300 – Use of Force Tools 4. When Feasible, Officers Shall Issue a Verbal Warning to the Subject...	Not Sustained (Lawful and Proper)
# 5	8.300 – Use of Force Tools 5. Officers Must Justify Each Separate Application of OC Spray	Not Sustained (Lawful and Proper)
# 6	Officers are Required to Report the Use of OC Spray, Regardless of the Effect...	Not Sustained (Lawful and Proper)

Named Employee #2

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	8.300 - Use of Force Tools 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection...	Allegation Removed
# 3	8.300 – Use of Force Tools 4. When Feasible, Officers Shall Issue a Verbal Warning to the Subject...	Not Sustained (Lawful and Proper)
# 4	8.300 – Use of Force Tools 5. Officers Must Justify Each Separate Application of OC Spray	Not Sustained (Lawful and Proper)
# 5	Officers are Required to Report the Use of OC Spray, Regardless of the Effect...	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director's Findings
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	5.140 - Bias-Free Policing 4. All Employees Share Responsibility for Preventing Bias-Based Policing	Allegation Removed

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 Complainants alleged that they were “doused in pepper spray” without justification during a protest at the University of Washington. They stated that, during the protest, SPD discriminated against Antifa and left-aligned protesters in favor of those associated with Patriot Prayer and other right-wing groups.

ADMINISTRATIVE NOTE:

OPA submitted this case outside the 180-day timeline imposed by collective bargaining agreement. During its initial investigation of this complaint, OPA was unable to interview either Complainant. The OPA Auditor requested that OPA make additional efforts to interview the Complainants and to conduct additional interviews with the Named Employees. Due to high case volumes at the time, there was a delay before OPA was able to do so. During that time, the 180-day timeline expired. Ultimately, the Office of the Inspector General certified this investigation as thorough and objective, although not timely. OPA notes that the delay did not affect OPA’s findings in this case.

SUMMARY OF INVESTIGATION:

On February 10, 2018, the University of Washington (UW) made a request for mutual aid to SPD to assist in providing security for a planned demonstration by Patriot Prayer, a right-wing organization invited to campus by the UW Young Republicans. A counterdemonstration was also planned by left-wing groups and Antifa. This demonstration occurred in the context of similar demonstrations around the country in which members of the two opposed groups attempted to goad each other into committing assaults. UW, operating on the assumption that such assaults would occur, placed barriers and deployed police officers between the two groups. During the demonstration, individuals from the Patriot Prayer group exited the cordoned-off area and mixed with the much larger crowd of left-aligned protesters, with disturbances reported as a result. SPD officers attempted to separate the groups and escort the Patriot Prayer protesters out of the crowd and back into their designated area. While doing so, officers, including the Named Employees, were involved in uses of force, including the deployment of OC spray.

After the demonstration, two individuals – the Complainants in this case – made complaints regarding SPD’s use of OC spray. The Complainants stated that they were “doused” with OC spray and that it contacted their faces. They alleged that the officers deployed OC spray against them without cause and with the purpose of denying them their rights to speak and assemble. They stated that SPD prevented left-aligned protesters from entering the area cordoned off for the Patriot Prayer group but “allowed” the right-wing protesters to enter the left-aligned counterdemonstration in order to cause assaults, and that this conduct amounted to discrimination based on political viewpoints. They stated that, in their opinion, OC spray and “other dangerous weapons” should not be permitted for use by SPD during demonstrations. This OPA investigation ensued.

OPA identified Named Employee #1 (NE#1) and Named Employee #2 (NE#2) as the involved officers based on the UOF statements they wrote in the aftermath of the demonstration and after interviewing these employees. The Complainants, who were contacted later, identified the Named Employees from third-party photographs. The female Complainant also identified a woman she believed to be herself from a photograph of NE#2 deploying OC spray. While the photograph does not depict NE#2 spraying her, the photograph was of a woman in close proximity to the OC burst, making it likely that the female Complainant was exposed during that OC deployment.



As part of its investigation, OPA reviewed the documentation generated by the officers and Body Worn Video (BWV). In addition, as discussed above, OPA interviewed the Named Employees, as well as interviewed other officers who were present during the events.

OPA determined that NE#1 was an SPD bicycle officer who was acting in a supervisory (sergeant) role. As such, he stood behind the main line of bicycle officers and observed both them and the crowd. NE#1 deployed OC spray three times during the demonstration. In the first incident, NE#1 noticed a disturbance in the large crowd. The crowd parted and he saw two males moving directly toward him. The first subject appeared to be trying to escape the second subject, who had a wooden cutting board strapped to his forearm. The second subject was assaulting the first with the cutting board and the first subject retaliated, causing the two of them to struggle and fall at NE#1's feet. Members of the crowd attempted to intervene and assault one or both of the involved parties. NE#1 deployed a burst of OC spray at the individuals attempting to intervene. In his interview and Use of Force (UOF) statement, NE#1 said that his deployment of OC was intended to prevent individuals in the crowd from assaulting the downed individuals and to obtain space for officers to move in and separate them. NE#1's use of OC spray was sufficient to cause the crowd to move back, and officers moved in to take the two individuals into custody for assault.

In the second incident, NE#1 documented that, while backing the line, he observed a female "lash out" at a bicycle officer. In response, that bicycle officer grabbed the female and attempted to place her under arrest. Members of the crowd attempted to pull the female out of the officer's custody, a tactic known as "de-arresting," which constitutes the crime of obstruction. In his UOF statement, NE#1 noted that de-arresting "puts the arresting officers in a higher risk of danger" due to the fact that, while conducting an arrest, officers focus on the arrested individual and not on the crowd around them, meaning they are less able to react to the crowd's actions. NE#1 noted in his interview that, during demonstrations, none of the participants are typically searched for weapons and officers are unable to know how far an individual protester is willing to go to effect a de-arrest. Both NE#1 and NE#2 stated in interviews that they were aware of cases in which officers and arrested individuals had been injured in a "de-arrest" situation. Both Named Employees also confirmed that, as part of their training, they had themselves been subjected to OC spray and were familiar with its effects.

NE#1 deployed a "split-second" burst of OC spray targeted at the individuals attempting to de-arrest the female. Due to the movement of the crowd, NE#1 stated that he was concerned about collateral exposure and was unable to issue a prior verbal warning. He stated that he observed the individuals he sprayed "melt" back into the crowd after being sprayed. NE#1 stated, and CAD/RMS documents confirm, that no individuals in the crowd directed requests for medical attention to SPD officers at the scene. The other officers took the female into custody without further incident.

In a third incident, NE#1 observed bicycle officers attempting to arrest another female. At the time, NE#1 was attempting to visually locate a separate individual who had been flagged by UW police for removal from the protest site. As he walked through the crowd, he observed officers attempting to effect an arrest while members of the crowd grabbed at the female and tried to de-arrest her. During the altercation, the female and one of the officers fell to the ground. NE#1 deployed "a couple separate short deployments" of OC spray at the individuals attempting to effect the de-arrest. The deployments of OC spray caused the members of the crowd to release the female and allowed the officers to regain control. During his interview, NE#1 stated that, given the presence and hostility of the crowd as well as the fact that both an officer and the arrested female were on the ground, he was concerned about the safety of both the officer and the female. He stated that his use of OC spray was purposed to allow the officers to complete the



arrest and prevent any assaults by unknown individuals in the crowd. NE#1 also stated that he reported each of his three OC deployments to a North Precinct sergeant and created a UOF statement as directed.

During the third incident NE#2 also deployed OC spray against individuals in the crowd. NE#2, who was part of the bicycle fence line, observed officers taking the female into custody and saw approximately five members of the crowd attempt to de-arrest her. One of those individuals, a male, attempted to pull officers off the female, causing an officer and the female to go down to the ground. NE#2 developed probable cause to arrest the male for obstruction. He and another officer stepped over the line of bicycles and took the male into custody. In his UOF statement, NE#2 recorded that approximately six “members of the...crowd started to move toward [us]” and that the rest of his squad was occupied with taking the female into custody. He deployed his OC spray in a two-second burst at this group of individuals. In his UOF Statement, NE#2 recorded that he did so because he believed the group was about to assault him in order to de-arrest the male. He stated that in de-arrest situations the actions of the crowd can cause injury to the arrested individual as well as officers, and he was concerned that both he and the arrested individual could have been hurt in the ensuing struggle. In his interview, NE#2 said that, as a result of his OC spray deployment, the crowd moved back. He contended that he did not provide a verbal warning because the incident occurred within one or two seconds, and a warning would not have been feasible. He also stated that he did not intentionally spray any individual not involved in the de-arrest conduct. NE#2 said that, to his knowledge, no individuals he sprayed approached him or other officers seeking medical assistance due to OC spray exposure. He stated that he reported his OC use to supervisors. OPA confirmed that NE#2 completed a UOF statement as directed.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

5.001 - Standards and Duties 2. Employees Must Adhere to Laws, City Policy and Department Policy

SPD Policy 5.001-POL-2 requires that employees adhere to laws, City policy, and Department policy. This allegation was added based on the Complainant’s assertion that the enforcement actions engaged in by the Named Employees and other SPD officers constituted impermissible and unconstitutional viewpoint discrimination.

As discussed more fully below, OPA finds no evidence supporting the conclusion that NE#1 or any officer took law enforcement action against the Complainants or other demonstrators based on their viewpoints. To the contrary, it appeared clear from the record that such action was based on the conduct of demonstrators, including those affiliated with both viewpoints.

Demonstrators are certainly entitled to First Amendment protections and have the right to assemble and express their beliefs, even vehemently. However, this right is not absolute and is subject to reasonable time, place, and manner restrictions. Moreover, the First Amendment covers speech rather than conduct (with limited exceptions). With regard to conduct, the First Amendment does not provide protections for assaultive, disorderly, or otherwise illegal behavior. Officers may take law enforcement action in those situations without running afoul of the Constitution. From OPA’s review of this incident, that is what happened here.

As such, 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. 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 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (See *id.*) Force is necessary where “no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

OPA finds that the force used by NE#1 was reasonable given the circumstances and that it therefore complied with applicable policy and law. Where an officer has the legal right to arrest an individual, the officer may use no more force than necessary to accomplish that goal. Here, the force was reasonable given the fast-moving nature of the protest, the significant disparity in number of demonstrators as compared to officers, and the impracticality of engaging in one-on-one de-escalation or negotiation with individuals acting as a group to obstruct the officers and de-arrest demonstrators.

The force was further necessary to prevent members of the crowd from assaulting NE#1 and/or obstructing the arrest of the arrested individuals, which is a crime in itself. Moreover, it was necessary to prevent those individuals from the crowd’s efforts to pull them out of police custody and the resulting potential for injuries. Finally, it was necessary to protect the officers themselves from assault by individuals who had not been searched for weapons and who showed demonstrated willingness to engage in criminal activity to prevent NE#1 and the other officers from carrying out their lawful duties.

Finally, the force was proportional to the risks posed by the various groups of demonstrators, their hostility to the police presence, and the willingness of certain individuals to engage in assaults to obstruct the arrest of persons in the crowd. The record shows that NE#1 calibrated the force he used to the situations in which he found himself, and deployed OC spray only in response to reasonably perceived threats and obstructive behavior. While it is possible that other individuals—potentially including the Complainants—were incidentally exposed to OC spray despite the fact that they were not involved in de-arrest attempts or other obstructive conduct, OPA’s examination of BWV and third-party video is sufficient to establish that NE#1 deployed OC spray in a targeted manner and in direct response to efforts by the crowd to assault or obstruct him or other officers.

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

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

Named Employee #1 - Allegation #3

8.300 - Use of Force Tools 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection...

SPD Policy 8.300-POL-5(3) states that “[o]fficers will use OC spray, including for crowd dispersal or protection, only when such force is objectively reasonable, necessary, and proportional.” (SPD Policy 8.300-POL-6(3)).

The elements of this policy are fully subsumed within the above allegation (see Named Employee #1 – Allegation #2). For that reason, OPA recommends that this allegation be removed.



Recommended Finding: **Allegation Removed**

Named Employee #1 - Allegation #4

8.300 – Use of Force Tools 4. When Feasible, Officers Shall Issue a Verbal Warning to the Subject...

SPD Policy 8.300-POL-5(4) states that “[o]fficers shall issue a verbal warning to the subject, other officers, and other individuals present” prior to deploying OC spray, and delay its use until a reasonable amount of time has elapsed for the individual(s) to comply. SPD Policy 8.300-POL-5(4). The policy further states that warnings are not required if they would “compromise the safety of the officer or others” and that the officer must articulate his or her reasons for believing a warning would compromise safety in the Use of Force statement. (*Id.*)

OPA finds that NE#1’s decision to deploy OC spray without a warning was supported by a reasonable belief that such warnings would compromise safety. In each case, NE#1 deployed OC spray to prevent individuals in the crowd from approaching him or other officers and intervening in the arrest process. BWV showed members of the crowd grabbing arrested individuals quickly and without warning, and instigating struggles with officers. There was also significant shouting and noise, making it less likely that a shouted verbal warning would be heard by the crowd. As such, OPA finds that a verbal warning would have provided minimal or no deterrent effect and could have permitted individuals in the crowd extra time and space to engage in obstructive conduct.

Finally, an examination of the UOF reports NE#1 completed indicated that he articulated his reasoning in those reports as policy required.

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

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

Named Employee #1 - Allegation #5

8.300 – Use of Force Tools 5. Officers Must Justify Each Separate Application of OC Spray

SPD Policy 8.300-POL-5(5) states that after every use of OC spray, “each subsequent spray must also be reasonable and the employee should reevaluate the situation accordingly.” SPD Policy 8.300-POL-5(5).

OPA notes that, for each of the three times NE#1 deployed OC spray, he cited articulable reasons specific to that incident in support of his decision-making. NE#2 similarly reported his OC spray deployment, including providing the rationale for his acts. There is no indication from the record that NE#1 or NE#2 deployed OC spray apart from the instances discussed above and that such deployments were not documented or justified.

As such, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both NE#1 and NE#2.

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

Named Employee #1 - Allegation #6

Officers are Required to Report the Use of OC Spray, Regardless of the Effect, as Well as the Decontamination Procedures That Followed



SPD Policy 8.300-POL-5(6) requires officers to report the use of OC spray as well as the decontamination procedures they followed. SPD Policy 8.300-POL-5(6).

OPA finds that neither NE#1 nor NE#2 violated this policy. Based on their interviews and UOF reports, both officers timely reported their uses of OC spray to supervisors and completed the required UOF reports. The record reflects that no individuals sought medical assistance from SPD related to OC spray exposure, and that those demonstrators affected by OC spray retreated into the crowd rather than remain in contact with officers. In such circumstances, NE#1 and NE#2 made a tactically sound decision to remain at their posts rather than potentially escalate the situation by further engaging protesters and entering into the crowd by themselves.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both NE#1 and NE#2.

Recommended Finding: **Not Sustained (Lawful and Proper) Error! Reference source not found.**

Named Employee #2 - 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. 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 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

OPA also finds that the force NE#2 used was consistent with policy. As noted above, where an officer has probable cause to arrest, he also has the right to use no more force than necessary to do so. Here, NE#2 observed the male individual attempt to de-arrest the female in such a way as to bring the female as well as an officer to the ground in the middle of a crowded protest situation. This conduct created a significant risk of injury to both individuals. As such, the force was reasonable given the rapidly developing situation and the potential hostility of individuals in the crowd. It was necessary to prevent individuals in the crowd from accidentally or intentionally injuring both the officer and the female, and it was proportional to the risk of injury.

As noted above, OPA finds it possible that the female Complainant was exposed inadvertently to OC spray, particularly given her positioning in the photograph relative to NE#2 and where the deployment occurred. While inadvertent OC spray exposure is not a desirable outcome in a protest context, it does not necessarily and standing alone convert an authorized use of force into one which violates policy.

OC spray is a critical tool for officers to exercise crowd control and prevent or disperse assaults and disturbances. Removal of OC spray from an officer’s response options would require the officer to physically intervene in fights between protesters or, conversely, allow them to occur. While it is evident that some individuals aligned with both the left-wing and right-wing believe that physical violence is a desirable outcome in a protest, OPA rejects this view. Rather, OPA believes that, when used appropriately and consistent with law and policy, less-lethal tools like OC spray provide officers with needed options to prevent assaults from occurring. Moreover, OPA supports the use of tools which allow officers to defuse fights without themselves having to physically intervene using manual force or impact



weapons. Ultimately, while OPA finds it regrettable that the Complainants may have been inadvertently exposed to OC spray, it does not agree that prohibiting use of OC spray would have a positive effect on SPD's ability to manage demonstrations.

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

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

Named Employee #2 - Allegation #2

8.300 - Use of Force Tools 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection...

As noted above, the elements of this allegation are completely subsumed within the above allegation (see Named Employee #2 – Allegation #1). For this reason, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**

Named Employee #2 - Allegation #3

8.300 – Use of Force Tools 4. When Feasible, Officers Shall Issue a Verbal Warning to the Subject...

As discussed in the context of NE#1, OPA similarly finds that NE#2's decision to not issue verbal warnings to individuals prior to deploying OC spray was consistent with policy. Again, NE#2 was responding to quick evolving situations where there were active assaults and de-arrest tactics ongoing. NE#2 was required to act promptly and delaying his response could have resulted in worse outcomes for all involved.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #4

8.300 – Use of Force Tools 5. Officers Must Justify Each Separate Application of OC Spray

For the same reasons as above (see NE#1 – Allegation #5) OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #2 - Allegation #5

Officers are Required to Report the Use of OC Spray, Regardless of the Effect, as Well as the Decontamination Procedures That Followed

For the same reasons as above (see NE#1 – Allegation #6) OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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



Named Employee #3 - Allegation #1

5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing

SPD policy prohibits biased policing, which it defines as “the different treatment of any person by officers motivated by any characteristic of protected classes under state, federal, and local laws as well other discernible personal characteristics of an individual.” (SPD Policy 5.140.) This includes different treatment based on the race of the subject. (*See id.*)

OPA was unable to identify sufficient evidence to show that any employee exhibited bias in managing the demonstration.

UW had primary responsibility for the incident plan and SPD officers followed their deployment instructions. Moreover, the decision to separate the two groups did not in itself represent favorable treatment of either side based on political view because both groups, though separate, were permitted to engage equally in speech activities. Absent probable cause to believe that a crime was being committed, SPD officers would have lacked a basis to take enforcement action against the right-wing aligned protesters merely because they exited the area designated for them and chose to mix with the left-wing group. Indeed, such behavior standing alone would likely be insufficient to generate probable cause to believe any crime was occurring. BWV and incident reports suggested that when SPD officers were able to intervene to prevent assaults they did so. That some protesters were able to evade the police line and engage in assaultive behavior, while unfortunate, is not sufficient evidence to show that SPD exhibited bias toward any group.

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

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

Named Employee #3 - Allegations #2

5.140 - Bias-Free Policing 4. All Employees Share Responsibility for Preventing Bias-Based Policing

OPA finds that this allegation is wholly subsumed within the above allegation (*see* Named Employee #3 – Allegation #1). For this reason, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**