



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 22, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0330

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	8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Not Sustained (Management Action)

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:

Multiple Complainants alleged that the Named Employee used excessive force and failed to de-escalate when he arrested the Subject.

SUMMARY OF INVESTIGATION:

This case arises out of the demonstrations that occurred within Seattle and across the nation in the wake of the killing of George Floyd by a Minneapolis Police Officer. These protests were unprecedented in scope and were directed at law enforcement. While most demonstrators protested peacefully, some demonstrations, especially during the early days of the protests and during nighttime hours, devolved into violence, property destruction, and looting.

The specific case addressed here occurred during the daylight hours of May 31, 2020, the third day of protests. On that date, at approximately 4:30 p.m., Named Employee #1 (NE#1) was assigned to a bicycle squad tasked with escorting and managing the flow of protests in downtown Seattle. Specifically, NE#1’s squad was assigned to block off one-way streets so that groups of marching protesters did not turn down them against the flow of traffic, causing gridlock and potential harm to persons. NE#1’s squad was transitioning between traveling down intersections and riding on the sidewalk.

When the incident in question arose, NE#1 was riding his bicycle with other officers on the sidewalk. There were individuals on his left – also on the sidewalk and in the street, and a building to his right. NE#1 was the second-rear-most officer in his squad. As the squad moved forward, they passed individuals to their left, including a male – who was later identified as the Subject. NE#1 and the other officers reported that they gave verbal orders to these individuals to move to the side and out of the way and identified themselves as police. The Body Worn Video (BWV) of this portion of the incident did not contain sound as it was recorded within the one-minute buffer period which the camera records



prior to an officer activating the camera; however, whether these orders were given does not appear to be in dispute given the totality of the evidence. The Subject, who was walking abreast of other individuals, did not appear to move out of the way and bumped into each of the officers as they passed. The BWV from all of the officers showed jostling consistent with the Subject bumping into them. The BWV of the officer riding immediately ahead of NE#1 showed that he successfully passed the Subject by reaching out with a hand and guiding him away. NE#1's BWV showed the Subject raise his arm as if exasperated by the leading officer's contact, but he did not otherwise react.

As NE#1 approached the Subject, NE#1 appeared to repeat the same maneuver as the officer in front did, reaching out with his hand and pushing the Subject slightly. Then, as he passed the Subject, the BWV showed NE#1's head and upper body move forward as if he experienced an impact of some kind.

BWV from the officer behind NE#1 showed the Subject move toward NE#1 as NE#1 passed him. Because the trailing officer was bent down over his bicycle handlebars, BWV captured only the lower bodies of the Subject and NE#1. However, it showed that, when NE#1 and the Subject made contact, NE#1's bicycle moved down and to the right as if collapsing, and NE#1 appeared to fall forward over his handlebars. The video also showed that the Subject's hips were turned toward NE#1 and that, at the time NE#1's bicycle fell to the right, the Subject was moving forward and toward NE#1. There was no obstruction in front of NE#1 at the time he dismounted his bicycle. NE#1 caught himself with his right foot against the pavement. NE#1 later reported that the Subject punched him at this time. OPA cannot establish whether this specific act occurred given the limitations of the video; however, it would not be inconsistent with the totality of the evidence.

BWV from the trailing officer showed the Subject appear to trip and go to ground while NE#1 grabbed at the Subject's right shoulder area. The Subject and NE#1 fell to the ground together with NE#1 partially on top of the Subject. NE#1 and the Subject struggled on the ground with the Subject turning towards him.

At this time, the officer in front of NE#1 got off his bicycle and turned toward NE#1 and the Subject, while the trailing officer got off his bicycle and began blocking NE#1 and the Subject off from the rest of the crowd. Individuals within the crowd began to gather around the officers and the Subject. BWV showed at least two individuals from the crowd attempting to intervene in the arrest. One of those individuals appeared to try to grab the back of NE#1's vest, and the trailing officer arrested that individual. That arrest was investigated separately by OPA under case number 2020OPA-0543, and it is not addressed further below except as relevant to this complaint.

While on the ground, the Subject continued to physically struggle with NE#1. BWV did not record the entirety of the interaction between NE#1 and the Subject because they were in close contact and the camera was obscured. The third-party video showed NE#1 use his right fist to strike the Subject twice in quick succession. Both strikes appeared directed towards the upper shoulder/lower head area of the Subject. It appeared that the first strike was glancing and did not make direct contact with the Subject. At the time this was occurring, the video depicted signs, bottles, and a metal pan being thrown at the group of officers and the Subject. Other individuals converged on that location and two demonstrators were taken down to the ground and placed under arrest.

The video indicated that NE#1 modulated his force as the Subject's physical resistance began to subside. NE#1 repositioned his body and used control holds and body weight to keep the Subject pressed to the ground and to prevent the Subject from further resisting. NE#1 was ultimately able to gain control of the Subject's hands and handcuff him. NE#1, the Subject, and backing officers moved toward the wall as additional bike officers arrived and began to move



the crowd back. Ultimately both the Subject and an individual who tried to intervene in the arrest were taken into custody.

Both the Subject and the other individual arrested gave statements during the arrest screening process that were captured on BWV. The Subject said that he was “rushed” by the officers and taken down to the sidewalk. He stated that the officers passed him “for no reason” and that he gave them space. He stated that the officers pushed him and that he was taken down to the sidewalk without cause and was punched “three or four” times. The other arrested individual stated that she observed the officers and the Subject bump each other accidentally and she could not say who bumped who. She said that the officers then assaulted the Subject without cause.

The third-party video, which depicted the incident only after the Subject was already on the ground, went viral and was referred to OPA from multiple complainants who viewed it online. This investigation ensued. During its investigation, OPA examined the use of force and arrest documents for the incident. Neither the Subject nor the other arrested individual returned requests for interviews and no other witnesses were identified or came forward.

In arrest reports for both the Subject and the other individual, NE#1 and the trailing officer stated that the Subject refused orders to move out of the way and appeared to “shoulder-check” each officer in the bike line as they rode past. The officers stated that, when NE#1 passed the Subject, the Subject first shoulder-checked him and then turned and punched or elbowed NE#1 in the shoulder or head. NE#1 noted in his use of force statement and arrest report that he based his probable cause to arrest the Subject on the assault the Subject committed against him.

In his use of force statement, NE#1 recalled that the Subject appeared to be trying to get between him and the officer in front of him, disrupting the bike line and preventing the squad from moving forward to block off the intersection. When this was unsuccessful, NE#1 stated that the Subject struck him in the head. NE#1 stated that he attempted to grab the Subject, causing them both to go to the ground, and that a hostile crowd was gathering as the Subject resisted arrest. NE#1 reported that his intent in using force was to stun and disorient the Subject to gain immediate compliance, and that his first punch missed and struck the pavement. He noted that, as he struggled with the Subject, he and other officers were hit with projectiles including unopened beer cans, signs, and rocks, and that he punched the Subject once more before gaining control. NE#1 documented that, during the struggle, both he and the Subject were exposed to OC spray.

OPA also interviewed NE#1. His account was broadly consistent with his use of force and arrest reports. He said that, in addition to the crowd becoming agitated during the arrest, members of the crowd were carrying signs, shields, and bear spray, as well as some sticks. NE#1 stated that this made it more urgent to quickly gain control of the Subject so that he and the other officers would not be surrounded. NE#1 described that he decided to punch the Subject to stun him and prevent him from continuing to fight. According to NE#1, using a punch to stun a resisting subject is a trained tactic designed to quickly end fights.

The first time he attempted to hit the Subject, NE#1 instead hit the pavement. However, he did strike the Subject the second time. NE#1 stated that after he gained a degree of control over the Subject, he ceased punching the Subject and modulated the force he was using. After he gained control of the Subject, NE#1 moved back from the crowd to create distance so that he could finish the arrest. NE#1 stated that, in his opinion, the force he used was reasonable, necessary, and proportional, and complied with policy.



OPA interviews with the other bicycle officers present at the scene were consistent with the above. In one interview, the trailing officer in the incident explained that he observed that the Subject “pushed or struck” NE#1 as NE#1 attempted to pass. During that same interview, a Guild representative who is an SPD defensive tactics instructor noted that the force of a punch is generated from the hips, so that when both NE#1 and the Subject were on the ground NE#1 would not have been able to throw a punch at full force. He stated that this would render punches painful but relatively unlikely to cause severe injury.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - 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.*)

In evaluating the propriety of the force, OPA deems it important to analyze the entirety of the video, not just the snapshot of the incident posted on social media. As with several other well-publicized uses of force stemming from the protests, truncated video, which often is concerning on its face, does not tell the whole story. The larger context is often extremely helpful, if not dispositive, in reaching an informed decision. This is certainly the case here.

Here, the video shows that physical contact was made by the Subject with several officers, including NE#1, while those officers were riding their bicycles down the sidewalk. As a threshold matter, the officers had the legal authority to ride down the sidewalk and did so in a manner that allowed sufficient space between them and the individuals next to them. However, despite this, the Subject made physical contact with virtually all of the officers who passed him. While one instance of such contact could be inadvertent, it is much less likely that repeated conduct, like what the Subject engaged in, would be. Moreover, the totality of the Subject’s actions, which were captured on video, indicated that he intentionally struck the officers.

Given that he did so to all of the officers and, as indicated by the video, made even more forceful impact with NE#1, there was probable cause to place the Subject under arrest. This is regardless of whether the Subject punched NE#1. In order to effectuate this arrest, NE#1 was permitted to use force if required to take the Subject into custody. Here, the Subject, who had just assaulted NE#1 as a matter of law, pulled away from him and they both fell to the ground. While on the ground, the Subject continued to struggle against NE#1, turning towards NE#1 and preventing himself from being controlled. Based on the Subject’s prior physical assault towards NE#1, the Subject’s resistance while on the ground, the other demonstrators that were converging on them, and the multiple projectiles that were being thrown at officers, NE#1’s use of two strikes to stop the conflict and to arrest the Subject was reasonable. It was also necessary, as there did not appear to be a reasonable alternative to the two strikes under the circumstances. As discussed above, NE#1 and the Subject were involved in an ongoing physical altercation and the Subject had previously assaulted NE#1. Any less-lethal tool available to NE#1, including OC spray, blast balls, and a baton, would



have been either impractical or too high a level of force. Moreover, the two strikes, at least one of which did not make full impact with the Subject, were reasonable to affect the lawful purpose of arresting the Complainant and quickly ending the physical conflict. Lastly, the force was proportional to the threat facing NE#1. NE#1 reported that the Subject punched him, which evidenced the Subject's willingness to cause him physical harm. While this was not captured on video due to the positioning of the trailing officer, the BWV did depict the Subject trying to harm NE#1 with his body. This coupled with the Subject's continued resistance while on the ground – including trying to turn to face NE#1, warranted the level of force used. Lastly, once the Subject's resistance subsided, NE#1 simultaneously modulated his force.

For these reasons, 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 under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

In evaluating de-escalation, OPA is required to determine whether NE#1 took sufficient steps to avoid the use of force. These steps – which constitute de-escalation, include seeking time, distance, and shielding. While de-escalation is a requirement prior to using force, this is only where it is safe or feasible.

As a general matter, when a person is actively assaulting an officer, de-escalation is no longer safe or feasible. With regard to safe, an officer is not required – or expected – to stand by idly while they are being assaulted and to permit further assaults to occur prior to taking action. With regard to feasible, where an incident is fast evolving – particularly an ongoing physical conflict as opposed to a static situation – there is insufficient time to de-escalate, thus excusing officers from doing so.

OPA does not believe that NE#1's conduct here violated the Department's de-escalation policy. When the Subject pushed NE#1, NE#1 was permitted to act to take the Subject into custody, and he was not required to de-escalate prior to doing so.

The larger question that OPA has with this case and with other similar cases that have arisen during the course of the protests is not whether officers could act but, instead, whether they should have done so. OPA has seen a number of situations where officers made decisions to effectuate arrests and/or to use force and, as a result, tensions with demonstrators rose, leading to even more police action and, in most cases, even more force.

For example, in this case, NE#1 indisputably had probable cause to make an arrest when the Subject physically contacted him when he was riding by. However, in doing so, he set in motion a chain of events that resulted in projectiles being thrown at officers, less-lethal tools being used, and multiple arrests.

Similarly, in an incident that raised significant public concern – the child who was pepper sprayed (2020OPA-0322), the NE made the decision to arrest an individual for an earlier assault that did not result in an injury. When he did so, the bicycle line collapsed, and demonstrators approached. This resulted in a woman breaching the line and pepper spray being dispersed, inadvertently striking the child who had been brought up to the line by his father.



In a third case, 2020OPA-0332, an officer was riding on the sidewalk when an individual apparently purposely bumped into him. The officer, like NE#1, made the decision to place the individual under arrest, resulting in a use of force and a raising of tensions within the crowd.

Indeed, OPA can track multiple uses of force that stem from one decision by a single officer and, in some respect, can map out large scale dispersals with the application of less-lethal tools to one such decision.

There are, of course, occasions where law enforcement action is necessary in the demonstration context. Indeed, the Department has asserted that making targeted arrests is necessary to show demonstrators that criminal behavior will not be tolerated and to, thus, potentially deter future malfeasance. Moreover, there is a legitimate law enforcement interest in making arrests for serious assaults or significant property damage. However, where the crime is a misdemeanor, including an assault comprised of a subject pushing into an officer without more, the Department needs to seriously consider whether the possible escalation of tensions within the crowd outweighs the need to make the arrest. This calculation is particularly important where, as was the case during the summer, the protests are directly focused on police. Such law enforcement action, even if warranted, can be perceived by crowds as illegitimate and, thus, cause unrest that creates a cycle of violence. This is even more the case when the arrest occurs a period of time after the crime – such as in 2020OPA-0322 – and the crowd may have no idea why the police are taking action.

Given the above, OPA believes that a Management Action Recommendation is warranted. There are multiple ways in which the Department could approach this issue. OPA outlines several here that could stand alone or be applied in conjunction. As an example, SPD could require that, in the protest context, officers will not arrest for misdemeanor assaults unless there are extenuating circumstances warranting the arrest that the officer can articulate. SPD could alternatively set forth criteria for when a misdemeanor arrest during a protest is permissible, including evaluating: (1) how many backing officers are available versus how many demonstrators are in the crowd (2) whether that number of officers can handle any likely escalation with the tools that they have available; (3) what the likelihood is that the subject will reoffend in the same way if not arrested; and (4) how serious the incident was that gave rise to the probable cause. SPD could also be more restrictive where the protests, like those from this summer, are focused on the police, and lessen those restrictions for other demonstrations.

As another example, SPD could mandate that arrests for misdemeanor offenses during demonstrations must be effectuated in close proximity to when the crimes occurred. This could serve to lessen the possibility that a crowd, which has no understanding of the conduct underlying the crime, would deem the arrest to be unjustified and/or illegitimate.

As a third example, SPD could narrowly address the factual circumstances of this case and 2020OPA-0332 and prohibit arrests of subjects making physical contact with bicycle officers during demonstrations unless there is an exigency that requires otherwise.

OPA strongly recommends that SPD take action in this area to prevent individual officer decisions on relatively low-level crimes from unduly raising tensions during already volatile protests. Regardless of how SPD approaches this issue, the Department needs to provide appropriate guidance to officers and supervisors to ensure that everyone is on the same page.

Recommended Finding: **Not Sustained (Management Action)**