



OFFICE OF POLICE ACCOUNTABILITY

Closed Case Summary

Complaint Number 2017OPA-0571

Issued Date: 02/05/2018

Named Employee #1	
Allegation #1	<u>Seattle Police Department Manual</u> 8.200 (1) Using Force: Use of Force: When Authorized (Policy that was issued September 1, 2015)
OPA Finding	Not Sustained (Inconclusive)
Allegation #2	<u>Seattle Police Department Manual</u> 8.300 (8.300-POL-8) Use of Force Tools: Use of Force - SPECIALTY UNIT WEAPONRY (Policy that was issued September 1, 2015)
OPA Finding	Not Sustained (Management Action)
Final Discipline	N/A

Named Employee #2	
Allegation #1	<u>Seattle Police Department Manual</u> 8.200 (1) Using Force: Use of Force: When Authorized (Policy that was issued September 1, 2015)
OPA Finding	Not Sustained (Lawful and Proper)
Allegation #2	<u>Seattle Police Department Manual</u> 8.300 (8.300-POL-8) Use of Force Tools: Use of Force - SPECIALTY UNIT WEAPONRY (Policy that was issued September 1, 2015)
OPA Finding	Not Sustained (Management Action)
Final Discipline	N/A

INCIDENT SYNOPSIS

The Named Employees were working at the May Day 2016 protest.

COMPLAINT

The complainant alleged that, during May Day 2016, the Named Employees used a FN 303 device and a pepperball launcher on multiple occasions, each time in violation of the Department's use of force policy.

INVESTIGATION

The OPA investigation included the following actions:

1. Review of the complaints
2. Review of Third Party Video
3. Review of Use of Force Reports
4. Search for and review of all relevant records and other evidence
5. Interviews of SPD employees

ANALYSIS AND CONCLUSION

From the OPA Director's reading, SPD policy did not provide much clarity as to how the reasonable, necessary, and proportional analysis applied to the pepper-ball launcher or the FN 303. This was compared to other tools, such as OC spray or blast balls, for which the requirements for and restrictions on use were much more clearly delineated. (See, e.g., SPD Policy 8.300-POL-6; SPD Policy 14.090-POL-9.)

With regard to Named Employee #1's use of the pepper-ball launcher, he explained that he did so on both occasions in a manner referred to as "area saturation." This meant that he did not actually hit anyone with the pepper-balls but, instead, fired them in near vicinity of the target to deter the target from engaging in certain behavior.

On the first occasion that he used force, Named Employee #1 recounted that he observed an individual clad in all black reach down to grab a metal object. Named Employee #1 was concerned that this individual would throw the object at officers. He did not provide sufficient detail, however, as to whether he previously saw this individual throw an object at officers or whether the individual engaged in a motion suggesting that he was about to throw the object.

The second time he used force, Named Employee #1 reported that another individual, also dressed at least in part in black, leaned down to pick up what appeared to be a pair of scissors. Named Employee #1 again used the pepper-ball launcher to fire pepper-balls in the vicinity of the target in order to prevent him from picking up the scissors. While Named Employee #1 opined that the target was going to use those scissors as a weapon against officers, he did not

specifically explain why he believed this to be the case. As with the first use of force, Named Employee #1 did not provide detail as to, for example, whether he previously saw this individual engage in violent acts targeting officers or whether he was in the near vicinity of other individuals who were doing so.

Without having the details discussed above, the OPA Director could not conclusively determine whether the force was reasonable, necessary, and proportional. There was no video of the incident that the Director had located and, thus, he was limited to Named Employee #1's paperwork and OPA interview, with which he had the outstanding questions detailed above. To be clear, the OPA Director believed it likely that Named Employee #1's force was consistent with policy. He simply could not reach that definitive conclusion based on the record before him.

SPD Policy 8.300 governs specific use of force tools. While the FN 303 and the pepper-ball launcher are not itemized under this section of the policy, they fall within "specialty unit weaponry," which is discussed in SPD Policy 8.300-POL-8. This portion of the policy requires that: "Specialty units that utilize unique weaponry will maintain unit manuals and training records which contain an inventory and specific guidance for each weapon." The policy further mandates that, like as set forth in SPD Policies 8.000 and 8.200: "Officers in specialty units shall use their weaponry in a manner that is objectively reasonable per the given circumstances."

This policy largely mirrors SPD Policy 8.200(1), in that it also contains a requirement that the utilization of the specialty weapon was objectively reasonable under the circumstances. As indicated above, the OPA Director could not conclusively determine whether the force used by Named Employee #1 was reasonable, necessary, and proportional, and, thus, reached a similar result here.

The OPA Director noted that this policy also required that units that utilize weaponry such as the FN 303 or the pepper-ball launcher must maintain manuals that contain an inventory of and specific guidance for such weapons. During its investigation, OPA requested this information from SWAT – the unit that employed both of the Named Employees – but, given what was received by OPA, the materials contemplated in the policy did not appear to exist.

On the first occasion that he used force, Named Employee #2 reported observing an individual break a storefront window with a metal pipe, which Named Employee #2 described as felony property damage. Named Employee #2 stated that he used the FN 303 in order to prevent the individual from doing so again and to facilitate taking him into custody. Once the individual was able to escape back into the crowd, Named Employee #2 stopped utilizing the FN 303.

On the second occasion that he used force, Named Employee #2 stated that he was among officers at whom projectiles were being hurled. He also observed fireworks being thrown at officers that later detonated. He believed that two individuals had dropped fireworks and observed those individuals trying to pick the fireworks up. He further believed that it was very possible that these individuals would then light and throw the fireworks at officers. This portion of the incident was largely captured on video. The officers were shown being pelted by

projectiles as they were lined up in front of a building. At one point, a firework could be viewed exploding at the feet of the officers. While it did not appear to cause physical harm to the officers, it certainly posed a clear danger. At that point, it appeared that Named Employee #2 and another officer utilized their FN 303 devices.

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.*) SPD Policy 8.300 governs the use of less lethal devices and states the following:

Less-lethal devices are used to interrupt a subject’s threatening behavior so that officers may take physical control of the subject with less risk of injury to the subject or officer than posed by greater force applications. Less-lethal devices alone cannot be expected to render a suspect harmless. Support officers should be prepared to take immediate action to exploit the brief opportunity created by the less-lethal device and take control of the subject if safe to do so.

With regard to both uses of the FN 303 by Named Employee #2, the OPA Director found that the force was reasonable, necessary, and proportional, and, thus, consistent with policy.

The first force used by Named Employee #2 to stop additional property damage and to effectuate the subject’s arrest was reasonable given the criminal conduct at issue and the fact that the subject still possessed a weapon (the metal pipe). It was further necessary to effectuate the lawful arrest of the subject for a potential felony offense. Lastly, it was proportional to the threat posed by the subject who, again, had already been viewed using a metal pipe to cause property damage and still had that weapon in his hand.

The OPA Director also found the second use of the FN 303 to have been reasonable. Named Employee #2 described an active and ongoing threat to officer safety. This threat was corroborated by the video of the incident, which displayed a chaotic scene. The officers, including Named Employee #2, were entitled to use force to prevent projectiles being thrown at them, including fireworks. The OPA Director found Named Employee #2’s belief that the subjects could have thrown additional fireworks at officers if they were allowed to pick them up to have been reasonable. This was particularly the case given that the video captured a firework being thrown and exploding in the vicinity of the officers shortly before the force was used. The OPA Director also found the force to have been necessary to prevent the fireworks being thrown at the officers and to ensure the officers’ safety. Lastly, the OPA Director found that the force used, pepper-balls to the posterior and thigh, was proportional to the threat facing Named Employee #2.

FINDINGS

Named Employee #1

Allegation #1

There was not a preponderance of the evidence either supporting or refuting the allegation. Therefore a finding of **Not Sustained** (Inconclusive) was issued for *Using Force: Use of Force: When Authorized*.

Allegation #2

A preponderance of the evidence showed that there was a deficiency in policy or SPD procedures. Therefore a finding of **Not Sustained** (Management Action) was issued for *Use of Force Tools: Use of Force - SPECIALTY UNIT WEAPONRY*.

Named Employee #2

Allegation #1

A preponderance of the evidence showed that the force used by Named Employee #2 was reasonable, necessary, and proportional. Therefore a finding of **Not Sustained** (Lawful and Proper) was issued for *Using Force: Use of Force: When Authorized*.

Allegation #2

A preponderance of the evidence showed that there was a deficiency in policy or SPD procedures. Therefore a finding of **Not Sustained** (Management Action) was issued for *Use of Force Tools: Use of Force - SPECIALTY UNIT WEAPONRY*.

The OPA Director's letter of Management Action recommendation to the Chief of Police is attached to this report.

NOTE: The Seattle Police Department Manual policies cited for the allegation(s) made for this OPA Investigation are policies that were in effect during the time of the incident. The issued date of the policy is listed.



City of Seattle

Office of Police Accountability

January 25, 2018

Chief Carmen Best
Seattle Police Department
PO Box 34986
Seattle, WA 98124-4986

RE: MANAGEMENT ACTION RECOMMENDATION (2017OPA-0571)

Dear Chief Best:

This case arose out of May Day 2016. The primary allegation was that the Named Employees, both assigned to SWAT at that time, used less lethal force tools on demonstrators – specifically, a pepperball launcher and a FN 303 device – in violation of policy. The Complainant contended that the four applications of force engaged in by the Named Employees using these tools were not reasonable, necessary or proportional.

In evaluating the usage of these less lethal force tools on the date in question, I found that it was inconclusive whether Named Employee #1's use of the pepperball launcher violated policy. I found, however, that Named Employee #2's use of the FN 303 device was lawful and proper and, thus, consistent with policy.

An allegation under SPD Policy 8.300-POL-8 was also classified for investigation against both of the Named Employees. This policy requires that "Specialty units that utilize unique weaponry will maintain unit manuals and training records which contain an inventory and specific guidance for each weapon." The policy further mandates that: "Officers in specialty units shall use their weaponry in a manner that is objectively reasonable per the given circumstances." OPA found it clear that a pepperball launcher and a FN 303 device were included among the specialty unit weaponry to which this policy applied.

During its investigation, OPA sought to verify that there existed within the SWAT unit "manuals and training records which contain an inventory and specific guidance for each weapon." While requested from SWAT, these material were not provided to OPA. Based on this, it is unclear whether these materials exist. If they do not, SWAT is not in compliance with this section of the policy.

For transparency and accountability purposes, as well as to ensure compliance with SPD policy, it is essential that these materials exist within the custody of SWAT and are regularly updated. These force tools, if not used appropriately, can cause serious injury if not death. As such, it is crucial that the Department ensure that specific guidance for the use of these weapons exists in writing and is provided to and understood by SWAT personnel. If these materials do not exist, the Department should ensure that SWAT, and any other specialty unit that has such weaponry, create and upkeep the manuals and training records required by SPD Policy 8.300-POL-8.

Thank you very much for your prompt attention to this matter. Please inform me of your response to this recommendation and, should you decide to take action as a result, the progress of this action.

Please also feel free to contact me with any questions or concerns.

Sincerely,

Andrew Myerberg

Andrew Myerberg
Director, Office of Police Accountability

cc: Deputy Chief Chris Fowler, Operations, Seattle Police Department
Assistant Chief Lesley Cordner, Standards and Compliance, Seattle Police Department
Rebecca Boatright, Senior Police Counsel, Seattle Police Department
Fe Lopez, Executive Director, Community Police Commission
Tito Rodriquez, OPA Auditor
Josh Johnson, Assistant City Attorney, Seattle City Attorney's Office
Tonia Winchester, Deputy Director, Office of Police Accountability