



CLOSED CASE SUMMARY

ISSUED DATE: NOVEMBER 10, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0353

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	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)
# 2	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)
# 3	15.180 - Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence	Not Sustained (Training Referral)

Named Employee #4

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)

Named Employee #5

Allegation(s):		Director’s Findings
# 1	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Unfounded)
# 2	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)
# 3	15.180 - Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence	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 the Named Employees, as well as unknown SPD officers, arrested the Complainant because he filmed part of a high-profile incident of alleged police misconduct. It was further alleged that Named Employee #3, a Sergeant, and other unknown SPD officers may have failed to conduct a thorough search for evidence.



SUMMARY OF INVESTIGATION:

A. Incident, Arrest, and Time in Custody

This case occurred on June 6, 2020, during large scale demonstrations in the vicinity of SPD's East Precinct. On that date, at approximately 9:45 p.m., a radio transmission was made by an officer indicating that there were individuals in the crowd pointing lasers in officers' eyes. This information was conveyed to Named Employee #3 (NE#3), a Sergeant, who then informed a Lieutenant.

Around one minute later, SPD transmitted the following over the PA system: "This is the Seattle Police Department. Do not point lasers at officers. Members of the crowd are pointing lasers at officers; that is an officer safety risk. If you are committed to peaceful protests, do not allow people inside the crowd to point lasers at officers." NE#3 spoke to other officers to warn them about the laser usage. He discussed with one officer where the individual pointing the laser into the crowd was located. Named Employee #1 (NE#1), Named Employee #2 (NE#2), and Named Employee #4 (NE#4) were on the roof at that time.

NE#3's Body Worn Video (BWV) showed him gesture into the crowd and say: "Right there, this guy right there." NE#3 again spoke with the Lieutenant and asked: "We're getting red lasers again. Can we get another PO in there? It's a guy with a gas mask on, he's already in there umbrella-less." NE#3 spoke with a Captain and asked whether another announcement on the PA could be made. NE#3 told the Captain that the laser user was wearing a gas mask and hiding amongst other demonstrators who had umbrellas. NE#3 said that it was a red laser. The officers identified that there was another individual in the crowd pointing a green laser at officers. NE#1 identified the individual with the green laser to NE#4. They discussed the individual's location and noted where he was moving to. NE#3 said: "I don't care if they're shining like lights on me, I don't care. I care about them shooting lasers at the line, so I'm just trying to, one, dissuade 'em from doing it, and, two, draw their ire to me." NE#3 stated to another officer: "so you see where my laser's at? That's where he's at, right in there. Yep right there. See him holding the green up? They actually got a green and a red laser." Referring to the individual with the green laser, NE#3 then directed the other officers: "see if we can ID this guy; the guy shooting the green. Move off – he's going to shoot me, see if you can get a description on this guy." At that point, a green laser moved across NE#3's BWV. NE#3 confirmed: "there's a red laser, it doesn't appear to be, uh, being used much. There's a green laser which I'm pretty certain is not eye safe, that they're targeting me, which I think is acceptable at this point." NE#3 continued: "Yeah, I have green laser protective eyewear." He told NE#1 to walk further down the roof and away from NE#3. NE#3 noted that it may give NE#1 a better vantage point. NE#1 did so.

NE#1 indicated to NE#3 that he identified the individual using the green laser. NE#1 stated that the individual was a male in his 30s who was wearing a blue Adidas jacket and an orange bandanna. The individual was further identified as having a beard and wearing a hat. NE#1 used binoculars to make the identification. The officers noted that the individual was ducking in and out of the crowd. NE#3 provided that description over radio, as well as a description of where the individual was walking to. NE#1 continued to call out the individual's location. NE#1 stated that the individual appeared to "ditch" something in a dumpster near the Rancho Bravo restaurant. NE#3 again went over the radio and said that the individual was returning towards the crowd with a backpack. NE#1 stated that the individual walked over to a hot dog stand. NE#1 told NE#3 that he believed the individual was the person who had been shining the green laser. NE#3 then showed an image on his phone to NE#1, who confirmed: "That's the subject we were tracking, yes."



An arrest team approached an individual who exactly matched the description provided. The individual – who was later identified as the Complainant – was placed under arrest. The Complainant denied engaging in criminal activity. At that time, demonstrators asked the Complainant for his name and his phone number. The Complainant provided this information, as well as the name of a person that he wanted the demonstrators to contact. At that time, the Complainant stated that he was the person who had filmed the pepper spraying of a child that occurred earlier during the protest (see 2020OPA-0322). The video he filmed, which showed the child in the aftermath of the pepper spraying, went viral. Other demonstrators seemed to be aware of the video. Based on a review of video, none of the officers who were in the vicinity reacted to the Complainant's name being said, expressed recognition of him, or mentioned the video.

The Complainant was transported in a marked van to the West Precinct. When they arrived, he was walked to a holding cell and placed inside. A Sergeant read the Complainant Miranda warnings. The Complainant asked for an attorney. The Sergeant later confirmed that the Complainant would not be questioned at the precinct concerning the incident and that he would receive his attorney later when he went to court. The Sergeant stated that he would be asking the Complainant for identifying information pursuant to Department protocols. The Complainant voluntarily provided this information. The Complainant denied shining a laser at officers. The Sergeant later provided the Complainant with medication pursuant to his request. The Complainant was subsequently transported to the King County Jail.

B. OPA Complaint and Investigation

In the aftermath of the Complainant's arrest, OPA received emailed complaints from individuals asserting that the Complainant was wrongfully arrested because he recorded a video of alleged police misconduct. OPA reached out to the Complainant's attorney in order to interview him and it was agreed that he would speak with OPA.

1. Interview of the Complainant

The Complainant told OPA that, after he recorded the pepper spray video, he received a significant amount of attention through the press and on social media. This included him being interviewed on camera once by KOMO. He said that on June 6, he was working at the hot dog stand during the demonstration. He told OPA that he did so until around 10:30 p.m. While working there, he noticed that a green laser was shined on him from the rooftop of a building. He looked up and saw approximately three officers. He felt that this was strange and started walking away. Shortly thereafter, he was placed under arrest by multiple officers. At that time, he was told that his arrest was based on the belief that the Complainant had been shining a laser at officers. An officer took a picture of him using a cell phone. After a few minutes, he heard that he had been positively identified as the suspect.

The Complainant indicated that, upon his arrest, the officers did not appear to know who he was. He further indicated that it was not until around eight minutes into the arrest that he identified himself and stated that he had recorded the pepper spray video.

The Complainant lastly asserted that his medication was withheld from him for his approximately 43-hour detention. He later clarified that he received medication at the precinct and that his medication was withheld at the King County jail. He also noted that, while in the jail, he was held near a detainee who he believed was in the midst of a mental health crisis. He did not believe this to be safe. These allegations of potential misconduct were forwarded to the King



County Office of Law Enforcement Oversight for review and, accordingly, were not further investigated by OPA and are not part of this case.

2. Video Evidence Provided by the Complainant

The Complainant's attorney provided OPA with two videos. One of those videos was 58 seconds long and appeared to be taken at the scene of the Complainant's arrest. The Complainant could not be seen on the video. At one point on the video, someone stated: "You got that hot dog seller real good." The second video, which was seven seconds long, showed the Complainant distributing hot dogs at the hot dog stand. OPA could not independently determine on what time and date this video was recorded; however, the Complainant appeared to be wearing the same clothing, which suggests that the video was from June 6.

3. Interviews of the Named Employees

OPA interviewed all of the Named Employees. NE#1 said that he was assigned to identify criminal acts from the rooftop. He said that, when scanning the crowd, someone pointed a green laser at his eyes. Officers on the rooftop shined a spotlight in the vicinity of the individual and NE#1 was able to identify him. The first time he saw the Complainant, he did so with his naked eyes. He said that the distance between him and the Complainant (in a straight line) was between 15 to 25 feet. He observed the Complainant again shortly thereafter. This time he did so with binoculars. He said that he was between 40 to 50 feet away this time and that the floodlights were still on. He gave a description to NE#3, who, in turn, notified other officers. NE#3 later showed him a picture of a person on his cell phone and NE#1 identified it as the person with the green laser. NE#1 told OPA that he was generally aware of the pepper spraying incident and that it was videotaped; however, he did not know that the Complainant was the individual who had taken the video. He also stated that he had no idea who the Complainant was at the time he was identified as the perpetrator. Lastly, NE#1 told OPA that another individual was arrested that same evening for pointing a laser at officers.

NE#2 confirmed that she was on the roof at the time that the Complainant was identified as the individual pointing a green laser at officers. She recalled two individuals in the crowd below using lasers and said that the lasers were pointed into her eyes. She did not see the individuals who pointed the lasers but was aware that NE#1 identified the Complainant as one of the perpetrators by using binoculars. She stated that no one on the rooftop discussed the Complainant's name. She had not heard of the Complainant before that and had not heard his name discussed among SPD officers.

NE#3 said that, while working at the demonstration, he saw lasers being shined in officers' eyes by people in the crowd. A supervisor directed him to go to the roof to try to identify the individuals who were engaging in this activity. NE#3 said that, while on the roof, he saw demonstrators using green, red, and purple lasers. He was able to identify the individual using the green laser – the Complainant – and the individual using the purple laser; however, they could not locate the individual who used the red laser. NE#3 personally identified the individual who used the purple laser and that individual was arrested.

He told OPA that NE#1 identified the Complainant while using binoculars. NE#1 tried to point out the Complainant to NE#3, but NE#3 could not identify his features as NE#3 did not have binoculars. One of the officers who made the arrest texted a photograph of the Complainant to NE#3. NE#3 showed the photograph to NE#1, who positively identified the Complainant as the perpetrator.



NE#3 said that he was unaware whether any of the officers on the ground conducted a search for the laser that was believed to have been ditched by the Complainant. NE#3 said that he did not do so because he was on the roof and could not go down at that time.

NE#3 confirmed that the Complainant's identity was not known prior to his arrest and the Complainant's name was not discussed or referenced by any of the officers. While NE#3 was aware of the pepper spraying incident, he did not know that the Complainant played any role in that incident.

NE#3 provided OPA with the photograph that was texted to him. The photograph was of the Complainant and was very similar to the booking photograph taken of the Complainant later that evening.

Lastly, OPA interviewed NE#4. He was on the roof that evening but did not personally view the Complainant. He did, however, see several individuals who were pointing lasers at officers. NE#4 said that he did not know the Complainant's identity until after the Complainant's arrest and had no idea that the Complainant had a connection to the pepper spraying incident.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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 Complainant, as well as several community members, alleged that the Complainant was arrested because he took a video of incident of purported police misconduct. They collectively opined that officers, presumably including the Named Employees, were aware of the video, knew that the Complainant took it, identified him in the crowd out of thousands of others, and falsely engineered his arrest. Presumably, and while not explicitly stated, other SPD employees were also involved in this conspiracy to retaliate against the Complainant, including the officers who arrested him.

Ultimately, when evaluating the evidence in this case, OPA deems these allegations to be contrary to the evidence. First, there is no indication that any of the Named Employees or, for that matter, any other officer present and involved with the Complainant, knew who he was or that he had videotaped the pepper spray incident. He was not mentioned by name prior to his arrest on any of the videos reviewed by OPA or referenced at any point on the radio. His name was not said at all until several minutes after he was arrested, and well after he was initially identified as the perpetrator. Moreover, he self-identified at that point, as well as disclosed that he videotaped the pepper spray incident. From OPA's review of the BWV, none of the officers appeared to react to this or exhibited any recognition of who the Complainant was. Indeed, the Complainant, himself, noted that this was the case.

Second, the Complainant was not the only individual arrested that evening for pointing lasers at officers. The other individual – who was alleged to have pointed a purple laser – was identified by NE#3 and later taken into custody.



OPA is not aware of any allegation that this arrest was also fabricated. While not necessarily dispositive of the validity of the Complainant's arrest, it is certainly a fact that supports the conclusion that the officers were not unilaterally targeting the Complainant for police action.

Third, NE#1 identified who he believed was shining the green laser at officers and called out a very specific description. The Complainant matched this description. While the Complainant and others may opine that this makes sense as the officers were purportedly searching for him, this stretches credulity. Again, as indicated above, to believe this, you would need to believe that the officers: knew who the Complainant was based on his brief on-camera interview with KOMO; located the Complainant from within a crowd of multiple hundreds if not over a thousand demonstrators; collectively identified and made the decision to arrest him without mentioning his name at any point; and maintained a conspiracy amongst at least a half dozen SPD employees to effectuate his arrest simply because he took a video of the tail-end of an incident that had yet to be adjudicated by OPA. The alternative hypothesis, and as the officers indicated and BWV appeared to corroborate, was that the Complainant was perceived to be shining a laser at officers and was arrested when he matched the exact description provided by NE#1. In evaluating this case and, for that matter, any other complaint that relies on a number of complicated and unlikely permutations to be true, OPA finds the principle of Occam's Razor to be compelling – of two competing theories, the simplest one is often correct. OPA believes that to be the situation here.

When evaluating the totality of the record, OPA finds no compelling evidence to suggest that the Named Employees or any other involved officer knew the Complainant at all, let alone that they arrested him in order to retaliate against him. Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against NE#1, NE#2, NE#3, and NE#4.

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

Named Employee #2 - Allegation #1

5.001 - Standards and Duties 14. Retaliation is prohibited

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

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

Named Employee #3 - Allegation #1

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.

As part and parcel of OPA's decision that the Named Employees did not arrest the Complainant in order to retaliate against him, OPA concludes that there was sufficient probable cause supporting the decision to take him into custody.



As discussed above, NE#1 asserted that he observed the Complainant using a green laser to point at officers. This is illegal given the damage it can cause to the eyes and constitutes a functional assault. NE#1 identified the Complainant using his naked eyes and, then again, by using binoculars. He did so in the presence of multiple officers, and verbally and physically pointed the Complainant out at that time. NE#1 provided a detailed description of the Complainant and, when he was taken into custody, the Complainant matched that description to a tee. Lastly, NE#1 confirmed that the Complainant was the perpetrator when shown a photograph of him.

The Complainant, to the contrary, denied that he had a laser and said that he was at the hot dog stand all night. However, OPA was not able to interview any witness, other than the Complainant, to corroborate this. Moreover, while the two videos provided by the Complainant's attorney indicated that the Complainant was in the vicinity of the hot dog stand on the night of the incident, they do not conclusively establish that this was the case for the entirety of the evening. Notably, the video that shows the Complainant handing out hot dogs is not time or date stamped; however, it appears to have been taken in the early evening, well before the Complainant was arrested. As such, these videos do not foreclose the possibility that, at some point during the evening, the Complainant walked away from the stand and shined lasers in the eyes of officers.

In addition, the absence of the laser does not, in and of itself, exonerate the Complainant. As the officers referenced on video, they observed the Complainant dispose of something in the dumpster. It is possible that this was the laser and, in any event, they did not need physical possession of the laser to arrest the Complainant given NE#1's observations.

Lastly, at the time this is being written, OPA is not aware of whether the charges against the Complainant have been dismissed. It is very possible that this has occurred and, indeed, OPA doubts that a prosecutor would be able to establish that the Complainant engaged in the acts alleged beyond a reasonable doubt. However, beyond a reasonable doubt and probable cause are two very different standards. The former is often given a percentage of certainty of 99% while the latter simply requires that an officer have a reasonable basis to believe that a crime has been committed. Where, there is no grounds to conclude that the evidence supporting the Complainant's arrest was fabricated and where the video indicates that the officers believes, in apparent good faith, that the Complainant was the perpetrator, OPA determines that there was a sufficient legal foundation for his arrest.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #3 - Allegation #2

5.001 - Standards and Duties 14. Retaliation is prohibited

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

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



Named Employee #3 - Allegation #3

15.180 - Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence

SPD Policy 15.180-POL-1 requires that, in primary investigations, officers conduct a thorough and complete search for evidence. The policy further requires officers to collect evidence and states that only evidence that is impractical to collect shall be retained by the owner. (SPD Policy 15.180-POL-1.) Such evidence should be photographed. (*Id.*)

While on the roof, NE#3 was informed by NE#1 that the Complainant was observed discarding something into a dumpster. It was believed by the officers that what the Complainant discarded was the laser. However, NE#3 did not ensure that an officer conducted a search of the dumpster to try to locate the laser.

OPA believes that NE#3's decision to not have an officer do so was a mistake and was inconsistent with the best practices set forth in SPD Policy 15.180-POL-1. Indeed, when evaluating the facts of this case, OPA cannot say that NE#3 ensured that a thorough and complete search for evidence was conducted. OPA feels that it would have been important to do so here and this evidence could have proven or, for that matter, disproven the Complainant's role in criminal behavior. At the very least, it would have stemmed some of the questions raised in this case and solidified the criminal investigation.

In evaluating this allegation, OPA recognizes the unique situation presented by the protests and the numerous responsibilities possessed by NE#3 and the other officers on scene. OPA also understands that NE#3 was assigned to remain on the roof, and, for that reason, he could not have, himself, gone to look for the laser and other potential evidence. Accordingly, OPA does not believe that discipline is warranted. Instead OPA believes that retraining is the better course of action.

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

- **Training Referral:** NE#3 should be assigned training on the elements of SPD Policy 15.180-POL-1, including when he is required to conduct a thorough and complete search for evidence and what such a search is comprised of. The chain of command should specifically discuss the policy in reference to the facts of this case. NE#3 should be counseled to more closely comply with this policy in the future. This retraining and counseling should be documented, and that documentation retained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**

Named Employee #4 - Allegation #1

5.001 - Standards and Duties 14. Retaliation is prohibited

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

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



Named Employee #5 - Allegation #1

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

OPA initially included the allegations of retaliation, lack of probable cause to arrest, and lack of a thorough and complete search for evidence against an unknown SPD employee. This was done because OPA could not foreclose after its intake investigation that an unknown SPD employee engaged in these actions. However, after completing its full investigation, OPA found no evidence of any involvement of an unknown SPD employee in potential misconduct. As such, OPA recommends that all the allegations against the unknown SPD employee be Not Sustained – Unfounded.

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

Named Employee #5 - Allegation #2

5.001 - Standards and Duties 14. Retaliation is prohibited

For the same reasons as stated above (see Named Employee #5 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #5 - Allegation #3

15.180 - Primary Investigations 1. Officers Shall Conduct a Thorough and Complete Search for Evidence

For the same reasons as stated above (see Named Employee #5 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

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