



## ***CLOSED CASE SUMMARY***

ISSUED DATE: JANUARY 14, 2022

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0475

### **Allegations of Misconduct & Director's Findings**

#### **Named Employee #1**

Allegation(s):		Director's Findings
# 1	9.010 – Employee Dress Standards	Sustained
# 2	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Allegation Removed
# 3	8.200 – Using Force 1. Use of Force: When Authorized	Sustained
Imposed Discipline		
Terminated Prior to Proposed DAR		

***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:**

Anonymous complainants alleged that Named Employee #1 violated SPD employee dress standards and was unprofessional because the officer wore what was alleged to be a “blue lives matter” facemask. It was also alleged that Named Employee #1 used excessive force.

### **ADMINISTRATIVE NOTE:**

During this course of this investigation, Named Employee #1 was terminated based on his conduct in an unrelated case. Once his employment ended, he was no longer subject to the 180-day timeline that ordinarily applies to SPOG members. Based on extremely high workloads, OPA was forced to prioritize other cases with active 180-day timelines and, thus, was not able to complete this case until now. For administrative purposes, OPA sets the date of this DCM as the 180-day deadline.

### **SUMMARY OF INVESTIGATION**

This case arises out of the demonstrations that occurred within Seattle and across the nation in the wake of the killing of George Floyd by a Minneapolis Police Officer. These protests were unprecedented in scope and were directed at law enforcement. While most demonstrators protested peacefully, some demonstrations devolved into violence, property destruction, and looting.

On July 26, 2020, OPA received two anonymous complaints that, taken together, alleged NE#1 violated SPD employee dress standards and was unprofessional because the officer wore what was alleged to be a “blue lives matter” facemask. The complaints also alleged that NE#1 used excessive force against several protesters. OPA also reviewed

a video posted to Twitter that appeared to depict, among other things, NE#1 wearing a facemask with vertical gray bars and one vertical blue bar. OPA opened an investigation.

***a. Lack of witnesses and NE#1 unavailability***

In addition to the fact that these complaints were made anonymously, the large number of SPD employees at the scene of the incident and the fast-paced fluctuation of the scene prevented OPA from identifying any complainant, witness, or employee contact information with reasonable accuracy. Additionally, NE#1 was terminated from SPD employment on October 28, 2020, based on an unrelated case. This precluded OPA from ordering NE#1 to provide a statement in relation to the allegations contained in this allegation. Considering the number of complaints OPA was investigating during this time, the inability to immediately identify witnesses, and the fact that NE#1 was terminated from SPD employment, OPA determined that it would be a misallocation of finite resources to continue searching for potential witnesses to these allegations.

***b. Video Review***

OPA conducted a video analysis of the Twitter video and NE#1's Body Worn Video ("BWV"). In relevant part, the Twitter video depicted NE#1 standing on a police line. A sticker on the officer's chest prominently and legibly displayed his name. NE#1 was observed wearing what appears to be a cloth facemask with a vertical bar pattern. The bars alternate between light and dark gray, with one bar a light blue color. A voice off camera asked: "can I ask you if that is a Blue Lives Matter mask?" For several seconds, NE#1 did not appear to respond. At that point, a sound could be heard that may have been NE#1 responding, but the ongoing street noise and fact that NE#1's mask covered his mouth make it unclear whether NE#1 made the sound or, more importantly, its content. A group of officers then quickly pushed past NE#1 and appeared to pursue one or more members of the crowd. NE#1 could later be seen standing in the middle of the street holding a baton.

NE#1's BWV also depicted an individual wearing a helmet with the word "PRESS" written on duct tape affixed to the helmet ("Media Member"). The Media Member was holding a cell phone and appeared to be recording NE#1 and narrating impressions of the scene. A short time later, NE#1 asked a female protester to step back, which she declined to do. At the same time, a male protester began shining a strobe light at NE#1. While still apparently recording NE#1, the Media Member stated: "This police officer, [NE#1], not only is attacking protesters, but is choosing to wear a political statement mask, a blue lives matter mask, at a Black Lives Matter movement. The side they are choosing is very clear." The female protester then approached NE#1 and held a cell phone towards him. NE#1 pushed the female protester's cell phone away. The female protester shouted: "don't touch my shit!" NE#1 responded: "don't get close to my face!" An unidentified officer then told the male protester with the strobe light to stop shining it or else he would be arrested. The male protester continued to shine the strobe light. The Media Member asked NE#1: "Officer, can I ask you if that is a Blue Lives Matter mask?" This is consistent with – apparently the "mirror image" of – the same scene in the Twitter video. A couple second later, officers rushed into the crowd towards the protester who had been shining the strobe light. Although the full context of the video became difficult to discern, NE#1 was observed using his baton to push at least one protester back as NE#1 appeared to follow other officers into the crowd. A short time later, an unidentified officer was observed spraying a chemical agent at a protester, causing the protester to fall to the ground. Another protester was observed approaching the fallen protester, then crouching over and placing hands on the fallen protester. NE#1 was then observed forcefully pushing both the crouching protester and the fallen protester, causing them to fall about two or three feet back on the ground.

Approximately fifteen to twenty minutes later, NE#1's BWV depicted a group of bicycle officers entering the crowd of protesters. Officers were overheard instructing protesters to move back. NE#1 also instructed protesters to move back. NE#1 was then observed using his baton to push a protester backward. A short time later, NE#1 used his baton to again push the same protester backward, but with apparently more force. Several seconds later, NE#1 used his baton to push a protester backward, this time causing that protester to either trip or fall to the ground.

## **ANALYSIS AND CONCLUSIONS:**

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

#### ***9.010 – Employee Dress Standards***

SPD Policy 9.010 (“Employee Dress Standards”) required that SPD Member “wear clothing and accessories that are appropriate for their work setting.” This policy also states that SPD members “should ensure that clothing does not create a distraction or cause a safety hazard.” Sworn employees working a uniformed assignment are required to wear the approved Uniform of the Day. The Complainant alleged that NE#1 violated the Employee Dress Standards by wearing a “Blue Lives Matter” mask.

In reviewing the photographs taken of NE#1, it appears clear to OPA that he was wearing a facemask that improperly referenced political beliefs. The mask contained blue, black, and one grey line and, even without language on it, was clearly suggesting support the thin blue line/blue lives matter platforms. While it was certainly permissible for NE#1 to hold these beliefs, he was not allowed to express them during work hours as a police officer staffing a protest. It is clear that wearing such a mask could escalate members of the crowd who, at that time, were specifically protesting against the police. This is specifically what this policy seeks to avoid. Lastly, OPA notes that no other officer at that demonstration was wearing a similar facemask and, in fact, OPA does not recall any officer involved in the 2020 demonstrations ever wearing a politically motivated facemask.

All of these factors convince OPA that a Sustained finding is warranted here.

Recommended Finding: **Sustained**

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

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

OPA finds that this allegation is subsumed within the finding for Allegation #1 and, as such, recommends that it be removed.

Recommended Finding: **Allegation Removed**

### **Named Employee #1 - Allegation #3**

#### ***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.*)

Here, the Complainant alleged that NE#1 “indiscriminately used physical, violent force against multiple protesters ...including beating protesters up.”

NE#1’s BWV depicts a NE#1 engaging in multiple uses of force. All but two of these instances are readily identifiable as *de minimis* uses of force. *De minimis* force is a “[p]hysical interaction meant to separate, guide, and/or control without the use of control techniques that are intended to or are reasonably likely to cause any pain or injury.” (SPD Manual 8.050.) The SPD manual specifically notes that *de minimis* force includes using “hands or equipment to stop,

push back, separate, or escort a person without causing any pain, or in a manner that would reasonably cause any pain.” (*Id.*; see also SPD Manual 8.400-POL-1.) However, *de minimis* force is still force and may only be used where “objectively reasonable, necessary, and proportional to effectively bring an incident or person under control, while protecting the life and safety of all persons.” (SPD Manual 8.200(1).)

Although not a model of restraint, NE#1 was justified in pushing the female protester’s phone away from him. NE#1 was working in a crowd management function where he was faced with a large group of protesters who were, at minimum, upset by his presence. When the female protester first stepped towards him, NE#1 warned her to step back – which she refused to do. When the female protester later held her phone apparently within mere inches of NE#1, NE#1 used an open hand to push the cell phone away from his body. Notably, the amount of force used by NE#1 here, if any, appeared so minimal that it is not clear from the BWV whether NE#1 even made physical contact with the female protester or her phone.

Similarly, NE#1 use his baton to push – not strike – at least one protester away from himself and other officers as other officers entered the crowd of protesters. Here, the BWV appears to show that a group of officers were taking police action within a crowd of protesters. While giving orders to back up, NE#1 held his baton with both hands and pushed a protester back by pushing his baton against the protester’s shoulder area. This was a similarly justified use of *de minimis* force directed at creating distance between the protesters and officers. Later, when a group of bicycle officers entered the crowd of protesters, NE#1 used similarly justifiable baton pushes to move the crowd back and create space.

Approximately fifteen to twenty minutes later, NE#1 pushed another protester with sufficient force to cause him to either trip or fall to the ground. NE#1 pushed this protester while the protester was standing up, slowly backing away, and intermittently displaying two middle fingers and gesturing to officers with a “come at me” or “bring it” gesture. This protester had already been pushed back by at least one other officer but continued to back up very slowly while gesturing at officers. NE#1 pushed this protester by holding his baton in both hands and then pushing the baton forcefully against the protester’s shoulder area. Although a close call, OPA finds that this force was permissible for several reasons. First, clear orders had been given for the protestor and others to vacate the area. Second, the protestor had already been pushed back by another officer and had failed to promptly leave the area. Third, NE#1 used a trained tactic to move the protestor back by extending his baton and pushing forward. Fourth and last, NE#1 did not strike the protestor or use undue force when pushing forward.

However, on two occasions, NE#1 inappropriately pushed protesters with sufficient force to cause them to fall to the ground, which was asphalt, concrete, or a similar substance. Under these the circumstances, such a use of force could reasonably be expected to cause at least transitory pain (a Type I use of force) or even physical injury, such as abrasion, bruising, or laceration (a Type II use of force). (See SPD Manual 8.400-POL-1.) Notably, NE#1’s push against the fallen and crouching protesters was neither proportional nor necessary. First, NE#1’s push was forceful enough to result in both protesters falling back several feet back to the ground. Moreover, neither of these protesters exhibited any apparent threat to the officers – the first had fallen to the ground, the second appeared to be pulling the first away from the officers. Finally, the only apparent lawful purpose that NE#1 could have had for pushing these protesters was to get them to back up. Given that one of them had just been sprayed with a chemical agent and was still on the ground, pushing them back down to the ground was hardly a more effective alternative than affording the protesters the opportunity to get up and walk away.

Accordingly, OPA recommends that this allegation be Sustained for the push against the two fallen/crouching demonstrators.

Recommended Finding: **Sustained**