



CLOSED CASE SUMMARY

ISSUED DATE: MAY 9, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0691

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	Not Sustained (Lawful and Proper)
# 2	6.220 - Voluntary Contacts, Terry Stops & Detentions POL – 4 (1) Officers Will Document All Terry Stops	Not Sustained (Unfounded)
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Inconclusive)

Named Employee #2

Allegation(s):		Director's Findings
# 1	5.100 - Operations Bureau Individual Responsibilities III. Patrol Sergeant A. Responsibilities 1. Direct supervision of police officers	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 Named Employee #1 subjected a pedestrian to excessive force without reason and that he engaged with the Complainant unprofessionally. OPA further alleged that Named Employee #1 may have failed to document the detention of the pedestrian and that Named Employee #2 may have failed to supervise Named Employee #1.

SUMMARY OF INVESTIGATION:

This incident occurred on November 4, 2020, the day after the election. SPD officers were assigned to monitor a number of planned demonstrations occurring throughout Seattle. Named Employee #1 (NE#1) was a member of a bicycle squad and Named Employee #2 (NE#2) was his Sergeant. They were riding their bicycles northbound on 10th Avenue East as they followed a group of demonstrators. At one point, NE#2 made the decision to have the officers begin riding on the sidewalk rather than in the street. He felt that this made sense for multiple reasons, including the weather, the lack of visibility, and that they were biking on steep streets. He further felt that this was a better vantage point to follow and observe the demonstrators, who were largely walking in the roadway. He also noted that, as the demonstration was moving slowly, the bicycle officers were as well, which reduced the danger to pedestrians posed by officers riding on the sidewalk.



Body Worn Video (BWV) showed that, while NE#1 was riding his bicycle in the 2400 block of 10th Avenue East, a woman – later identified as the Complainant – appeared to swat at NE#1 with her bag as he rode by her. Shortly thereafter, a female pedestrian wearing a blue top appeared to step in front of NE#1 as he proceeded towards her. NE#1 dismounted his bicycle, made physical contact with the pedestrian, and moved her away from his path of travel. He recalled telling her that she could not stand in front of him and that it was a crime for her to do so.

The Complainant approached them and interjected herself. Another officer – referred to here as Witness Officer #1 (WO#1) – was captured on BWV stating to either or both the Complainant and the pedestrian: “You’re free to leave. Have a nice day. Don’t obstruct a law officer, you’ll get arrested.” The officers then rode off. The Complainant later initiated an OPA complaint. She alleged that NE#1 handled the pedestrian roughly and that this constituted excessive force. She also asserted that NE#1 made unprofessional comments towards her. This OPA investigation ensued.

During its investigation, OPA reviewed BWV recorded by officers. OPA further interviewed NE#1, NE#2, and WO#1. OPA was unable to interview the Complainant and could not identify the pedestrian in order to interview her.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

8.200 - Using Force 1. Use of Force: When Authorized

The Complainant alleged that NE#1 handled the Complainant roughly, thus subjecting her to excessive force.

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.*)

At his OPA interview, NE#1 stated that, while he was riding on the sidewalk, he perceived the pedestrian step in front of him. He indicated that, prior to this occurring, the pedestrian looked backwards towards him, which informed his belief that she knew he was riding behind her and purposefully stepped in his path of travel. Both NE#1 and NE#2 described that this was a tactic frequently used during demonstrations to slow down bicycle officers and to prevent them from monitoring protests and/or taking law enforcement action. NE#1 described that, when this occurred, he dismounted his bicycle and moved the pedestrian from in front of him. He said that he used nothing other than de minimis force – low level force to guide the pedestrian out of the way. He denied that he pushed, shoved, or handled the pedestrian roughly. NE#1 rejected the assertion that he used excessive force.

NE#1 opined that he had the legal authority to use force at the time because the pedestrian stepped in front of him while he was lawfully riding down the sidewalk. He stated that, while generally pedestrians had the right of way in this situation (*see* SMC 11.44.120), officers engaging in legitimate law enforcement duties – such as actively monitoring demonstrations – were exempted from this. NE#1 could not point to a specific provision of the Seattle Municipal Code (SMC) setting forth this exception. He stated that, regardless, officers were still expected to provide



a warning before driving past individuals on the sidewalk – either verbally or via the bicycle – and to allow sufficient time for the individuals to comply before making physical contact.

NE#1's account of the incident and the force he used was consistent with the BWV. Specifically, the BWV showed the pedestrian step in front of NE#1, who was riding behind her. It further showed NE#1 take hold of the pedestrian and move her out of the way. As indicated by NE#1, the video confirmed that he did not appear to grab her or move her with undue force, or, for that matter, to push her or strike her. OPA agrees that this force was de minimis.

OPA further finds an insufficient basis to determine that force lacked legal authority. To this end, while OPA could find no explicit exception from this section of the SMC for law enforcement officers, OPA could not definitively determine that it did not exist. Moreover, such an exception would be consistent with other sections of the SMC and the Revised Code of Washington, which, for example, allow officers to drive outside of normal traffic patterns for legitimate law enforcement purposes.

Lastly, it is certainly possible that the pedestrian did not intend to step in front of NE#1 and that she did so inadvertently due to a lack of awareness of her surroundings. However, given what he experienced while driving up the street – including being swung at by the Complainant – and as obstructing bicycle officers was a common tactic used by demonstrators, OPA finds that NE#1's conclusion that the pedestrian was engaging in this conduct to have been reasonable. Accordingly, OPA concludes that his low-level force was consistent with policy and recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #2

6.220 - Voluntary Contacts, Terry Stops & Detentions POL – 4 (1) Officers Will Document All Terry Stops

SPD Policy 6.220-POL-4(1) requires that officers document all Terry stops using a Field Contact Report. It was alleged that NE#1 failed to document the brief detention of the pedestrian.

At his OPA interview, NE#1 asserted that he was not required to complete a Field Contact Report because the stop was based on probable cause, not reasonable suspicion. He opined, and NE#2 agreed, that the pedestrian was potentially committing obstruction at the time.

When evaluating the totality of the evidence, OPA finds it clear that NE#1 did not conduct a Terry stop of the pedestrian. While the physical contact between them constituted a seizure, even if brief, it was much more akin to contact based on probable cause than on reasonable suspicion (even if OPA is less confident than the officers that the elements of obstruction were met). Moreover, it is not present practice to require that all physical contact between officers and demonstrators in the demonstration scenario, let alone in the normal patrol context, be reported in this fashion, even if this would be best practice.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3



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

The Complainant alleged that NE#1 made unprofessional statements during their interaction. Specifically, the Complainant stated that, when she pointed out that the officers were not wearing facemasks, NE#1 responded: “what if I have a medical exemption” and laughed. She also recounted that, when she told the officers not to drive on the sidewalk, NE#1 replied that “it was legal to ride on the sidewalk in Seattle.”

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.*)

While NE#2 and WO#1 were recording on BWV, NE#1 was not. The statements attributed to NE#1 were not captured on the BWV for either NE#2 or WO#1.

In addition, at his OPA interview, NE#1 had no recollection of making the comments. He stated that a significant amount of time had passed since the incident and a lot had been going on at the time, which affected his memory of what occurred and what he said.

If NE#1 made the statements in question, they could have been contrary to the Department’s professionalism policy depending on context. However, as indicated above, this cannot be proven or disproven based on the available evidence. Accordingly, OPA recommends that this allegation be Not Sustained – Inconclusive.

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

Named Employee #2 - Allegation #1

5.100 - Operations Bureau Individual Responsibilities III. Patrol Sergeant A. Responsibilities 1. Direct supervision of police officers

SPD Policy 5.100(III)(A) sets forth the general responsibilities of patrol sergeants, including, as set forth in Subsection (1), the direction supervisor of police officers under their command. It was alleged that NE#2 may have failed to comply with this policy here by not appropriately supervising NE#1 during this incident.

Even presupposing that NE#1 used excessive force or acted unprofessionally towards either the Complainant or the pedestrian, which have not been proven here, this would not necessarily require a finding that NE#2 failed to supervise him. Stated differently, there would be no basis to conclude that NE#1’s acts were a result of a lack of supervision, rather than individual decisions made by him that were outside of NE#2’s control. In addition, OPA does not find that NE#2, personally, engaged in any acts or omissions that would have constituted a violation of this policy.

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



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