



## CLOSED CASE SUMMARY

ISSUED DATE: MARCH 13, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0512

### Allegations of Misconduct & Director's Findings

#### Named Employee #1

Allegation(s):		Director's Findings
# 1	8.300 Use of Force 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection, Only When Such Force is Objectively Reasonable, Necessary, and Proportional	Not Sustained (Lawful and Proper)
# 2	8.100 De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics	Not Sustained (Training Referral)

#### Named Employee #2

Allegation(s):		Director's Findings
# 1	8.100 De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics	Not Sustained (Lawful and Proper)
# 2	8.200 Using Force 2. Use of Force: When Prohibited	Not Sustained (Unfounded)

#### Named Employee #3

Allegation(s):		Director's Findings
# 1	8.200 Using Force 1. Use of Force: When Authorized	Not Sustained (Inconclusive)
# 2	8.400 Use of Force Reporting and Investigation 1. Officers Shall Document in a Use-of-Force Report All Uses of Force Except De Minimis Force	Not Sustained (Training Referral)
# 3	5.001 Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Training Referral)

#### Named Employee #4

Allegation(s):		Director's Findings
# 1	8.200 Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	8.300 Use of Force 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection, Only When Such Force is Objectively Reasonable, Necessary, and Proportional	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.***



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**EXECUTIVE SUMMARY:**

Several Complainants alleged that the Named Employees engaged in excessive force during an incident in Cal Anderson Park.

**SUMMARY OF INCIDENT:**

The incidents at issue occurred in the Cal Anderson Park area. During this time, there were many protests following the killing of George Floyd by a Minnesota police officer. As a result, there was tension between officers and members of the public, especially in the Capitol Hill neighborhood, including Cal Anderson Park.

**I. Narrative of Incident**

Named Employee #1 (NE#1) arrived at Cal Anderson Park to locate a felony property damage suspect (Subject #1). At that time, officers had been given verbal instructions not to enter the park alone. Instead, officers were instructed to enter in units with a formulated plan to follow. Once NE#1 contacted Subject #1, a crowd formed around them. A "Help the Officer" was broadcast over the radio, which led other available officers to respond to the park. As officers arrived, the crowd became larger and more hostile. During that time, several arrests were made. Other officers tried to keep members of the crowd from encircling the officers that were making arrests and the officers who were trying to escort the felony property damage suspect out of the park. These events led to the allegations at issue.

**a. Body Worn Video**

Body Worn Video (BWV) showed Named Employee #1 (NE#1) riding on his bike. He asked a patrol car for a description of Subject #1, who he was told was in Cal Anderson Park. NE#1 rode into the park by himself. NE#1 made contact with Subject #1 and a crowd of protestors formed around him. At that time, the "Help the Officer" broadcast was issued over the radio.

Other officers arrived to help NE#1 escort the suspect out of the park, but they were impeded by the crowd of protestors. As the crowd encircled the officers and Subject #1, the video showed Subject #1 collapse onto the sidewalk from an apparent seizure. Officers tended to Subject #1 while other officers, including NE#1 tried to keep the crowd back.

To the side of NE#1, a scuffle broke out as officers took an individual to the ground to make an arrest. Officers yelled at the members of the crowd to "move back." NE#1 pepper sprayed three individuals: one person who was standing and beginning to turn away from the officers on the ground, one person who was kneeling on the ground near the officers, and one person who was standing next to the kneeling individual. The spray lasted for less than a second each, and the three individuals each backed away. After that, NE#1 stood by with other officers to control the crowd.

Named Employee #2 (NE#2) arrived at the park with another officer to locate Subject #1. As NE#2 entered the park, she was confronted by an individual, referred to here as Subject #2, who was yelling profanity at her. As Subject #2 approached NE#2, NE#2 pushed Subject #2 with two hands in their chest, telling them to get out of her face. NE#2 then made contact with Subject #1 and tried to escort him out of the park, at which point he collapsed onto the



sidewalk, as detailed above. NE#2 remained with Subject #1 to keep him conscious until the Seattle Fire Department (SFD) arrived. Given the size of the crowd, SFD could not enter the park, so the officers eventually transported Subject #1 out of the park to meet SFD on the street.

Named Employee #3 (NE#3) arrived at the park after a crowd had formed around the officers. The group of officers to the side of NE#1 were making the arrest on the ground. NE#3 saw an individual – Subject #2 – on the ground with a black object in their hand. NE#3 kicked at Subject #2's hand to try to dislodge the object, but BWV did not capture whether or not contact was made with Subject #2 or their hand. After that, NE#3 stood by to prevent the crowd from interfering with the officers who were helping Subject #1, who had collapsed onto the sidewalk at that point.

NE#3 left the park briefly and then reentered. He saw an individual challenging another officer and yelling at him. NE#3 grabbed the individual from behind and pushed him off the sidewalk onto the grass. NE#3 pushed another individual who was in the way and yelled at her to get back. He further yelled: "That's what I fucking thought. Get back." NE#3 stood security again and did not interact with the crowd for the remainder of the incident.

Named Employee #4 (NE#4) arrived at the park when Subject #2 was yelling at NE#2. NE#4 attempted crowd control near the group of officers. NE#4 pointed her taser at several people and directed them to "get back." At one point, NE#4 pulled Subject #2 by the shirt when they were near the group of officers. NE#4 briefly went out to her car, and as she re-entered the park a woman tried to get in her way; NE#4 yelled at her to "get out of the fucking way." She used pepper spray on the woman, which made the woman back away.

#### **b. Twitter Video**

A video was posted to Twitter of part of the incident. It showed an officer entering the frame and appearing to kick at an individual on the ground. Based on BWV, the individual and officer were confirmed to be Subject #2 and NE#3. There was a group of officers making an arrest on the ground, which blocked NE#3's foot, so it is unclear whether he made contact with Subject #2. However, Subject #2 appeared to roll to the side after NE#3 kicked out his leg. The Twitter post showed the video in full speed as well as in slow motion.

### **II. Named Employee Interviews**

#### **a. Named Employee #1**

When interviewed, NE#1 said he entered the park to locate a property damage suspect – Subject #1 – and did so by himself. He believed that any officer presence in the park could have led to escalation, regardless of the number of officers. He further stated that his use of pepper spray was in defense of other officers who were making an arrest on the ground. He recalled that three members of the crowd approached the officers on the ground, ignoring orders to move back. NE#1 made the decision to spray each of the three individuals for less than one second each, which he believed was effective because the individuals left the area thereafter. He did not think he had another reasonable alternative given that he was one officer facing three approaching individuals.

#### **b. Named Employee #2**

NE#2 stated she entered the park to locate Subject #1 because she had probable cause to make an arrest for felony property damage. NE#2 said that she had an interaction with Subject #2 the day before the incident. According to



NE#2, Subject #2 yelled profanities at NE#2 and threatened to hurt her the next time they interacted. When Subject #2 approached NE#2 on the date of the incident, NE#2 stated that her goal was to create space between herself and Subject #2 so that she could help the officers assisting Subject #1. She did so by pushing Subject #2 with two hands in their chest. NE#2 believed this had the desired outcome of creating space and allowing her to reach Subject #1 and help get him out of the park.

**c. Named Employee #3**

NE#3 explained that he responded to the “Help the Officer” call, which meant that all available officers were needed at the incident scene immediately. When he arrived, the crowd was already hostile, and he had to yell at people to move out of the way as he ran to help the other officers in the park.

NE#3 was asked about the allegation that he kicked at Subject #2’s hand while they were on the ground. He explained that he believed Subject #2 had a knife because he saw they were holding a black object. After the incident, he found out that Subject #2 was actually holding a body camera that had fallen. NE#3 did not believe his foot actually made contact with Subject #2, which is why he did not report the incident at that time.

NE#3 further explained his professionalism allegation. He said that he did not have any other crowd control tools on him besides a taser and a gun. He believed the individuals that he ended up shoving aside were squaring up to another officer. He wanted to get them to back off without having to use his taser or gun. He chose to use intimidation tactics, which he believed had the desired effect of getting the two individuals to back away from the officers. NE#3 recognized that his statements could have been perceived as unprofessional but said that he preferred to try the intimidation tactics so that he could avoid using force.

**d. Named Employee #4**

NE#4 explained that she believed Subject #2 posed a threat to the officers who were making the arrest on the ground. She did not believe she had a reasonably effective alternative to pulling Subject #2 away by the shirt. She said that, after returning to her patrol vehicle, she needed to get back to the other officers quickly, and that members of the crowd were attempting to get in her way and keep her from helping the other officers with Subject #1. She further explained her deployment of pepper spray on a woman who she believed had “squared up” to her. She described the spray as “brief,” and that it had the desired effect to get the woman away who she believed was attempting to impede her.

**ANALYSIS AND CONCLUSIONS:**

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

***8.300 Use of Force 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection, Only When Such Force is Objectively Reasonable, Necessary, and Proportional***

SPD Policy 8.300-POL-5(3) permits officers to use OC spray only when reasonable, necessary, and proportional under the totality of the circumstances. SPD Policy 8.300-POL-5(3).

NE#1 used pepper spray on three individuals who he believed were attempting to interfere in the arrest of Subject #1 and who, in NE#1’s perspective, posed a threat of harm to officers.



BWV showed that, immediately before the pepper spraying, the crowd was hostile and was actively trying to prevent the arrest of Subject #1. Moreover, all of the individuals targeted had been either physically engaging with officers, were on the ground trying to interfere with officers and/or to stop them from pulling Subject #1 away, or were advancing within less than a foot of the arrest. When NE#1 deployed pepper spray, he and other officers simultaneously yelled move back. The deployment caused all of the individuals to back away from the officers and provided a buffer to allow them to make the arrest.

Only one of NE#1's pepper spray deployments was, in OPA's opinion, questionable. At one point, he sprayed an individual who was in the immediate vicinity of the altercation but appeared to be beginning to move back. NE#1 sprayed the side of his body and face. While a close call, OPA ultimately finds that this use of force did not violate policy. Fundamental to this determination is the recognition that it was a chaotic situation with a hostile crowd and ongoing physical disturbances. OPA also notes that NE#1 was required to make a split-second decision based on the immediacy of what he was facing. While, in hindsight, a different judgement – including not deploying at this individual – would have been the better course of action, this does not cause NE#1's force to be inconsistent with policy and further is not an appropriate standard under the case law and policy under which to evaluate NE#1's conduct. Ultimately, OPA finds that the remainder of the pepper spray deployments by NE#1 were in line with policy for the reasons stated herein.

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

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

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

#### ***8.100 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.



NE#1 initially entered the park alone, contrary to general guidance from supervisors. Upon review, OPA finds that the individuals in the park started to become hostile as more officers arrived at the scene. NE#1 was focused on contacting Subject #1, and as a result was unable to keep those individuals from forming a crowd. This eventually impeded his ability to escort Subject #1 out of the park.

However, OPA cannot say with certainty that had NE#1 acted differently, this incident would not have occurred. There was already significant hostility between members of the public and officers at the time of the incident. While NE#1's decision to enter the park alone could have escalated the situation because NE#1 alone lacked the tools and capacity to control a crowd, it is also plausible that this would have been the case even if multiple officers had entered the park at the same time.

OPA finds it significant that, aside from initially entering into the park by himself, NE#1 did not engage in any words or actions that were escalatory. To the contrary, he remained calm and tried to convince Subject #1 to comply and the other individuals to back away until the time came where force was required. As such, even though OPA finds that decision to enter the park alone to not be optimal, there was no indication that NE#1 engaged in any affirmative acts that increased the likelihood for force.

Given this, OPA does not believe that a Sustained finding is warranted and, instead, recommends that NE#1 receive the below Training Referral.

- **Training Referral:** NE#1 should receive retraining and counseling from his chain of command concerning his decision-making here and why a better course of action would have been preferred. The chain of command should specifically discuss his decision to enter the park alone, despite guidance to the contrary, as well as how that conduct could have been at odds with the requirements of the de-escalation policy. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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

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

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

The BWV from a witness officers showed Subject #2 address NE#2 with profanity when she approached (“you dusty ass bitch, you bitch, you fucking bitch”). As Subject #2 made the comments, Subject #2 took a step towards NE#2. NE#2 yelled: “Get out of my face.” NE#2 then pushed Subject #2 back with two hands. Subject #2 responded immediately to the push, as did other individuals in the crowd.

NE#2 later explained that she pushed Subject #2 back because she perceived Subject #2's actions and statements to present a threat. NE#2 also explained that Subject #2 had threatened her with physical harm the day before and that Subject #2's actions during this incident appeared to be related to Subject #2 potentially carrying out that threat.

OPA finds no evidence in the record undermining NE#2's relating of Subject #2's prior threats. In addition, Subject #2's conduct appeared consistent with animus to NE#2. Notably, when NE#2 walked up, Subject #2 immediately advanced towards her and began using profanity towards her. It appeared that Subject #2 knew and had significant anger towards NE#2.



Given this, OPA does not believe that the push violated the de-escalation policy. OPA agrees that NE#2 had a legitimate law enforcement interest in preserving her safety and, given the confluence of Subject #2's words, actions, and prior threat, she was permitted to act to move Subject #2 away from her. While the push indisputably escalated both Subject #2's and the crowd, given the justification for NE#2's conduct and her need to act, this does not constitute a violation of this policy.

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

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

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

***8.200 Using Force 2. Use of Force: When Prohibited***

SPD Policy 8.200-POL-2 prohibits the use of force in certain situations. (SPD Policy 8.220(2)) For example, an officer is prohibited from using force to punish or retaliate against an individual. (*Id.*) An officer is also prohibited from using force against individuals who “only verbally confront them unless the vocalization impedes a legitimate law enforcement function.” (*Id.*)

As discussed above, NE#2's use of force was not premised solely on Subject #2's statements and profanity towards her. Instead, it was based on the prior threat Subject #2 made to harm NE#2, coupled with the tenor and nature of Subject #2's statements and her advancing towards NE#2. Accordingly, OPA finds that the force was appropriate and not purposed to punish or retaliate against Subject #2.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

**Named Employee #3 - 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. Officers shall only use “objectively reasonable force, proportional to the threat or urgency of the situation, when necessary, to achieve a law-enforcement objective.” 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 8.050.) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative to the use of force appeared to exist” and “the amount of force used was reasonable to effect the lawful purpose intended.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

From OPA's review of the BWV and the third-party video, it cannot conclusively determine whether NE#3 kicked Subject #2. While Subject #2 appear to roll after the kick, OPA could not verify whether this was the result of physical contact by NE#3. He denied that he made contact with Subject #2, and Subject #2 did not participate in an OPA interview to provide a counter to that assertion.



Even if NE#3 did so do, it may not have violated policy. Assuming it was true that he perceived that Subject #2 had a knife and he kicked out to knock the knife away, this may very well have been consistent with policy. In support of his recitation of the events was the fact that Subject #2 appeared to be holding a black object, even though that item was later determined to be a BWV camera that had fallen to the ground. However, depending on the nature of the kick and whether it targeted Subject #2's head or body rather than the hand, it still could have violated the necessity and proportionality elements of the use of force policy, regardless of whether NE#3 legitimately perceived Subject #2 to be a present danger.

Without a conclusive view of the kick and whether and where it impacted, OPA cannot assess whether or not it violated policy. Accordingly, OPA recommends that this allegation be Not Sustained – Inconclusive.

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

### **Named Employee #3 - Allegation #2**

#### ***8.400 Use of Force Reporting and Investigation 1. Officers Shall Document in a Use-of-Force Report All Uses of Force Except De Minimis Force***

SPD Policy 8.400-POL-1 requires that officers report all uses of force except de minimis force. This policy defines different levels of force and is intended to devote greater resources to reviewing more serious types of force. (*Id.*)

OPA finds two main problems with NE#3's compliance with this policy. First, NE#3 did not initially report that he kicked at Subject #2. He explained that this was because he did not believe that he made contact with Subject #2; however, he did not foreclose that it was a possibility. Given this, NE#3 should have at the very least notified a supervisor that he kicked at Subject #2. Second, NE#3's later documentation indicated that he "kicked" and pushed people in the crowd. NE#3 later clarified that he should have written "kicked at" instead of "kicked"; however, this yields the conclusion that his report was inconsistent, if not deficient.

As discussed above, OPA could not conclusively determine whether NE#3 actually made contact with Subject #2. If he had done so and failed to report that force, OPA would have recommended that this allegation be Sustained. However, given that this is not established, OPA believes that the other concerns identified with NE#3's force reporting are better addressed via a Training Referral.

- **Training Referral:** NE#3's chain of command should ensure that, in the future, NE#3 notifies a supervisor of and timely documents reportable and potential high-level uses of force. NE#3 should also be reminded to ensure that his use of force reporting is complete, accurate, and consistent. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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

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

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

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

OPA understands NE#3’s stated purpose for using profanity towards the crowd. OPA also recognized that it was used to accentuate NE#3’s statement and was not purposed as an insult. However, as NE#3 recognized, his comment was problematic and should have been avoided.

Under the circumstances of this case and given the exigent nature of what was going on, OPA declines to find that N#3’s use of profanity was so egregious so as to warrant a Sustained finding. Instead, OPA recommends that NE#3 receive the below Training Referral.

- **Training Referral:** NE#3’s chain of command should discuss his comment and use of profanity towards demonstrators and remind him that he should made every attempt to avoid such statements in the future. The chain of command should review the BWV of this incident with NE#3 and discuss other strategies for obtaining voluntary compliance with lawful orders, including various verbal de-escalation strategies. This training should be documented, and that documentation retained in an appropriate database.

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

**Named Employee #4 - Allegation #1**

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

OPA finds that the force NE#4 used against Subject #2 to get them away from the group of officers making an arrest was de minimis because NE#4 grabbed the back of Subject #2’s shirt to get them to move away. This force was not meant to harm or injure Subject #2, and it did not appear to do so. It was also reasonable and necessary to prevent interference with the ongoing arrest, and, like the above push by NE#2, was proportional to both the risks posed by the crowd and the possibility that Subject could possibly interfere.

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

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

**Named Employee #4 - Allegation #2**

***8.300 Use of Force 3. Officers Will Use OC Spray, Including for Crowd Dispersal or Protection, Only When Such Force is Objectively Reasonable, Necessary, and Proportional***

NE#4 used pepper spray against a woman who approached her, and who NE#4 believed “squared up” to her.

The BWV showed NE#4 walking through a largely hostile crowd towards other officers. A woman who had a phone in her hand, made a loud noise when NE#4 walked towards her and appeared to take a step towards NE#4. NE#4 reacted by saying “get out of the fucking way” and moving the woman to the side. While not completely clear given the angle of NE#4’s BWV, it appeared that the woman may have pushed out with her hand towards NE#4 or started to do so. NE#4 then deployed a burst of pepper spray, causing the woman to move back.



While perhaps there was another less intrusive means of moving the woman back rather than utilizing pepper spray, OPA does not find that the deployment violated policy. NE#4 told the woman to step back and tried to direct her to do so. In response, the woman appeared to push out with her hand or try to do so. Under policy, NE#4 was permitted to deploy pepper spray to prevent that from occurring and to create space between them.

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

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