



## CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 3, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0439

### 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)

***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 the Named Employee subjected her to excessive force when he deployed OC spray at her.

### 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***

The Complainant alleged that, on June 7, 2020, she was subjected to excessive force by SPD officers. She specifically asserted that Named Employee #1 (NE#1) improperly used OC spray on her. In her electronically submitted complaint, the Complainant wrote the following:

I was protesting peacefully outside of the East Precinct with a group. We were sitting on the ground outside of the barricade when a group of bike cops began to trample us, hitting us with bikes, while cops in riot gear advanced from the front. I was shoved twice by officers and then grabbed by one, who pepper sprayed me in the face from less than one foot away for multiple seconds. When I turned away, he continued to spray the back of my head, neck, and clothes. I was able to escape and dropped to the ground outside of the crowd where I was helped by volunteer medics.

As part of its investigation, OPA interviewed the Complainant. She said that, on June 7, she was peacefully protesting at a police barricade in the vicinity of the East Precinct. She was with her partner. She said that she was sitting down at the barricade with around 100 other demonstrators present. She recalled that, around 7:00 p.m., officers wearing riot gear approached the barricade. In response, demonstrators stood up and opened umbrellas to



protect themselves from blast balls and OC spray. The Complainant stated that, while the officers in riot gear approached, a group of bicycle officers came behind the demonstrators, effectively preventing them from moving either forward or backward.

The Complainant said that, at some point thereafter, a flash bang was deployed into the crowd. Then the officers in riot gear began moving into the crowd of demonstrators. The Complainant recalled being disoriented by the flash bang and she saw that her partner had been hit by shrapnel. She stated that she tried to move away by proceeding towards the edge of the crowd. At that time, she was pepper sprayed in the face by an officer who was standing a foot away.

The Complainant reported turning away from the officer; however, the officer continued to spray the back of her head and neck. She was then forcefully shoved. She struggled to make her way to the edge of the crowd and then fell to the ground. She was assisted by other demonstrators. She began breaking out in hives and ultimately went to the hospital where she was treated for an allergic reaction and given an EpiPen.

OPA identified Body Worn Video (BWV) that captured the incidents set forth in the Complainant's complaint. This allowed OPA to determine that two officers used force on the Complainant. The first – Named Employee #1 (NE#1), pepper sprayed her. The second – Named Employee #2 (NE#2), pushed her. Shortly after this complaint was initiated, NE#2 went on extended military leave. As such, he was unavailable to be interviewed. OPA subsequently bifurcated this case and proceeded with his investigation against NE#1. The investigation against NE#2 was tolled pending his return from military leave.

The BWV indicated that the Complainant was at the front of the group of demonstrators at the barricade. There were officers wearing riot gear that began walking towards the barricade. A squad of bicycle officers advanced towards the line behind the officers. The sergeant supervising the bicycle squad walked up to the barricade and asked the demonstrators to move to the side to allow emergency vehicles to proceed through. The Complainant was to the front left of the Sergeant and could be heard yelling at officers: "get the fuck away from us!" The demonstrators did not move in response to the Sergeant's request and several shook their heads indicating that they would not do so. The Sergeant informed demonstrators that if they did not move, they would be arrested. The Complainant continued to yell at the officers to get away from them.

Officers began to open the barricade, and, at that time, demonstrators sat down in an organized fashion and positioned umbrellas in front of themselves. Officers started to walk through the seated demonstrators, continuing to say: "move back." The Sergeant directed that those demonstrators who did not move should be arrested, and officers began taking people into custody. At that time, a demonstrator wearing a red sweatshirt quickly advanced towards an officer and pushed him back from a demonstrator who was being taken into custody. The officer stood up and pushed the demonstrator back. They then faced each other. Another demonstrator, who was dressed in all black and had a florescent orange backpack, moved forward into the bicycle line and placed himself in between the officers and the individuals lying on the ground. The individual with the orange backpack began pulling demonstrators back from the officers. The demonstrator with the red sweatshirt advanced towards other officers who were moving back the crowd, and he was pepper sprayed. The individual with the orange backpack was also pepper sprayed and pushed backwards by the officers.

The clearest view of where the Complainant was positioned at that time was captured by a video posted on Twitter. It showed her to the left of the scuffle between the officers and the demonstrators in front of them. A blast ball was



deployed, and the Complainant moved back from the barricade. At that time, additional bicycle officers came up behind her and moved her back and towards other demonstrators. The video indicated that, at this time, the Complainant had at least two avenues of egress away from the officers. The Complainant appeared to plant her feet and push back against an officer who had a hand on her back and was trying to move her away. A smaller group of demonstrators, directly next to her, began to move close to each other, in an apparent attempt to block officers from clearing a path. The officers kept moving forward and instructed demonstrators to “move back.”

The Complainant then turned away from the officer that had been trying to move her back and towards the officers at the barricade. As she stepped towards them an officer reached out to grab her arm. She was simultaneously sprayed once with OC spray by NE#1. She then turned and walked into the crowd and away from the barricade.

When viewing the deployment from NE#1’s perspective as captured on BWV, he was looking down at demonstrators that officers were trying to get off the ground. When he looked up, the Complainant had turned towards him and taken a step in his direction. He then virtually immediately deployed OC spray at her. The distance was significantly more than the one foot identified by the Complainant. When the OC spray was deployed, she quickly turned and disappeared into the crowd. As she turned, NE#1 ceased his deployment. The incident, from NE#1’s first sighting the Complainant to deploying, lasted for around two seconds.

OPA interviewed NE#1 to obtain his rationale and explanation for the deployment. He stated that the crowd was non-compliant with the officers’ requests that they move back so that a path could be created for emergency vehicles. He said that demonstrators purposefully blocked their way, so the officers began physically moving them to the side. NE#1 recalled that demonstrators began confronting and pushing officers and he and other officers used OC spray to move those demonstrators back and to disperse them.

He stated that, around this time, he observed the Complainant break away from an officer who had been gripping her arm and turn to approach the barricade and officers. NE#1 deployed a short burst of pepper spray at her face from approximately six feet away to move her back.

He explained that, at the time of the deployment, he believed that the Complainant was advancing towards him and other officers. He felt that his deployment was consistent within policy as it was purposed to protect him and other officers and to disperse a non-compliant demonstrator.

SPD Policy 14.090-POL-10 permits officers to use OC spray in the demonstration context for self-protection or to protect others. Like all use of force, OC spray deployments must be reasonable, necessary, and proportional. SPD Policy 14.090-POL-10(a) states that OC spray must be directed at the individual who presents a threat and that the exposure of other individuals should be avoided.

OPA finds that this case is analogous to another recent investigation – 2020OPA-0377. In that case, a woman was taking items out of her backpack when she asserted that she was struck with a fired projectile. The officer, for his part, stated that he and other officers believed that the woman may have been withdrawing items to throw at officers from her backpack, given that she was crouched behind a sign with other individuals while going through her bag and because other projectiles had just been thrown at officers. He thus fired a pellet with OC spray in their vicinity to disperse them. In evaluating that case, OPA noted that the accounts of both the woman and the officer were not necessarily mutually exclusive. It was possible that the woman was not engaging in any criminality and was innocently searching her backpack and that the officer believed in good faith given the totality of the circumstances



that she was preparing to extract items that could be used to harm officers. OPA concluded that, when applying a reasonableness standard and when avoiding 20/20 hindsight, the force was justified. The same analysis applies to the Complainant's case.

The video clearly showed that the Complainant was lined up at the barricade yelling at officers and that she did not move away when initially asked to do so. The video also showed that demonstrators did not get off the ground and, when officers tried to remove them and to take them into custody, demonstrators intervened and aggressively approached officers. The video further showed that, even though many demonstrators then left, the Complainant did not do so and, when pushed back by an officer, appeared to plant her body and push back towards him. This indicates, in OPA's perspective, that, at least up to that point, the Complainant was purposefully not complying with officers' lawful orders to leave that immediate area.

However, OPA finds it possible that, at the time of the OC spray deployment, the Complainant was turning to leave and was confused on what direction to proceed in given everyone who was around her. As such, OPA concludes that her statement that she was not purposefully advancing towards the barricade and was, instead, seeking a way out, to be plausible. On the other hand, NE#1's BWV clearly showed the chaos of the incident, the multiple demonstrators who acted aggressively towards officers, and the overall noncompliance of demonstrators. It also showed the Complainant appear to advance directly towards NE#1 and in the direction of where she had been directed to move away from. Given this and due to what he had just experienced from other demonstrators, it was reasonable for NE#1 to believe in the two seconds that he had to react that the Complainant could have a nefarious motive.

Again, as explained above and in 2020OPA-0377, OPA is prohibited from engaging in a hindsight analysis. This means that OPA cannot impute perfect knowledge to NE#1. OPA, instead, is required to evaluate whether the force was proper, given the facts known to NE#1 at the time and the circumstances of the incident that he experienced. When applying that standard, OPA concludes that he reasonably felt that the Complainant was advancing towards him and, by doing so, that she posed a potential threat to him and other officers. Again, NE#1 did not know who the Complainant was, whether she had engaged in violence towards officers previously, and could not read her mind to know her intentions. Indeed, he was not required to do so in the two seconds he had to react and was permitted to apply the force he used.

In reaching this finding, OPA finds it unfortunate that the Complainant was injured as a result. OPA also understands that, as she has clearly expressed, the Complainant is angry and feels that she was wronged. The Complainant's feelings are legitimate; however, they do not dictate the conclusion in this case. To the contrary, OPA's determination is based on the evidence and the appropriate legal standard. When applied here, it is clear to OPA that the force was within policy.

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

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