



## **CLOSED CASE SUMMARY**

ISSUED DATE: MARCH 23, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0556

### **Allegations of Misconduct & Director’s Findings**

Named Employee #1

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 10. Officers Shall Strive to be Professional	Not Sustained (Unfounded)
# 3	6.010 - Arrests 3. Officers Shall Advise All Arrestees of Their Full Miranda Rights	Not Sustained (Training Referral)
# 4	De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics	Not Sustained (Lawful and Proper)
# 5	Using Force 1. Use of Force: When Authorized	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 violated multiple SPD policies when he used force against her and arrested her.

### **SUMMARY OF INVESTIGATION:**

The Complainant alleged that she was assaulted by a group of bicycle officers, that she was unlawfully arrested, and that she was never read Miranda warnings. OPA initiated this investigation.

As part of this investigation, OPA attempted to interview the Complainant. She referred OPA to various attorneys. OPA contacted the attorneys to seek their consent to interview the Complainant; however, none of the attorneys responded to OPA.

OPA reviewed Body Worn Video (BWV), which captured the arrest of the Complainant and the force used. The video showed bicycle officers, including Named Employee #1 (NE#1), riding up to the vicinity of Cal Anderson Park (specifically Nagle Place). The Complainant could be viewed on the video standing in that area. The Complainant was situated around 25 feet away at the end of the block. The Complainant was provided multiple orders to leave the area or else she would be subject to arrest. The Complainant did not move and responded: “For what?” NE#1 told the Complainant that she was in an exclusionary zone established by the Mayor and that she needed to leave by



proceeding north. The Complainant again asked why she needed to leave, and another officer provided her with the same information about the exclusionary zone. She stated that the Mayor had no authority over her and that the officers had no right to remove her from the area.

OPA verified that the area in which the Complainant was situated was, in fact, within a designated exclusionary zone. This exclusionary zone was set pursuant to a validly issued order by the Mayor. OPA further determined that, at a roll call briefing prior to this incident, officers, including NE#1, were instructed that they were responsible for enforcing the terms of the exclusion order. They were told to warn demonstrators within the area to depart and, if they did not, to place those demonstrators under arrest.

The Complainant did not immediately depart from the area. Instead, the Complainant, who walked with a cane, proceeded towards the officers and stopped mid-block. The Complainant asked for officers' "badge numbers" and began to take pictures of them. The officers got back onto their bikes and began to ride up the street. NE#1 told the Complainant again that she needed to leave the area ("you must leave, Ma'am, you're going to be arrested"). The Complainant took a few steps north but again stopped as the officers began to proceed by her on their bikes. One officer loudly stated "go, go, go." NE#1 rode directly up to the Complainant and used an outstretched hand to push her up the street. She yelled: "Do not push me." She further recoiled towards NE#1. He grabbed onto her and turned her around. She then appeared to go down to her knees, largely under her own power. NE#1 told her to put her hands behind her back and pushed the top of her body downwards. She was then handcuffed. The Complainant did not complain of pain or injury or make any exclamations that suggested pain or injury. At that time, the Complainant disclosed that she had a pocketknife in her right pocket. She also contended that officers had shot her son.

NE#1 did not immediately read the Complainant Miranda warnings. He walked her to a prisoner van, and she was seated inside. She asked NE#1 whether he "felt safe now." He told her that she was asked to leave on her own volition but that she chose not to do so. The Complainant responded: "I don't have to listen to unjust commands." She was asked for her last name by a sergeant and replied: "fuck you all." NE#1 then walked away and proceeded to continue to clear Cal Anderson Park with the other officers.

### **ANALYSIS AND CONCLUSIONS:**

#### **Named Employee #1 - 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.

NE#1 arrested the Complainant for failing to leave the vicinity pursuant to the Mayor's exclusionary order. While the Complainant may have believed that she was not beholden to that order and that it was "unlawful," she is factually and legally incorrect. Moreover, she was given numerous opportunities by officers to comply with the order and made the choice not to do so. That choice came with consequences – here, her arrest. Lastly, the arrest was in-line with the explicit directions that NE#1 had been given by supervisors.



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As OPA finds that the arrest of the Complainant was appropriate and supported by probable cause, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

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

The Complainant alleged generally that she was treated inappropriately and improperly by the officers. OPA construed this to be a professionalism allegation.

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.) 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.*)

To the extent the Complainant believes that NE#1 was unprofessional because he arrested or used force on her, that conduct is fully captured by Allegations #1, #4, and #5. OPA saw no other conduct on the part of NE#1 or any other officer that rose to the level of unprofessionalism. Notably, NE#1 and the other officers were polite yet firm with her prior to making the arrest. They referred to her as “ma’am” and gave her multiple opportunities to comply with their orders and to leave the area, which she refused to comply with. Moreover, NE#1 did not make any statements to the Complainant that were derogatory, contemptuous, or disrespectful, and did not use profanity towards her.

For these reasons, OPA finds no evidence indicating that NE#1 was unprofessional and recommends that this allegation be Not Sustained – Unfounded.

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

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

***6.010 - Arrests 3. Officers Shall Advise All Arrestees of Their Full Miranda Rights***

SPD Policy 6.010-POL-3 requires that arrestees be read their Miranda warnings “as soon as practical” after being taken into custody.

The BWV established that NE#1 did not read the Complainant Miranda warnings at the time of her arrest or when he walked her to the prisoner van. NE#1 recognized that he did not do so and stated that this was due to the dynamic nature of the situation – ongoing demonstrations – and his need to rejoin his squad.

While OPA recognizes that the demonstrations were fluid and, at times, chaotic, this was not the case at the exact time of the Complainant’s arrest. OPA concludes that NE#1 had more than enough time to read the Complainant Miranda warnings and that he should have done so.



Even though OPA finds that NE#1's failure to read Miranda warnings at the time of the Complainant's arrest was inconsistent with policy, OPA recommends that he receive a Training Referral instead of a Sustained finding. In reaching this decision, OPA notes that NE#1 has never violated this policy before, that the Complainant was not subjected to a custodial interview at any time, and finds the ongoing demonstrations to be mitigation supporting retraining rather than discipline.

- **Training Referral:** NE#1 should be counseled by his chain of command concerning his failure to timely provide Miranda warnings. NE#1 should be informed that future non-compliance with this policy may result in the imposition of discipline. 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 #4**

##### ***De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics***

"De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance." (SPD Policy 8.100-POL)

The policy further instructs that: "When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution." (SPD Policy 8.100-POL-1) Officers are also required, "when time and circumstances permit," to "consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors" such as "mental impairment...drug interaction...[and/or] behavioral crisis." (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident "when deciding which tactical options are the most appropriate to bring the situation to a safe resolution." (*Id.*)

(*Id.*) De-escalation is inarguably a crucial component of the Department's obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department's policy and expectations.

Based on a review of the BWV, OPA finds that NE#1 and other officers engaged in a significant amount of attempted de-escalation prior to using force. They calmly and clearly instructed the Complainant to leave the vicinity, explained why she needed to depart, and gave her ample opportunities to do so. At the time that NE#1 decided to use force and pushed the Complainant back, she had stopped in the midst of the officers, was refusing to leave, and, by doing so, threatened to move behind their advancing lines. At this point, given her statements and clear actions, further de-escalation was not feasible, and NE#1 was permitted to act by physically moving the Complainant back. The officers had a legitimate law enforcement interest in clearing individuals out of the exclusionary zone. They were not required to negotiate further with the Complainant prior to physically removing her from the area.

Accordingly, OPA recommends that this allegation be Not Sustained – Lawful and Proper.



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

**Named Employee #1 - Allegation #5**  
***Using Force 1. Use of Force: When Authorized***

The Complainant alleged that she was subjected to excessive force and assaulted by officers when she was “slammed” to the ground.

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.*)

In explaining why he used force, NE#1 stated that he did so to move the Complainant away from him and the other advancing officers and to “guide” her out of the area. He asserted that it was not meant to harm her and was low-level force. However, he asserted that it was justified to move her and to prevent her from getting behind him and the other officers.

In reviewing the BWV and when considering the totality of the facts, OPA reaches several conclusions, including: (1) the Complainant was in an area where she had no legal right to be; (2) she did not leave the area despite multiple orders that she do so; (3) she stopped suddenly as officers proceeded towards her on their bicycles and began to pass her; (4) there is no indication from her words and actions that she would have voluntarily left the area; (5) NE#1 was legally permitted to remove her, using force if needed; and (6) the Complainant was not slammed to the ground by NE#1.

In a perfect world, NE#1 would not have used any force and the Complainant would have voluntarily complied; however, that was not the case here. As such, when the Complainant continued to refuse to leave the area, NE#1 was entitled to physically compel her to do so and to prevent her from getting behind the officers. The force used to do so was minor and did not appear to cause any injury or pain to the Complainant. Moreover, the force used to push the top of the Complainant’s body down was also minor and appeared necessary to ensure that she put her hands behind her back and could be handcuffed. Lastly, the Complainant assertion that she was “slammed” to the ground was disproved by the BWV.

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

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