



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 22, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0070

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 (Lawful and Proper)
# 2	8.200 – Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 3	8.400 - Use of Force Reporting and Investigation POL-1 Use of Force Reporting and Investigation	Not Sustained (Lawful and Proper)
# 4	5.001 – Standards and Duties 14. Retaliation is Prohibited	Not Sustained (Unfounded)
# 5	5.160 - Observation of Officers 2. People Have the Right to Record Police Officer Enforcement Activities	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director's Findings
# 1	5.001 – Standards and Duties 14. Retaliation is Prohibited	Not Sustained (Unfounded)
# 2	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 (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 and Named Employee #2 intentionally targeted journalists with pepper spray as a form of retaliation. It was further alleged that Named Employee #1 did not report his force appropriately, used force that was outside of policy, and improperly prevented journalists from recording video.

SUMMARY OF INVESTIGATION:

SPD's Public Affairs Unit received a complaint concerning the pepper spraying of two independent journalists from Portland. The complaint asserted that the journalists were improperly pepper sprayed, with one of the journalists alleging that they were deliberately targeted. The complaint also contended that the journalists were told that they could not record and had to disperse, even though they displayed their credentials. The Public Affairs Unit referred the complaint to OPA, and this investigation ensued.



OPA's investigation included reviewing third-party video, which was posted on Twitter, as well as relevant Twitter posts. OPA also reviewed Body Worn Video (BWV) and SPD documentation, including use of force reports. After reviewing the totality of this information, OPA identified Named Employee #1 (NE#1) as the officer who used the pepper spray in question.

NE#1 documented that, during the protests, demonstrators caused acts of vandalism, including breaking store windows. Later that evening, a demonstrator within a smaller group threw a rock at officers while the demonstration moved towards Cal Anderson Park. NE#1 wrote that, after this incident, "a couple people with cameras and press markings got between police and protestors." NE#1 documented that he "told them to move out of the way because [he] did not want them to get caught between police and the group of violent protestors." NE#1 did not note directing reporters to disperse or to stop recording. NE#1 wrote that, while in the vicinity of 11th Avenue and Cal Anderson Park, officers moved in to arrest the demonstrator who threw the rock at officers. At that time, several other demonstrators attempted to de-arrest that individual. NE#1 deployed pepper spray at the group.

The application of pepper spray was captured on both the Twitter video and BWV. The BWV showed that NE#1 was among a group of bicycle officers moving a crowd down the street. An explosion could be heard on the video. NE#1 and other officers began ordering the crowd to move faster and began using their bicycles' front tires to push the crowd forward. At this time, a projectile was thrown from the crowd and landed near an officer's bicycle tire. The officers continued to move the crowd forward, now with more urgency. During this time, the video showed NE#1 yell: "Press, move out of the way! We don't want you to get caught in this, press!" There were approximately three people in front of NE#1 at the time and the video showed two people move to the side. NE#1 and other officers continued to move the crowd. As they reached Cal Anderson Park, the situation became more chaotic. Officers ran into the crowd in pursuit of an individual, with NE#1 following. The video showed an officer tackle the individual and tell the individual that they were under arrest. Very shortly thereafter, NE#1 deployed pepper spray at a group of people in the immediate vicinity of the individual.

The Twitter video showed a group of demonstrators running from bicycle officers. Two people ran towards the person recording and through some parked cars. Officers approached and tried to apprehend at least one of the running persons, trying to tackle them and yelling that they were under arrest. The recorder turned to the right and captured an ongoing arrest. An officer was shown throwing his arms around a demonstrator while two other individuals tried to pull the demonstrator away. This occurred around six feet from where the recorder was standing. An officer – believed to be NE#1 – came within two to three feet of the recorder and pointed a can of pepper spray at the two individuals pulling the demonstrator away. NE#1 deployed the pepper spray in a left to right motion for approximately one second. As the spray moved right, some of it appeared to coat the recorder's camera.

OPA tried to locate both journalists using social media. One of the journalist's Twitter accounts was deactivated and OPA had no other contact information for her. OPA tried to contact the other journalist, but he did not respond to OPA. OPA interviewed NE#1 on two occasions concerning his actions.

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 pepper spray shall have the primary objective of defending the officer, defending another, or preventing significant destruction of property. It further states that individual officers are to deploy pepper spray “at the specific suspect(s) who are posing a threat.” (*Id.*)

From OPA’s review of both the Twitter video and the BWV, NE#1’s use of pepper spray did not violate policy. First, the video showed that, at the time of the deployment, there were two individuals who were trying to pull the arrestee away from officers. This constituted individualized probable cause to arrest those individuals, as well as presented a risk of harm to the officers and others. As such, NE#1 was permitted to deploy pepper spray at those individuals under SPD policy.

Second, at the time of the deployment, it appeared to OPA that NE#1 directed the pepper spray at the two individuals. The one-second deployment was focused on them. While it was clear that some pepper spray got on the camera lens of one of the journalists, there was no indication from the video that this was inadvertent or that this journalist was targeted. To the contrary, it appeared to be the result of the journalist’s close proximity to the two individuals who were appropriately targeted.

While it is unfortunate that some of the pepper spray affected the journalist, this did not violate SPD policy and make an otherwise permissible deployment improper. 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 #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. 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.*)

BWV showed that, on multiple occasions, NE#1 used the front tire of his bicycle to push into demonstrators’ legs in order to move them and the larger crowd forward. NE#1 began using this tactic after there was an explosion and continued to do so after a projectile was thrown at an officer.

At his OPA interview and in his use of force report, NE#1 said that he used his bicycle in this manner because of the explosion and his concerns that the situation could escalate if the crowd was allowed to remain static. He noted that, in his experience, slow moving crowds could pose a danger for officers and could be a source of projectiles. NE#1 stated that, once the crowd began moving, he modulated his force and moved back from them.

Earlier in the demonstrations, SPD was deemed to have acted impermissibly by using less-lethal tools, including blast balls, to move crowds. The concern – as expressed by both the United States District Court and OPA – was that, even



if there was a law enforcement interest in moving the crowds, the less-lethal tools were too indiscriminate and could injure those who were not actively seeking to harm the officers. Officers were eventually prohibited from doing so and were required to show an individualized threat posed by an individual prior to using a less lethal tool – the sole need to move the crowd no longer sufficed. In response, officers developed new tactics to keep the crowd moving, which included using bicycles to push demonstrators forward. These tactics also developed over time. At the outset, some officers swung their bicycles or lifted the bicycles up and pushed with the front tires. OPA viewed this as more than de minimis force and as undesirable practices. The tactics evolved into what NE#1 engaged in during this incident – the use of the front tire to push into the back of a demonstrator without using significant momentum or lifting the bicycle substantially off the ground. While NE#1 was not formally trained on that tactic at the time, it is now officially the trained procedure of bicycle officers and a standard practice during demonstration management.

Under the circumstances of this incident, OPA does not believe that the use of this tactic by NE#1 violated policy or, stated differently, that it constituted excessive force. At the time, NE#1 had a legitimate need to move the crowd and he attempted to do so in the least invasive manner reasonably available to him. There is no indication that he caused any demonstrator to suffer injury and he modulated his force when appropriate. 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

8.400 - Use of Force Reporting and Investigation POL-1 Use of Force Reporting and Investigation

SPD Policy 8.400-POL-1 governs force reporting. The policy states that all force except de minimis force must be documented in a use of force report. The report must be sufficiently thorough to allow the force to be assessed.

At his OPA interview, NE#1 explained that he documented his use of pepper spray in his use of force report. He stated that, while he considered the bicycle pushes to constitute de minimis force that did not need to be reported under policy, he still referenced them in his use of force report. Given this, NE#1 contended that he fully complied with SPD policy.

In assessing NE#1's use of force report, OPA finds that he sufficiently documented his actions and that he did so in a manner that allowed the force to be reviewed by the chain of command. As such, OPA finds that he acted consistent with policy and recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #4

5.001 – Standards and Duties 14. Retaliation is Prohibited

SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-14.) SPD employees are specifically prohibited from retaliating against a person who engage in activities including, but not limited to, “oppos[ing] any practice that is reasonably believed to be unlawful or in violation of Department policy” or “who otherwise engages in lawful behavior.” (*Id.*) Retaliatory acts are defined broadly under SPD's policy and include “discouragement, intimidation, coercion, or adverse action against any person. (*Id.*)



The journalists contended that they were targeted by NE#1 with pepper spray because of their professions. If true, this would constitute retaliation.

As discussed above, OPA concludes that the pepper spray deployment in question was consistent with policy. Moreover, based on a review of all of the video, there is no indication that NE#1 knew that anyone in the vicinity was a journalist, let alone that he targeted anyone for that reason. To the contrary, NE#1 appeared to be responding to the two individuals who were activity trying to pull the arrestee away and directed the pepper spray at them. The pepper spray affecting the journalist who was recording was inadvertent and was due to the journalist's proximity to the ongoing arrest and de-arrest.

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

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

Named Employee #1 - Allegation #5

5.160 - Observation of Officers 2. People Have the Right to Record Police Officer Enforcement Activities

The journalists alleged that they were told by officers that they had to disperse and could not record.

SPD Policy 5.160-POL-2 states that, as a general matter, people have the right to record police officer enforcement activities. This right is additionally enshrined in City law. The policy contains three exceptions from this rule, including that the conduct of the person recording does not “hinder, delay, or compromise legitimate police actions or rescue efforts.”

Here, OPA found no evidence that any officers, including NE#1, told the journalists that they could not record or ordered them to disperse. At one point, NE#1 told them to move out of the way. However, he did not state that to prevent them from recording but instead to ensure that they were not subjected to harm. Indeed, this is clear from his actual words: “Press, move out of the way! We don’t want you to get caught in this, press!” Any prevention of recording was minimal and temporal, and the journalists were not ordered to disperse.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #1

5.001 – Standards and Duties 14. Retaliation is Prohibited

OPA found no evidence indicating that an unknown and unidentified SPD employee either told the journalists that they could not record and needed to disperse or targeted them with pepper spray. Accordingly, OPA recommends that this allegation and Allegation #2, below, be Not Sustained – Unfounded.

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

Named Employee #2 - Allegation #2



14.090 - Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls Consistent with Title 8 – Use-of-Force

For the same reasons as stated above (see Named Employee #2 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

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