



## ***CLOSED CASE SUMMARY***

ISSUED DATE: NOVEMBER 24, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2021OPA-0303

### **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 (Unfounded)
# 2	5.160 – Observation of Officers 2. People Have the Right to Record Police Officer Enforcement Activities	Sustained
# 3	5.001 – Standards and Duties 10. Employees Will Strive to be Professional	Allegation Removed
Imposed Discipline		
No Discipline		

***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 excessive force when he hit a cellphone held by the Subject, as well as that, when he did so, he acted unprofessionally and inappropriately and prevented the Subject from recording video of officer conduct.

### **SUMMARY OF INVESTIGATION:**

Officers, including Named Employee #1 (NE#1), were staffing a demonstration on May 1, 2021. At one point, officers began to effectuate the arrest of an individual who had thrown lit flares. NE#1 and other officers were tasked with keeping the crowd back so that the arrest could occur safely. The arresting officer reported that the individual initially resisted arrest but ceased doing so once a second officer came over to assist.

At this same time, NE#1 was part of a bicycle line facing other members of the crowd. He later reported that he directed the crowd to “move back” on several occasions. In his use of force report, he noted that he used his open hands and bicycle to push back demonstrators who were not complying with his orders. He asserted that this force was de minimis and that it did not cause any apparent injuries to people in the crowd.

A reviewing lieutenant identified that, at one point, NE#1 appeared to “smack” a cellphone away from a person who was using it to record officer conduct. The lieutenant did not identify any injuries caused to that person (who is referred to here as the Subject). A second reviewing lieutenant documented speaking to NE#1 about him making physical contact with the filming individual. He wrote that NE#1 “articulated that he recognized the cell phone’s



attached handle as a potential weapon that could be used to attack him, and he pushed the Subject's hand away to mitigate the threat." The second lieutenant wrote the following concerning NE#1's further explanation for his actions:

[NE#1] stated that his intention was not to interfere with the Subject recording video or to knock the phone to the ground or otherwise damage it. The Subject maintained control of the phone and it did not fall to the ground or otherwise appear to be damaged. [NE#1's] push of the [Subject's] hands sideways caused the [Subject] to spin to the left which presented the [Subject's] right shoulder towards [NE#1]. He then pushed the [Subject's] right shoulder to move him back which was successful.

The second lieutenant concluded that NE#1 did not violate policy or training by making contact with the Subject's phone. In reaching this finding, the second lieutenant provided the following reasoning: "It does not appear to me that [NE#1] intended to or in fact violated SPD policy when he pushed the [Subject's] outstretched hand, holding the camera, off to the side." He also wrote that: "If [NE#1's] goal had been to disrupt the camera, he could have easily knocked it out of the Subject's hands, which did not happen."

The first lieutenant later sent OPA an email setting forth the facts of this case and requesting guidance on next steps. After conducting a preliminary review, OPA opened an intake and later commenced an investigation into this incident. As part of its investigation, OPA reviewed the documents generated by officers relating to this matter, including the use of force reports and reviews. OPA also watched Body Worn Video (BWV). The BWV for another officer – referred to here as Witness Officer #1 (WO#1) – provided the best vantage point of what occurred. Lastly, OPA interviewed NE#1 and WO#1.

NE#1 told OPA that, at the time of this incident, he observed a black object coming towards his face and he addressed the object immediately by swiping it away. He said that he did not recognize that the object was a phone at that moment. NE#1 said that he was focused on the Subject's hands. He also noted that, immediately behind the Subject, were individuals dressed in all black who he believed to be affiliated with the Black Bloc. He explained that he had been struck in the back of his head by an object during an earlier demonstration, causing him to suffer a serious injury, and that he was vigilant because of this. He stated that the individuals dressed in all black appeared to be holding on to the Subject and one of the individuals had an umbrella. NE#1 said that he did not recognize that the Subject was holding a phone until after the incident when he had an opportunity to watch his video. NE#1 told OPA that he was aware that individuals had the right to record officer conduct; however, he also asserted that there were time, place, and manner restrictions that limited this right. He said that he would not have had time or the ability – given noise levels – to advise the Subject to record somewhere else. Lastly, NE#1 denied that he engaged in excessive force or acted unprofessionally during this incident.

WO#1 said that, after working numerous demonstrations, he was used to be constantly filmed. He said that he would have no issues with individuals who were doing so unless they moved beyond his bicycle line. That did not occur here. WO#1 told OPA that, personally, he would not have advanced towards the Subject and pushed him back. He said that this was consistent with what he actually did (or did not do) during this incident and the fact that he gave repeated directions to people in the crowd rather than used force.

#### **ANALYSIS AND CONCLUSIONS:**

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



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**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 agrees with NE#1 and the chain of command that NE#1’s force was de minimis. He swiped the hand of the Subject and, in doing so, did not cause any apparent injury to the Subject and the Subject did not complain of pain. Ultimately, as discussed below, OPA finds that the swiping of the phone was not appropriate under the circumstances because it prevented the Subject from exercising his right to record; however, OPA does not believe that it constituted excessive force.

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

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

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

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

SPD Policy 5.160-POL-2 states that “people have the right to record police officer enforcement activities.” The policy provides three exceptions from this general rule. Specifically, the policy states that “[t]he person’s conduct and presence must not”: (1) “hinder, delay, or compromise legitimate police actions or rescue efforts”; (2) “threaten the safety of the officers or members of the public”; or (3) “attempt to incite others to violence.” Lastly, the policy instructs that: “These conditions on the conduct do not prohibit conduct that creates a slight inconvenience for an officer, such as minor delay caused by escorting the person to a nearby location.”

A review of the BWV shows that approximately five seconds elapsed from when the Subject took a step towards where the bicycle line was to begin recording to when NE#1 struck the cellphone. During that time, the Subject was positioning his camera directly in front of himself and in plain view of the officers. There was no indication that he was preparing to use the camera or its handle as a weapon or to try to assault NE#1 and/or other officers. Moreover, although people dressed in all black were immediately behind the Subject, they were not advancing towards the officers or engaging in any activities that presented an imminent threat of harm.

While OPA understands that this was NE#1’s stated perspective and OPA recognizes what NE#1 previously experienced at another demonstration, OPA does not believe that NE#1’s actions were reasonable based on the video evidence and the time frame during which this incident occurred. In reaching this conclusion, OPA places weight on the statement provided by WO#1 and, specifically, WO#1’s statement that he did not believe that it was necessary under the circumstances to push the Subject back and to strike the camera. Moreover, NE#1’s decision-making must also be weighed against the actual impact of his actions – namely, preventing a person who was lawfully filming officers conducting an arrest from doing so. Not only did this run counter to SPD policy, but it was also inconsistent with City law.



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For these reasons, OPA recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

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

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

SPD Policy 5.001-POL-10 requires that SPD employees “strive to be professional.” The policy further instructs that “employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers” whether on or off duty. (SPD Policy 5.001-POL-10.) The policy further states the following: “Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person.” (*Id.*) Lastly, the policy instructs Department employees to “avoid unnecessary escalation of events even if those events do not end in reportable uses of force.” (*Id.*)

In evaluating this allegation, OPA finds that it rises and falls with the finding in Allegation #2. Stated differently, striking the phone from the hand of an individual thus preventing a recording is unprofessional as it is contrary to the expectations of officer conduct set by the Department and the community. However, as OPA already recommends that Allegation #2 be sustained, OPA finds it unnecessary to also sustain this allegation. Accordingly, OPA instead recommends that it be removed.

Recommended Finding: **Allegation Removed**