



CLOSED CASE SUMMARY

ISSUED DATE: APRIL 13, 2021

FROM: DIRECTOR ANDREW MYERBERG
 OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0613

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)
# 2	8.300 – POL –5 Use of Force – Oleoresin Capsicum (OC) Spray 9. Officers Shall Assist Exposed Subjects with Decontamination and Medical Aid	Not Sustained (Management Action)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)

Named Employee #3

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)
# 2	8.300 – POL –5 Use of Force – Oleoresin Capsicum (OC) Spray 9. Officers Shall Assist Exposed Subjects with Decontamination and Medical Aid	Not Sustained (Management Action)

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 Named Employee #1 and Named Employee #3 engaged in unprofessional conduct and that Named Employee #2 used excessive force while arresting a demonstrator. OPA further alleged that Named Employee #1 and Named Employee #3 may have failed to provide medical assistance to an arrestee.

SUMMARY OF INVESTIGATION:

On September 15, 2020, a group of demonstrators marched throughout downtown Seattle. While doing so, individuals within that group engaged in property damage, including striking and damaging a parking pay box with a hammer and breaking a window. The Named Employees were assigned with other officers to monitor the group and to take law enforcement action if necessary. They observed an individual – referred to here as the “Subject” –



engage in criminal activity, including property damage. The Subject was identified based on what she was wearing. The decision was then made to effectuate a targeted arrest of the Subject.

The Named Employees and other officers rode up to the group on their bicycles. They stopped the group from walking forward and an officer – referred to here as Witness Officer #1 (WO#1) – told the Subject that she was under arrest and told her to come towards him. The Subject moved into the group and away from WO#1 as he approached. Demonstrators in the group moved around her and the Subject crouched behind them. Another officer – Witness Officer #2 (WO#2) – went to the other side of the group to prevent the Subject from running away. NE#2 reached into the group and grabbed the Subject, pulling her away from the group and towards officers. At that time, WO#2 deployed pepper spray towards two individuals who had been blocking access to the Subject and did not back away when ordered to do so. WO#2 further assisted in taking the Subject into custody. After she was pulled out from the larger group, the Subject asserted that her knee hurt. She was later diagnosed with a broken tibia. The Subject and the two individuals who were pepper sprayed were all placed under arrest.

After these arrests were completed, Named Employee #1 (NE#1) was putting away his equipment and, while doing so, sprayed himself and Named Employee #3 (NE#3) with Cold Fire (a fire retardant). NE#3 initially believed that he had been sprayed with OC spray and was concerned that it was all over him. However, NE#1 informed him that this was not the case. Ultimately, both laughed at the situation. NE#3 also took a picture of NE#1 and another officer. The purpose of the picture was to document the levity in their minds of NE#1 inadvertently spraying and being covered with Cold Fire.

The taking of the photograph was observed by a demonstrator who posted on social media their concerns about its inappropriateness. The Complainant, who was not present at the demonstration, viewed the social media posts and then filed an OPA complaint alleging that NE#1 and NE#3 were unprofessional when they posed for and took the photograph, as well as that NE#2 used excessive force on the Subject. This investigation ensued.

As part of its investigation, OPA reviewed the Body Worn Video of this incident, which captured both the taking of the photograph and the force used by NE#2. OPA also reviewed the FIT investigation into NE#2's force. Lastly, OPA interviewed all of the Named Employees.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

It was alleged that NE#3's taking a picture of NE#1 was unprofessional.

SPD Policy 5.001-POL-10 requires that SPD employees "strive to be professional at all times." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." (SPD Policy 5.001-POL-10.)

At their OPA interviews, both officers stated that they did not intend to insult the individuals under arrest or other demonstrators. They mentioned the high stress of working at demonstrations. They both said that NE#1 inadvertently spraying himself with the Cold Fire was harmless but funny. They said that they made the human decision to laugh about it and, as part of that, for NE#3 to take the photograph. They explained that, at the time,



they had a ring of officers standing around and they did not think that other demonstrators were watching them. They stated that neither of the arrestees expressed concern with the taking of the photograph.

The BWV captured the photograph taking. It showed NE#1 covered with Cold Fire and NE#3 taking the photograph. The video confirmed that neither officer made comments towards any of the arrestees that were insulting or demeaning. However, the BWV also showed that, both before and after the photograph was taken, one arrestee complained of discomfort from both how they were positioned (before) and another arrestee complained of discomfort from OC spray (after).

OPA believes it clear that the taking of the photograph was a bad decision under the circumstances. While perhaps a human reaction after months of stressful demonstrations, it was done not only in view of demonstrators in the vicinity but also the arrestees who were sitting near them. Moreover, at the time, individuals – including officers and demonstrators – had been affected by OC spray and did not find that amusing. Indeed, one of the arrestees complained of OC spray shortly after the photograph was taken. The question for OPA is whether this conduct was so egregious to warrant a Sustained finding. Ultimately, when considering all of the evidence and the officers' statements, OPA finds that it was not. Fundamentally, OPA finds no intent of the officers to demean and insult arrestees or other demonstrators and, instead, believes that the officers were making light of each other, even if this was ill advised. Moreover, when assessing the community response to this incident, OPA finds no basis to conclude that it so significantly undermined public trust and confidence to warrant discipline as opposed to retraining and counseling.

Accordingly, OPA recommends that this allegation be Not Sustained – Training Referral as against NE#1 and NE#3.

- **Training Referral:** The chain of command for NE#1 and NE#3 should discuss with them their decision to take a photograph during the demonstration. The chain of command should specifically instruct the officers that such actions, even if not intended to demean or insult others, can have this functional result and can diminish public trust and confidence in the Department. The chain of command should make sure that the officers understand that such conduct should not occur in the future. This counseling and any retraining should be documented, and this documentation should be maintained in an appropriate database.

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

Named Employee #1 - Allegation #2

8.300 – POL –5 Use of Force – Oleoresin Capsicum (OC) Spray 9. Officers Shall Assist Exposed Subjects with Decontamination and Medical Aid

SPD Policy 8.300-POL-5(9) requires officers to assist arrestees and others who have been exposed to OC spray with decontamination and medical aid “as soon as reasonably possible.” The policy states that, if an individual was exposed to OC spray in a confined space, they will be removed (if feasible) from the contaminated area and exposed to fresh air. The policy also directs officers to seek medical aid for individuals who continue to feel discomfort.

Here, the BWV indicated that the arrestees were not in a confined space at the time OC spray was deployed and that, after the deployment, they were exposed to fresh air. The BWV further confirmed that neither NE#1 nor NE#3 took steps to rinse out the arrestees' eyes after the deployment.



At their OPA interviews, both officers stated that, while they were generally aware that OC spray had been used and that the arrestees had been affected, they had no recollection of one of the arrestees complaining about discomfort from the OC spray. Both officers noted that the Seattle Fire Department had been notified and that medics were on their way to the scene. Lastly, both officers said that they had no ability to decontaminate the arrestee at the time.

In assessing this policy, OPA struggles with the lack of clarity surrounding what decontamination means. All that is referenced in this respect is potentially moving individuals from a “contaminated” area to a place with fresh air. The policy does not reference the rinsing of the individuals’ eyes with water or another liquid, which is what OPA thinks of when defining decontamination. OPA further notes that, unlike officers assigned to patrol vehicles, bicycle officers do not have ready access to bottles of water and/or first aid kits. While some officers carry personal water bottles with them, given the ongoing pandemic, it seems undesirable, in OPA’s opinion, to use those liquids to decontaminate.

Ultimately, given the above, OPA concludes that a Management Action Recommendation is appropriate and that two changes should occur as a result of this case. First, the policy needs to be revised to clearly state what decontaminate means and to specifically instruct officers that, if requested, officers should rinse the eyes of individuals who have been affected by OC spray. Second, given the limitations on the access of bicycle officers to bottled water, the Department should assign at least one bicycle officer in each squad (perhaps a supervisor) a sterile saline solution that can be used to rinse individuals’ eyes.

Recommended Finding: **Not Sustained (Management Action)**

Named Employee #2 - 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.*)

The force used by NE#2 consisted of him grabbing onto the Subject and pulling her towards him. He did not use any other force against her. It is undisputed that, as he pulled her, the Subject injured her leg. At the time this force was used and as recorded on BWV, the Subject had been identified as the perpetrator of property damage. As such, there was probable cause for her arrest. The BWV also showed that WO#1 initially tried to gain the Subject’s compliance through verbal orders and without using any force at all. However, although she was told that she was under arrest, the Subject did not comply with the order to come towards WO#1. Indeed, she did the exact opposite when she proceeded back into the crowd. As the Subject was being shielded by other individuals at the time, NE#2 explained that he thought grabbing her and pulling her out of the group was the least intrusive force he could use to get the Subject away from the other demonstrators and to place her under arrest. He noted that, based on a review of BWV, when he did so, other demonstrators appeared to be trying to hold the Subject back and the Subject seemed to plant her leg. He opined that this may have contributed to the injury the Subject suffered.



Based on a review of the totality of the evidence, OPA concludes that NE#2's force was consistent with policy. The force was reasonable to effectuate the arrest of the Subject, who failed to comply with officers' directions to move towards them and went back into the crowd in an attempt to prevent being taken into custody. Given her behavior, force was appropriate to bring her under control. The force was also necessary under the circumstances. Notably, pulling the Subject out of the crowd was a lower level use of force than pepper spraying her or using other less-lethal tools. Moreover, had the officers tried to go into the group to extract her, it likely would have resulted in more harm to the officers and demonstrators. Lastly, the force – pulling the Complainant – was proportional to the threat posed by her actions and those of the other demonstrators who actively prevented her arrest. That the Subject suffered a leg injury is unfortunate, but it does not cause the force to be not proportional or otherwise inconsistent with policy. The injury was less a result of the type or extent of force used by NE#2 than an unforeseen occurrence that could not have been predicted.

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 #1

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

OPA recommends that this allegation be Not Sustained and refers to the above Training Referral (see Named Employee #1 – Allegation #1).

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

Named Employee #3 - Allegation #2

8.300 – POL –5 Use of Force – Oleoresin Capsicum (OC) Spray 9. Officers Shall Assist Exposed Subjects with Decontamination and Medical Aid

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

Recommended Finding: **Not Sustained (Management Action)**