



CLOSED CASE SUMMARY

ISSUED DATE: JUNE 18, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0766

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	8.400 - 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 (Management Action)

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 the Named Employee may have used out of policy force during a demonstration, and that he failed to report and document that force.

SUMMARY OF INVESTIGATION:

On December 21, 2020, OPA was notified of a use of force that may not have been reported. A Lieutenant told OPA that, while watching video from June 1, 2020, he observed an officer – later identified as Named Employee #1 (NE#1) – push an individual, causing that individual to fall down over a bush. The Lieutenant could not find any indication that this force was screened with a supervisor or reported. The Lieutenant believed that this lack of reporting could potentially be contrary to policy. OPA commenced this investigation.

OPA reviewed the Body Worn Video (BWV) that captured NE#1's force. The video showed that NE#1 was part of a group of officers who were telling demonstrators to "move back." The officers, including NE#1, were holding their batons out in front of them as they moved towards the demonstrators. NE#1 approached a group of individuals who were standing in the vicinity of Cal Anderson Park. NE#1 advanced forward and told them to move back. All of the members of the group did except for one individual. That individual remained unmoving. NE#1 told the individual to "move back" and, when he did not, NE#1 extended his baton and pushed the individual westbound. The individual moved away from NE#1 and then turned back towards him, stating: "Why'd you fucking push me, bitch?" NE#1, who continued to advance forward, again pushed the individual with his baton extended, telling him to "move back." The individual moved to the right near a hedge that ran along the park. NE#1 used his baton to push the individual once more to move him down the street. This time the individual appeared to trip on the hedge and lost his balance. He disappeared from the view of the BWV. The individual got up and yelled at NE#1: "Fuck you, you piece of shit. I've got you!" While saying this, he pointed a light at NE#1. NE#1 told him to "move back" and continued to proceed forward.



NE#1 completed a use of force report after the incident concerning an unrelated deployment of OC spray. In that report, he wrote the following: “along with other officers [I] conducted a mobile (foot) fence line and [we] used our riot batons to push any subjects out of the area.” He further wrote that: “All physical contact (with the baton) was reported to my supervisor and labeled as de minimis.”

OPA interviewed NE#1. He reasserted his belief that the force was de minimis and was not required to be reported. He said that most if not all demonstrators complied with his orders to “move back” except for the individual, who remained standing still. NE#1 said that his use of his baton to push the individual back was low-level force that was consistent with his training. He further opined that it was the minimum of amount of force that he felt would cause the individual to comply. NE#1 said that he did not recognize the presence of the hedge at the time. He further stated that the individual did not appear to suffer any injuries from tripping over the hedge or complain of any pain or injuries.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - 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.*)

Based on a review of the BWV, OPA concludes that the force used by NE#1 did not violate policy. At the time, demonstrators had been directed to leave the area pursuant to a validly issued dispersal order. NE#1 and other officers to push the demonstrators back. To do so, they walked forward, with their batons extended at chest level, and while saying “move back.” Virtually all demonstrators in the area moved consistent with the officers’ orders, except for the Subject, who remained standing still. NE#1 then pushed the Subject back, again using his baton to do so. As NE#1 indicated, this force was a trained tactic and was appropriate under the circumstances. Moreover, the second and third pushes were also permissible as the Subject remained in the area while directing profanity towards NE#1. While the Subject fell back over a hedge after the third push, there was no evidence on the BWV suggesting that this was NE#1’s intent or anything other than the Subject inadvertently losing his balance. In any event, this does not, by itself, yield the force out of the policy and there was no indication that the Subject suffered any injuries as a result of that push or any of the other pushes.

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

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



Named Employee #1 - Allegation #2

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

SPD Policy 8.400-POL-1 requires that officers report all uses of force except de minimis force. As a general matter and including within the demonstration management context, de minimis force is not required to be screened with a supervisor or documented in any respect. Type I force, as with Type II and Type III force, needs to be reported to a supervisor and documented in a use of force report.

SPD policy defines de minimis force as: “Physical 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.” The policy provides the following example of de minimis force: “Using hands or equipment to stop, push back, separate or escort, and the use of compliance holds without the use of sufficient force to cause pain.” Type I force is defined as: “Force that causes transitory pain or the complaint of transitory pain.” The following are examples provided of Type I force: “Controlled placement/takedown that results in a complaint of pain or causes/is likely to cause transitory pain or disorientation”; “Strike with sufficient force to cause pain or complaint of pain”; and “Open hand technique with sufficient force to cause complaint or indication of pain.” Notably, the examples provided expand the definition of this category of force. Specifically, all of the examples note that force is Type I not just when it results in a complaint or indication of pain but also where the force is of such a level that it could cause or is likely to cause such a complaint.

As discussed above, NE#1 noted in his report that the pushes that he effectuated with his baton were de minimis. In his perspective, this included the push that caused the individual to trip and fall over. NE#1 reiterated this belief at his OPA interview. Fundamental to NE#1’s conclusion that it was de minimis force was that the individual did not complain of injury, exclaim in pain, or appear to have suffered any injuries.

In OPA’s opinion, a baton push that causes someone to fall to the ground constitutes Type I force and should be reported as such. OPA reaches this finding as it believes that such a push is of a level that it could cause a complaint or pain or is likely to do so. That being said, OPA recognizes that there is a conflict within the policy between the definition and the examples. As the individual did not complain of pain – which is confirmed by the video – NE#1 is technically correct that the force could have been classified as de minimis. This is the case even though it would fall within the examples of Type I force as falling to the ground after being pushed could possibly cause a complaint of pain. As such, OPA concludes that NE#1 did not violate policy when he failed to report the baton pushes.

That being said, this incident clearly demonstrates an internal inconsistency in this policy that SPD should remedy. OPA feels that the best course of action would be to expand the definition of Type I force to read as follows: “Force that causes transitory pain or the complaint of transitory pain *or is likely to do so under the circumstances.*” SPD should further consider whether to use this or a less expansive definition in the context of demonstrations given the significant amount of low-level force used to move crowds or to set reporting standards that do not unnecessarily burden officers and supervisors while ensuring that force is fully and transparently documented.

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