



## CLOSED CASE SUMMARY

ISSUED DATE:      OCTOBER 21, 2021

FROM:                DIRECTOR ANDREW MYERBERG  
                             OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER:      2020OPA-0443

### **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 (Training Referral)
# 2	8.100 - De-Escalation 1. When Safe, Feasible, and Without Compromising Law Enforcement Priorities, Officers Shall Use De-Escalation Tactics	Sustained
# 3	9.020 - Uniform 4. All Outward Facing Uniform Items Include Proper Identifying Markings	Not Sustained (Training Referral)
# 4	5.001 – Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)
# 5	16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity 5. Employees Recording Police Activity	Not Sustained (Lawful and Proper)
# 6	16.090 - In-Car and Body-Worn Video 7. Employees Will Document the Existence of Video or Reason for Lack of Video	Not Sustained (Lawful and Proper)

**Imposed Discipline**

Resigned Prior to Proposed DAR
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**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations	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 subjected her to excessive force, did not de-escalate, was unprofessional towards her, and did not properly wear his nametag and badge. OPA further alleged that the Named Employee may have failed to record Body Worn Video and did not document the lack of a recording.

**ADMINISTRATIVE NOTE:**

OPA initially recommended that the allegation concerning NE#1’s potential use of out of policy force be Sustained but concluded that NE#1 de-escalated prior to using force. Based on a further review of this incident and after the



discussions at the discipline meeting in this matter, OPA now reverses these findings. OPA's decision in this regard is more fully explained below.

**ANALYSIS AND CONCLUSIONS:**

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

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

Named Employee #1 (NE#1) and other officers were tasked with staffing a barricade. Demonstrators were on the other side. At one point, the decision was made to open the barricade to allow Department vehicles to pass through. In order to permit egress, the officers asked demonstrators standing in front of the barricades to clear to the sides. However, a number of the demonstrators refused to do so. NE#1 and other officers began opening the barricades and continued to request that demonstrators move. The officers started walking towards the crowd. At that time, there were at least two demonstrators lying on the ground. Officers began to move individuals, including a woman who walked towards an officer to NE#1's left. NE#1's Body Worn Video (BWV) showed another woman – who was later identified as the Complainant – quickly advance towards NE#1. She came within inches of his face, yelling and gesticulating at him. NE#1 reached out and pushed her back and she fell to the ground.

BWV from a supervisor also showed the incident and the push, as well as how the Complainant fell to the ground. That BWV confirmed that, at the time, of the push, the Complainant was directly in front of NE#1 and was nearly touching him. In addition, there were other demonstrators in NE#1's immediate vicinity. The video indicated that NE#1 gave the Complainant a hard push, causing her to move backwards. While she was doing so, her foot appeared to catch on the body of an individual who was lying on the ground. This increased the momentum of her fall. She then struck the ground.

The Complainant later alleged that NE#1 violated multiple policies, including subjecting her to excessive force. This investigation ensued.

As part of its investigation, OPA interviewed both the Complainant and NE#1. The Complainant confirmed her belief that the force was excessive. She recalled that NE#1 grabbed her by her clothes and then pushed her back, causing her to fall backwards around five feet. She said that she suffered injuries as a result.

NE#1 described the Complainant as both agitated and aggressive. He indicated that, given her closeness to him and her demeanor, she represented a threat. He cited the conduct of the crowd and the number of demonstrators present as additional indicators of potential threats. He felt that he had a lawful basis to move her away from him and to prevent her from causing him harm. Accordingly, he used an open hand to push her back. He said that she fell back, creating the space he was seeking. NE#1 denied that the force he used was excessive.

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.*)



OPA initially determined that NE#1's force violated policy. In reaching that determination, OPA opined that, while it may have been both reasonable and necessary to use a push to move the yelling Complainant away from him, the force used by NE#1 was ultimately not proportional. OPA specifically focused on its perception that the push was made by NE#1 with significant power behind it and that the Complainant fell to the ground. However, at the discipline meeting in this case, the chain of command raised concerns with this determination. First, they expressed the belief that a push was an appropriate level of force. Second, they disagreed with OPA's perception of the power behind the push and, instead, pointed to the fact that the Complainant fell back over another person. While this fact was identified by OPA in the initial DCM, the chain of command felt that it should have carried more weight than OPA afforded to it. The chain of command and OPA discussed the fact that the larger issue here may be de-escalation and the choice to use a push rather than apply other tactics that may have been safe or feasible at the time.

In re-assessing its initial conclusion, OPA also looked at 2020OPA-0665, an analogous case. In that investigation, OPA considered an officer's push of a demonstrator. There, the officer used a two-handed push to move a woman that had purposefully slowed down in front of him while he was trying to get to where other officers were located. There, the woman tripped over an object, which contributed to her falling down to the ground. OPA ultimately deemed the push to be consistent with policy but found that the officer failed to de-escalate as there were other options available to him apart from the push and that he failed to consider these options prior to using force.

OPA believes that the decision in 2020OPA-0665, coupled with the chain of command's concerns, warrants changing its initial finding on this allegation from Sustained to Not Sustained – Training Referral. OPA remains concerned with the proportionality of the force but believes that a Sustained finding for de-escalation better addresses the problems with the totality of NE#1's conduct. Were NE#1 still employed by SPD, OPA would have required retraining and counseling on this allegation. While such retraining and counseling will not be provided to NE#1 unless he returns to SPD, OPA still believes that this is the appropriate finding under the circumstances.

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

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

#### **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-1.)

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." (*Id.*) 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.

As with the officer in 2020OPA-0665, OPA believes that NE#1 had other options available to him when dealing with the Complainant apart from using a hard push. As a starting point, he could have tried to take a moment to communicate with her in order to gain voluntary compliance. While this may not have been successful, it should have been done prior to force being used. Indeed, the situation did not appear to be so exigent to prevent such communication or other de-escalation efforts from being attempted. In addition, NE#1 could have grabbed onto her clothing and pulled her to the side or guided rather than pushed her. Both would have been less significant than a hard push and less likely to cause the Complainant injury.

Ultimately, the force NE#1 used aggravated not only the Complainant but also others within the crowd. This was escalatory and could have been avoided had NE#1 evaluated alternatives prior to using force.

Accordingly, OPA now recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

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

***9.020 - Uniform 4. All Outward Facing Uniform Items Include Proper Identifying Markings***

The Complainant asserted that, after NE#1 pushed her, she approached him and tried to identify him. However, he did not have a name tag or serial number listed on his uniform. She stated that she demanded his identification and that he eventually placed his identifying information on his uniform. She ultimately determined NE#1 name and filed this complaint against him.

SPD Policy 9.020-POL-4 requires that officers wear uniforms including proper identifying markings. In virtually all situations these "proper identifying markings" will be the officers' last name and serial number.

The BWV confirmed that, at the inception of the incident, NE#1 was wearing an external protective vest that did not have a name tag or his serial number visible. People in the crowd, including the Complainant, began yelling for his identifying information. The BWV indicated that, shortly thereafter, NE#1 appeared to place a nametag and cloth badge on his uniform. This was confirmed by the sound of Velcro that could be heard on the BWV, as well as because the identifying information was visible thereafter.

NE#1 told OPA that, when getting ready to staff the barricade, he placed a protective vest over his uniform. He said that, when he did so, he inadvertently covered his nametag and badge. He stated that, as soon as he was notified that he did so by the crowd, he moved his nametag and his badge from his uniform to his vest.

In evaluating this allegation, OPA notes that NE#1 did technically comply with the letter of the policy as he had his nametag and badge affixed to his uniform. That being said, he clearly did not comply with the spirit of the policy, which is that officers need to be readily identifiable.



Given that NE#1's account is corroborated by the BWV and because OPA does not see any evidence of improper motive on his part, OPA declines to sustain this allegation. OPA instead recommends that it be Not Sustained – Training Referral.

- **Training Referral:** NE#1 should be reminded to ensure that his nametag and badge are affixed to the outermost part of his uniform, including to a protective vest if he is wearing it. NE#1 should be counseled and retrained on the importance of complying with this policy.

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

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

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

The Complainant asserted that when she confronted NE#1 about his lack of a badge and asked for his name and serial number, he responded: "If you would shut the fuck up I'm trying to get it." She also contended that, when she approached NE#1 to take his picture, he threatened her with OC spray. She alleged that this behavior was unprofessional. Later during her OPA interview, the Complainant clarified that NE#1 did not threaten her with OC spray, but that he held the canister in his hand.

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.*)

At his OPA interview, NE#1 denied using profanity or insulting language towards. He stated that, contrary to the Complainant's allegations, he did not violate the Department's professionalism policy.

The BWV indicated that NE#1 did not use profanity towards the Complainant. At one point, an individual in the crowd shouted: "watch your fucking mouth!" While this indicates that the crowd interpreted NE#1 to have been using profanity, this is simply not supported by the video. In addition, the BWV captured NE#1 saying, in response to the Complainant's request for his identifying information: "Can you stop talking, I'll show it to you." Again, NE#1 did not use profanity and this statement did not violate the Department's professionalism policy.

In addition, while it was unclear from the BWV whether NE#1 brandished his OC spray at the Complainant, OPA was able to verify that he was holding it. However, even had he pointed his OC spray at the Complainant and others, the BWV indicated that, at the time, multiple individuals were advancing towards him and were yelling. It would not have been unreasonable or unprofessional for NE#1 to have held up his OC spray in an attempt to dissuade these individuals from coming closer and to move them back.

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

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



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**Named Employee #1 - Allegation #5**

***16.090 - In-Car and Body-Worn Video 5. Employees Recording Police Activity 5. Employees Recording Police Activity***

SPD Policy 16.090-POL-1(5)(b) states that when safe and practical, employees will record delineated law enforcement activity. In the protest context, officers are expected to record criminal activity and direct law enforcement taken, such as using force or effectuating an arrest. SPD Policy 16.090-POL-1(7) requires that Department employees document the existence of video or the reason for the lack of video. Officers are required to note the failure to record in an update to the CAD Call Report, as well as to provide an explanation for the lack of a recording in an appropriate report. (SPD Policy 16.090-POL-1(7).)

During its intake investigation, OPA was unable to locate any BWV recorded by NE#1. In an email he sent to OPA, NE#1 explained that he did record BWV during this incident but, because he was using a camera not normally assigned to him, it did not come up under his name when searched for. OPA was able to verify this and located NE#1's BWV, which was utilized as evidence in this case.

As NE#1 did, in fact, record BWV, OPA recommends that this allegation and Allegation #6 both be Not Sustained – Lawful and Proper as against him.

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

**Named Employee #1 - Allegation #6**

***16.090 - In-Car and Body-Worn Video 7. Employees Will Document the Existence of Video or Reason for Lack of Video***

For the same reasons as stated above (see Named Employee #1 – Allegation #5), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

***5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 6. Employees Will Report Alleged Violations***

The Complainant asserted that, after she was pushed, she informed an officer – later identified as Named Employee #2 (NE#2) – that she was injured. She said that she also made it clear that she wanted to file a complaint against NE#1 but that NE#2 appeared to take no action.

SPD Policy 5.002-POL-6 concerns the reporting of misconduct by Department employees. It specifies that minor misconduct must be reported by the employee to a supervisor, while potential serious misconduct – such as the use of excessive force – must be reported to a supervisor or directly to OPA. (SPD Policy 5.002-POL-6.) The policy further states the following: “Employees who witness or learn of a violation of public trust or an allegation of a violation of public trust will take action to prevent aggravation of the incident or loss of evidence that could prove or disprove the allegation.” (*Id.*)



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OPA interviewed NE#2. He indicated that he observed NE#1 push the Complainant. He said that, at the time of the push, the Complainant was about as close as she possibly could be to NE#1 and, given the need to clear the area and due to her conduct, NE#1 pushed her back. He did not see the exact mechanism of her fall as his view was partially blocked. He stated that he heard her allege that she had been injured, but he did not hear her explicitly state that she wanted to file a complaint. He told OPA that he reported the Complainant's claim of injury to a supervisor and he was later informed that the supervisor, in turn, notified a Lieutenant. NE#2 lastly told OPA that he sought medical attention for the Complainant once he became aware of her claim of injury.

The BWV confirmed that the Complainant told NE#2 that she was injured. The BWV also confirmed that, while in NE#2's presence, she asked who was going to "report" NE#1. While she did not explicitly indicate that she wanted to file a complaint, a reasonable officer should have interpreted this as an allegation of misconduct that needed to be reported.

Ultimately, NE#2 did, in fact, report the force to a supervisor. That supervisor spoke with a Lieutenant and, according to the supervisor, informed the Lieutenant that the force may have been excessive. Accordingly, while OPA believes that NE#2 should have comprehended that an allegation of misconduct was being made by the Complainant and apparently did not do so, he still satisfied the requirements of this policy through his actions.

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

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