



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 10, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0333

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	Sustained
Imposed Discipline		
Written Reprimand		

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 deployed a CS gas canister in violation of policy.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1 ***8.200 Using Force 1. Use of Force: When Authorized***

This case arises out of the demonstrations that occurred within Seattle and across the nation in the aftermath of the killing of George Floyd by a Minneapolis Police Officer. The specific case addressed here occurred on the evening of June 1, 2020.

On that date, demonstrations were occurring in the vicinity of the East Precinct and Cal Anderson Park. An incident commander issued a directive to begin clearing demonstrators out of the area. This decision was made based on ongoing property damage, projectiles being thrown at officers, and failures of demonstrators to comply with orders to disperse. Officers were authorized to use less-lethal tools to disperse the crowd, including both blast balls and CS gas. With regard to CS gas, officers were permitted to use a launcher and to deploy canisters by hand. Only SWAT officers were equipped with launchers, and they were previously trained to use these tools as a function of their assignment. However, a wider group of officers was authorized to deploy canisters by hand. These officers, who were largely assigned to patrol, received an abbreviated training on the usage of these tools. All of these officers had previously been trained in the use of blast balls. The training on the dispersal on CS gas was, according to a Sergeant interviewed by OPA, conducted on either May 31, 2020 or June 1, 2020. The training lasted for approximately 30 minutes and was led by the Sergeant and another SWAT officer. The Sergeant described the training as “impromptu.” Both the Sergeant and the incident commander – a Lieutenant also interviewed by OPA – stated that CS gas was authorized and trained on because the Department was beginning to run out of blast balls and other



less-lethal munitions that were available to patrol officers. Named Employee #1 (NE#1) was among the officers who received this training and was given authorization to utilize CS gas canisters during demonstrations.

OPA notes that the overall determination made to disperse the crowd and the manner in which that was effectuated is being investigated in a separate case. That case and other investigations will address the decision of the Department to authorize and then continue to use CS gas, as well as the decision to make this tool available for patrol officers who had only received abbreviated training. The investigation discussed herein concerns the throwing of a CS gas canister by NE#1 and whether this individual use of force was consistent with policy.

With regard to this specific use of force, NE#1 was among the officers directed to clear the vicinity of the East Precinct and Cal Anderson Park. Based on a review of multiple videos, including Body Worn Video (BWV) and third-party video, OPA determined that NE#1 threw a silver CS gas canister from where he was positioned towards Cal Anderson Park. The CS gas canister landed in the immediate vicinity of a news crew and it struck a woman referred to here as the "Reporter." The CS gas canister sparked and damaged the sleeve of the Reporter's jacket. The Reporter and her crew subsequently moved quickly out of the park.

As part of its investigation, OPA interviewed the Reporter and another member of the news crew. The Reporter stated that she was finishing up a report in Cal Anderson Park and was beginning to leave when she noticed conflicts beginning between officers and protestors. She saw munitions being used in the park and she was struck by a "flash bang." It damaged her jacket. Prior to that, she heard dispersal orders being issued at the protest line outside of the East Precinct. She and her crew were leaving, as they did not stay during ongoing riots. She said that the main group of demonstrators were in the street, and she did not see any individuals engaged in illegal activities in the park. The Reporter told OPA that she and her crew were clearly marked as media at the time.

The other member of the news crew provided a similar account to the Reporter. He said that they were in the vicinity of the East Precinct reporting but once tensions began to rise between demonstrators and the police, they left and went into the park. He recalled that the police started to use munitions towards people in the park, which he found concerning. He told OPA that, at this time, people were dispersing and running away, but officers were still using blast balls and CS gas. He was not personally harmed as a result.

Portions of this incident were recorded on Body Worn Video (BWV) and by news outlets and community members. The video taken by the Reporter's news outlet showed that she was standing in the park preparing to report. Blast balls, OC spray, and CS gas were being used on the crowd to her left that was in the street. While the street was crowded with people, the park was relatively empty. Most of the people in the park were recording what was happening on their phones. There was no evidence from the video of any individuals in that vicinity of the park who were throwing projectiles at officers. The video showed what appeared to be a CS gas canister that was thrown over the fence. The canister sparked and then struck the Reporter, who subsequently ran with her news crew. The time of the explosion and the striking of the Reporter was 9:19 p.m.

NE#1's BWV showed his actions at around that same time. The BWV confirmed that he deployed a CS gas canister towards the park. His deployment occurred at 9:19 p.m. NE#1 threw the canister overhand towards a group of individuals. NE#1's BWV also indicated that, virtually immediately after he threw the CS gas canister, an explosion occurred in the vicinity of the Reporter and her news crew. NE#1's BWV did not conclusively show any projectiles being thrown at NE#1 or other officers from the park.



OPA also reviewed the BWV of a Sergeant. That video showed another perspective of NE#1's deployment. This BWV indicated that NE#1 threw the canister forward through a gap in the fences surrounding the park. From this vantage point, the canister appeared to have been directly thrown at several individuals.

OPA interviewed both NE#1 and the Lieutenant concerning NE#1's CS gas canister deployment. The Lieutenant confirmed that he gave the order to use less-lethal tools to disperse the crowd. This was due to his perception of significant violence towards officers from the crowd, including the throwing of projectiles. He stated that demonstrators were using the tactic of placing passive people at the front to use umbrellas to block those behind them who were throwing projectiles. The Lieutenant said that he approved the use of OC spray and launchable CS gas towards the park. The Lieutenant explained that he called for launchable CS gas, as opposed to hand-deployed canisters, because of the greater range and ability to strategically place the launched canisters. The Lieutenant told OPA that, absent exigent circumstances, CS gas canisters should be rolled, not thrown overhand. The Lieutenant had no recollection of authorizing overhand throws during this incident. The Lieutenant said that he always had a concern when an officer deployed CS via an overhand throw. He indicated that, without knowing NE#1's rationale for the deployment, he would want to be sure that there was a sufficient necessity for throwing it overhand. In addition, the Lieutenant confirmed that, even though he authorized the use of CS gas, each officer remained responsible for justifying individual deployments.

NE#1 confirmed that he took part in the training on using CS gas canisters. He said that he was instructed to deploy the canisters like blast balls. This meant that they should be deployed in front of crowds and not directed at individuals. He said that he recalled observing a riot occurring. He stated that he moved towards the park due to the Lieutenant's order to use CS to clear the park. He indicated that he saw a group of demonstrators that were not dispersing. However, that group eventually dispersed. He then saw another group that was not dispersing. He told OPA that this group was throwing projectiles at officers. He deployed CS gas in front of them. He said that he threw the CS gas through a gap between fences. He noted that he had to throw the canister harder than usual due to distance and obstacles. He said that the CS gas canister reached its desired location and detonated in front of the crowd that was throwing projectiles.

After being shown the video of the Reporter being hit, NE#1 was asked if this changed his perception of the incident and his deployment. He said that he thought the CS canister detonated further west than it did. He said that the people throwing projectiles were further west than the Reporter. He said that he did not see her or her news crew or recognize that they bore press credentials.

NE#1 told OPA that he felt his deployment was consistent with policy. He said that the force was reasonable and necessary to carry out the dispersal order. He believed that this was particularly the case given ongoing assaults on officers. He stated that he did not believe that he had any reasonable alternative to using this force. He also did not think he could have deployed it in a different manner under the circumstances. Lastly, he felt that the force was proportional to the ongoing threats of harm posed by demonstrators.

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.*)

Based on the totality of the evidence and while recognizing the chaotic nature of the demonstrations and the resulting dispersal, OPA finds that NE#1’s deployment of the CS gas canister violated policy. First, at the time of the deployment, there was no indication that the individuals within range of the canister were posing a threat of harm to officers. The BWV did not show projectiles coming from that area. This was confirmed by the news video that showed a different angle of the deployment. Second, the BWV established that NE#1 threw the canister overhand and directly at individuals. Doing so is impermissible absent some necessity. Again, the collective video established that there was no evidence that these individuals were engaged in any crimes of violence at the time. Third, the video shows that NE#1 simply did not exercise due care when he deployed the CS gas canister and, in this regard, his deployment appeared to be indiscriminate. This caused it to impact innocent bystanders, including the Reporter and her news crew. This is simply inconsistent with the expectations and training surrounding the use of such less-lethal tools.

What occurred here is one example from a number of cases – including 2020OPA-0335 – in which officers deployed CS gas canisters and blast balls overhand and, at times, directly at individuals or without being aware of surroundings. This resulted in injuries to and the targeting of individuals who were not posing threats to or harming officers. Ultimately, this is inconsistent with policy and played a role in the banning of less-lethal tools by the City Council. OPA intends to issue a recommendation to SPD on this issue under separate cover.

With regard to the specific deployment here, OPA finds that it was inconsistent with policy and recommends that this allegation be Sustained.

Recommended Finding: **Sustained**