



ISSUED DATE: SEPTEMBER 9, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0155

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	8.300 – Use of Force Tools 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray	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 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Unfounded)
# 2	8.300 – Use of Force Tools 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray	Not Sustained (Unfounded)
# 3	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Will Use De-Escalation Tactics in Order to Reduce the Need for Force	Allegation Removed
# 4	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Lawful and Proper)

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 Complainant alleged that he was subjected to excessive force when he was OC sprayed and shoved, as well as when firearms were pointed at him. The Complainant further asserted that SPD officers used excessive force on other demonstrators, failed to de-escalate, and made arrests that lacked probable cause.



SUMMARY OF INVESTIGATION:

The Complainant filed an OPA complaint in which he alleged that, on March 13, 2021, Named Employee #1 (NE#1) and Named Employee #2 (NE#2) shoved him for no legitimate reason and pepper sprayed him in the eye at close range, which resulted in him being incapacitated and struggling to breathe. The Complainant also alleged that, during the course of the evening, unknown SPD employees pointed guns at him. He assumed they were less lethal launchers but did not know. The Complainant contended that he was "looking down the barrel of a rifle the whole night." Based on the Complainant's contention, it was alleged that this may have constituted improper pointing of firearms. The Complainant further asserted that additional SPD employees shoved and pepper sprayed other protestors without a basis to do so and acted in an escalatory manner. He also said that force was used to disperse the crowd prior to any dispersal orders being provided. Lastly, the Complainant alleged that protestors were arrested without probable cause and only based on the fact that they were in close proximity to officers. OPA commenced this investigation.

OPA's review of this matter involved watching Body Worn Video (BWV) for NE#1, NE#2, and other officers, as well as reviewing additional documentary evidence.

Relevant to the Complainant's allegations, BWV indicated that SPD officers were monitoring an ongoing demonstration. Video captured items thrown into the street by demonstrators. Other documentation, including the CAD Call Report, indicated that individuals within the group of demonstrators caused property damage. Contrary to the Complainant's assertions, the BWV showed that multiple dispersal orders were provided to the crowd, but a number of individuals, including the Complainant, did not disperse. At one point, a bicycle line, which included a Sergeant, NE#1, and NE#2, advanced towards several individuals standing in the street. The Complainant was part of this group. As the officers advanced, they told the group to move back, but the group did not do so. At one point, a demonstrator grabbed the handlebars of the Sergeant's bicycle. The Sergeant attempted to arrest the demonstrator, but one other individual tried to pull the demonstrator away. BWV showed that the Complainant was in the immediate vicinity.

As this was occurring, both NE#1 and NE#2, who were standing near the Sergeant, deployed OC spray. NE#1 deployed twice, with the second deployment occurring quickly after the first. NE#2 deployed once. The BWV indicates that they both targeted the individual who was trying to pull the arrestee away. BWV from another officer captured where the Complainant was situated at the time. He was approximately two feet away and back from the target of the OC spray. The BWV conclusively disproved the Complainant's allegation that he was shoved at the time of the deployment, or that the OC spray was deployed directly into his face at close range.

The BWV showed that a number of SPD employees were equipped with 40mm launchers on the date in question. Those launchers were predominantly held at the low-ready. OPA found no evidence that any officers pointed firearms at the Complainant or any other demonstrators.

Two other arrests were effectuated, both near a Nordstrom store. One of those arrests is being investigated under a separate case number – 2021OPA-0153. OPA also has another investigation concerning police action that occurred in the vicinity of the Mariner's Store – 2021OPA-0142.

As part of its investigation, OPA also interviewed NE#1 and NE#2. Both officers asserted that they deployed OC spray to stop the de-arrest and that they targeted the involved individual. Both further contended that their uses of force were reasonable, necessary, and proportional. NE#1 informed OPA that his second deployment of OC spray was unintentional.



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.*)

From OPA’s review of the BWV, it appeared that a demonstrator grabbed the Sergeant’s bicycle after not complying with orders to move back. When the Sergeant attempted to arrest the demonstrator, a second individual tried to pull the demonstrator away. Both NE#1 and NE#2 targeted that second individual with OC spray.

In assessing this force, OPA finds that there was probable cause to arrest the demonstrator and, when the second individual tried to pull the demonstrator away, there was also probable cause to arrest the second individual. The officers also had the legal authority to stop the second individual from trying to obstruct the arrest of the demonstrator and they were entitled to use appropriate force to do so. Here, both NE#1 and NE#2 used OC spray to effectuate this goal.

OPA finds that this force was reasonable for the reasons stated above. It was further necessary because it was the best alternative available to the Named Employees to quickly stop the second individual from interfering in the arrest and to move the crowd back. It was also proportional to the threat posed by the de-arrest and the second individual’s actions, as well as to the potential risk posed by other members in the crowd during that fluid and chaotic situation.

This analysis does not change for NE#1’s second inadvertent deployment. The second deployment was very close in time to the first and was directed in the same vicinity. As such, it was not contrary to policy.

Lastly, as discussed above, there is no evidence that the Complainant was targeted with OC spray and that he was sprayed in the face from a close distance as he contended. To the extent he was affected by the spray given his proximity to the arrest and de-arrest, this is unfortunate but does not represent a violation of policy.

Accordingly, 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 #2

8.300 – Use of Force Tools 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray

SPD Policy 8.300-POL-5 governs the specific requirements surrounding the use of OC spray. The policy requires that such usage be reasonable, necessary, and proportional. It further directs that, when used in the crowd control context and where multiple people are in the vicinity, “officers will direct OC only towards the person(s) posing a specific threat of harm to officers.” The policy cautions officers to “attempt to avoid or minimize incidental exposure to non-



involved persons.” Lastly, the policy states that officers “will assist exposed subjects with decontamination and medical aid, as soon as reasonably possible.”

As discussed above, OPA concludes that the use of OC spray here was reasonable, necessary, and proportional. OPA also finds that the Named Employees did target the individual who attempted the de-arrest and, in doing so, took efforts to avoid exposure to others, including the Complainant. While the Named Employees did not provide medical attention to the exposed individual, they said that he entered the crowd and ran away. This was confirmed by BWV. The video also did not indicate that other individuals in the crowd appeared to be in clear discomfort from OC spray exposure or that others requested medical attention.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper as against both Named Employees.

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

Named Employee #2 - Allegation #1

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

For the same reasons as stated above (see Named Employee #1 – Allegation #2), 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 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray

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

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

Named Employee #3 - Allegation #1

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

OPA interprets the Complainant to be making three separate excessive force claims against unknown SPD employees. First, that they pointed firearms at him at multiple occasions during the demonstration. Second, that they shoved him and others unnecessarily. Third, that they improperly deployed OC spray at him and others. The first allegation is discussed here, the second allegation is better addressed in the context of another OPA investigation – 2021OPA-0142, and the third allegation is assessed in Allegation #3 below.

Based on a review of the BWV, OPA found no evidence that any SPD officer ever pointed a firearm at the Complainant, or, for that matter, any other demonstrator. Moreover, while some officers were equipped with 40mm launchers, OPA could find no instance where the launcher was pointed at the Complainant at all, let alone for a sustained period of time. Even if this was the case, it would not have violated SPD policy.

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



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

Named Employee #2 - Allegation #2

8.300 – Use of Force Tools 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray

From OPA's review of various BWV relating to this incident, there was no indication of any other OC spray deployments that appeared to be inconsistent with policy. Aside from generally stating that this was the case, the Complainant provided no further information about the facts underlying those deployments, including when and where they occurred and the involved officers. Without that additional information, OPA has no basis to conclude that any policy violations occurred.

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

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

Named Employee #3 - Allegation #3

8.300 – Use of Force Tools 8.300-POL-5 Use of Force – Oleoresin Capsicum (OC) Spray

The Complainant's allegation of a failure to de-escalate on the part of multiple SPD employees is better addressed in the context of another ongoing OPA investigation – 2021OPA-0142. Accordingly, this allegation is removed.

Recommended Finding: **Allegation Removed**

Named Employee #3 - Allegation #4

6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed.

The Complainant raises issues with arrests that occurred in the vicinity of the Nordstrom. There were two individuals who were arrested. Both arrests are more fully addressed in other OPA cases – 2021OPA-0142 and 2021OPA-0153 – and will not also be evaluated here.

While not explicitly raised by the Complainant, OPA considers in this case whether the arrest of the demonstrator who grabbed the Sergeant's bicycle was supported by probable cause. As discussed above, OPA finds that it was. Again, at the time, the crowd had been given lawful orders to move back. The demonstrator did not do so and, instead, grabbed onto the Sergeant's bicycle. At that point, she could have been arrested both for obstruction and for failure to disperse.

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

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