



## ***CLOSED CASE SUMMARY***

ISSUED DATE: FEBRUARY 17, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0477

### **Allegations of Misconduct and the Director's Findings**

#### **Named Employee #1**

<b>Allegation(s):</b>		<b>Director's Findings</b>
# 1	14.090 Crowd Management 9. Crowd Dispersal b. The Incident Commander Shall have the Authority to Direct the Use of Blast Balls and OC Spray to Disperse the Crowd	Not Sustained (Lawful and Proper)
# 2	5.160 Observation of Officers	Not Sustained (Management Action)
# 3	5.001 Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

#### **Named Employee #2**

<b>Allegation(s):</b>		<b>Director's Findings</b>
# 1	14.090 Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls	Sustained
# 2	5.160 Observation of Officers	Not Sustained (Management Action)
# 3	5.001 Standards and Duties 10. Employees Shall Strive to be Professional	Allegation Removed

#### **Imposed Discipline**

Discipline Pending
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#### **Named Employee #3**

<b>Allegation(s):</b>		<b>Director's Findings</b>
# 1	14.090 Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls	Not Sustained (Lawful and Proper)
# 2	5.160 Observation of Officers	Not Sustained (Unfounded)
# 3	5.001 Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)

#### **Named Employee #4**

<b>Allegation(s):</b>		<b>Director's Findings</b>
# 1	14.090 Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls	Not Sustained (Inconclusive)
# 2	5.160 Observation of Officers	Not Sustained (Inconclusive)
# 3	5.001 Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Inconclusive)

## **EXECUTIVE SUMMARY:**

An anonymous Complainant alleged that the Subject and other journalists were targeted by SPD with OC spray. The incident occurred during two separate pushes by SPD on East Pine Street.

## **ADMINISTRATIVE NOTE:**

OPA initially recommended that Allegation #2 against Named Employee #2 be Sustained. However, after further discussion at the discipline meeting in this matter, as well as a re-review of the Body Worn Video and Named Employee #1's use of force report and OPA interview, OPA agrees that the question of whether he definitively knew that the Subject and others were present at the time he used force and whether this knowledge informed his use of force is inconclusive. OPA accordingly altered its finding to incorporate the Management Action Recommendation issued in the context of Named Employee #1.

## **SUMMARY OF INVESTIGATION:**

This incident occurred on July 25, 2020 during the protests following the killing of George Floyd by a police officer in Minnesota. SPD's Incident Action Plan (IAP) for the day designated the then-Deputy Chief of Police as the citywide Incident Commander, as well as an SPD captain as the Operations Section Chief responsible for managing specific incidents. The IAP also designated Named Employee #1 (NE#1), a lieutenant, as the Deputy Operations Section Chief. NE#1 was tasked with on-the-ground crowd management.

On the afternoon of July 25, approximately 4,000 to 5,000 protesters gathered near the Seattle Police Department's East Precinct. Members of the crowd blocked access to the alleyway on Pine Street, others attempted to dismantle fencing around the precinct, while still others smashed windows and attempted to set fire to the building. Approximately a minute after the fire was reported at the precinct, multiple lieutenants at the scene directed the use of less lethal tools to disperse the crowd.

Projectiles were also being thrown at officers prior to and throughout the incident. NE#1, the Deputy Operations Section Chief, determined that moving the crowd backwards was necessary because of an explosion or fire that went off at the precinct. Officers, including bicycle squads commanded by NE#1, conducted a series of pushes on Pine Street to move the crowd away from the precinct. It was during one of these pushes that the incident at issue in this case occurred.

### **I. Narrative of Incident**

An individual, who is the Subject of this case, was visible on Body-Worn Video (BWV) of several officers, standing with a group of other individuals carrying cameras. They were on Pine Street west of the intersection of 11th and Pine, near a Rancho Bravo restaurant. The Subject is a well-known journalist and livestreamer in Seattle who covered this summer's protests extensively.

#### ***a. Body Worn Video***

BWV showed bicycle officers in a mobile fence line telling protesters to move back, and a PA announcement could be heard stating that the unlawful assembly must clear the area immediately. As the crowd moved back, bike officers leap-frogged forward to continue moving the crowd. Another announcement was heard on the BWV telling the crowd to move westbound or else individuals would be subject to arrest. Officers deployed blast balls to continue moving the crowd, and BWV showed that members of the crowd either attempted to throw them back or deployed fireworks as improvised explosives.



BWV showed the press group, including the Subject, on the left side of the street near a building. The Subject was livestreaming the event. The incident at issue constituted about two minutes of the livestream. Members of the press group verbally identified themselves and had multiple types of cameras. At least some individuals had badges around their necks, and some also had media company names and logos on their vests or gas masks. There was no designated media zone because the scene of protest was not static, so at times the press and public intermingled as the crowd was being pushed back.

As previously mentioned, NE#1 directed another officer to give the dispersal order to the crowd. Pursuant to that, if the crowd did not comply, NE#1 authorized the officers to use nonlethal force. NE#1 did not instruct any officers to prevent anyone in the crowd, including media, from recording. NE#1 did not personally use any force against members of the press during the incident. OPA did not uncover any evidence suggesting that NE#1 directed any force in the direction of the press group.

Named Employee #2 (NE#2) was part of the push to move the crowd back. At the time of the incident, NE#2 was near the press group operating as a “linebacker” – an officer who supports a mobile fence line. At one point, when the press group was near the Rancho Bravo restaurant, NE#2 could be heard telling them to move back. At the time, the individuals in the press group were visibly walking away from the police line as it advanced. BWV showed that NE#2 deployed a burst of OC spray in a horizontal plane. The press group was actively walking backwards while NE#2 continued to spray two of them. NE#2 sprayed one individual who was retreating with his back to the officers; the spray struck his right shoulder and the right side of his face. Another individual was walking backward when NE#2 deployed OC, hitting the left side of the individual’s face and body. Subsequently, NE#2 left that part of the line to assist with an unrelated arrest.

Officers deployed blast balls and used OC spray on members of the crowd. The officers made another push forward and the press group started to move backwards, which increased the distance between the officers and the protesters. Named Employee #3 (NE#3) told the crowd to move back again. At one point, a member of the crowd carrying a board used the board to strike an officer’s bicycle, which formed a part of the mobile fence line. NE#3 deployed OC against that individual. Shortly after, another individual with a blue umbrella refused to move back as NE#3 and the other officers advanced the line. NE#3 deployed OC against that individual. BWV showed the OC stream deflecting off the individual’s umbrella, and it appeared that the spray deflected towards the press group. At one point, NE#3 told the group of press to back up. He gave the order three times, but BWV did not show them moving. The Subject could be heard stating that there was no room to move back, and NE#3 asserted that there was. During the push west, NE#3 made several more deployments of OC, but these did not appear to be targeted at members of the press group.

NE#3 also deployed blast balls as a way to break up the shield and umbrella wall that members of the crowd formed between themselves and the officers. It did not appear that NE#3 deployed any blast balls directly at the press group. Other officers then deployed blast balls at the general vicinity of the press group, potentially affecting them with OC from the detonations.

Several minutes after the initial OC spray deployment that affected the Subject and his colleagues, BWV showed a blast ball apparently thrown into the group of press. That blast ball landed between the Subject’s feet and detonated, causing injury. OPA conducted a frame-by-frame analysis of this portion of NE#3’s BWV, which depicted



the blast ball deployment. That analysis was unable to identify the officer who threw the blast ball, and no use of force statements filed by officers conclusively identified the officer making this deployment. Consequently, OPA was not able to identify which officer threw the blast ball that detonated near the Subject.

OPA also examined BWV of another officer, which showed the blast ball flying after being thrown in an apparent high (overhand) deployment. The blast ball initially appeared to be directed into the center of the crowd rather than toward the left side of the police line, where the press group was located. While in flight, the blast ball hit a power line, causing it to redirect to the left and sharply down. It then landed near the Subject and detonated, as shown on NE#3's BWV above. OPA was still unable to identify which officer deployed this blast ball.

***b. Subject's Live Stream Recording***

Video review of the Subject's livestream showed the Subject yelling at the officers that he was not their enemy and trying to keep the press group together. The livestream was consistent with the BWV. There were PA announcements, blast balls being deployed, and officers using OC spray. The Subject made several announcements that identified the group as media. He instructed the group to stay tightly together. The Subject's livestream showed that the Subject tried to get the group to follow officers' instructions to move backwards.

Similar to the BWV, the live stream showed NE#3 using OC spray against individuals with shields (such as boards and umbrellas) who were not complying with the orders to move back. The live stream also showed the Subject coughing and telling others that he could not breathe as NE#3 had directed OC spray to the left of the Subject. Consequently, OPA finds it likely that NE#3's deployment of OC spray inadvertently affected the Subject.

**II. Witness Statements**

The Complainant remained anonymous and was not available to be interviewed. In the Complainant's initial complaint to OPA, he or she stated that SPD targeted the Subject and members of the press "all down the block." In particular, the Complainant referenced the incident near the Rancho Bravo restaurant. The Complainant noted that the complaint was based on a viewing of the Subject's livestream.

When the Subject was interviewed by OPA, he said that the press group was clearly identified and repeatedly told the officers that they were media. He said the group had a variety of cameras and insignia of media companies. The Subject urged the group to comply with the orders to move backwards, but it was difficult to do so quickly because there were lots of obstacles in the way (e.g., street signs, bike racks, trees).

**III. Named Employee Interviews**

When OPA interviewed NE#1, he said there was no plan to target members of the press. He also noted the difficulty of telling the difference between members of the press, people livestreaming, and other protesters. Typically, members of the press were identified based on uniform and cameras. NE#1, who conducted the roll-call briefing for officers before the incident, confirmed that officers were told that anyone could record them for any reason, and that press were only to be pushed back for safety reasons.



When OPA interviewed NE#2, he stated that the reason for the push was because some protesters were throwing explosives and rocks. He stated that several of the explosives appeared large enough to damage bicycles and cause officers to suffer injury. With respect to his decision to use force against the group of press, NE#2 explained that the press group was moving more slowly than other parts of the crowd, causing the police line to move forward at different rates. NE#2 said a gap had formed on the left side where the press group was, which increased the chance of protesters breaking through the line. He referenced the need to maintain the integrity of the police line to effectively move the crowd backwards.

NE#2 stated that the force was reasonable because individuals at the front of a protest chose to be there, to be in contact with the police, and to obstruct the movement of the police line. He said that the force was necessary because the press group was preventing or delaying the forward motion of the line and creating gaps. NE#2 explained that when a crowd is stationary, it is easier for individuals to pick up objects and throw them and that it was therefore necessary for SPD to create movement. NE#2 stated that the force was proportional because lesser force (such as forward motion of the police line or de minimis force used to direct the protesters) was not effective.

NE#2 stated that the decision to use OC spray was his individual decision, but it was in line with the order from NE#1 to be able to use less lethal munitions to move the crowd. NE#2 also stated that he did not recognize anyone in the group as members of the press. He did not recall what they were wearing, but upon review of the BWV said that they appeared to be wearing regular clothes like other protesters in the crowd. NE#2 cited significant crowd noise making it difficult for him to hear and did not recall members of the group stating that they were press.

When OPA interviewed NE#3, he stated that he only used force against individuals who were directly assaulting him by throwing large rocks, fireworks, and bricks, or who were not complying with the order to move back. NE#3 explained that objects were being thrown at officers from behind the shields, so he determined the use of force was necessary to protect the officers and other members of the crowd from being hit. NE#3 did not know if he used force against any members of the press because he did not recognize any press group and believed they were intermingled with the crowd.

#### **ANALYSIS AND CONCLUSIONS:**

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

##### ***14.090 Crowd Management 9. Crowd Dispersal b. The Incident Commander Shall have the Authority to Direct the Use of Blast Balls and OC Spray to Disperse the Crowd***

SPD Policy 14.090-POL-9(b) states that the Incident Commander (IC) has the authority to direct the use of blast balls and OC spray to disperse a crowd. (SPD Policy 14.090-POL-9(b)) A lieutenant may authorize the use of blast balls and OC spray where an immediate life safety emergency exists, and there is insufficient time to obtain approval from the IC. (*Id.*) The policy defines a "life safety emergency" as "an unplanned, dynamic situation where immediate police action is necessary to protect the officers' and/or the public's safety." (*Id.*) It goes on to state that when feasible, a dispersal order should be given and the crowd afforded sufficient time to disperse prior to the use of blast balls and OC. (*Id.*) Similarly, when feasible, blast balls and OC should not be deployed in the vicinity of people who do not pose a threat to safety or property. (*Id.*)



At the outset, OPA finds that NE#1—who was acting as the incident commander for the purposes of managing this crowd—had the requisite justification to order that the crowd be dispersed. Of all the protests examined by OPA, the events of July 25 were more violent than most. The crowd present at the East Precinct clearly attempted to interfere with the operation of the precinct and succeeded in causing non-trivial damage to the building itself. Indeed, setting a fire in the precinct amounted to precisely the kind of “life safety emergency” contemplated in this policy, meaning that even had NE#1 not been acting as the incident commander, he would have been justified in ordering immediate crowd dispersal.

Though NE#1 gave the dispersal order, he did not direct any officers to deploy munitions at members of the press or at the area of the line where the press group was specifically. Officers were instructed to push back the crowd for safety reasons, and the press group was pushed back along with any other protesters. NE#2 and NE#3 confirmed that the deployments at issue were individual decisions. Given this, OPA finds that NE#1 did not bear personal responsibility for the uses of force that affected them. As such, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

##### ***5.160 Observation of Officers***

SPD Policy 5.160 states that:

[A] person not involved in an incident may remain in the vicinity of any stop, detention, arrest, or other incident occurring in a public place, and observe or record activity and express themselves, including making comments critical of an officer’s actions, so long as the person’s conduct and presence are otherwise lawful.

The policy provides several factors that may be relevant to determining whether it was permissible to remove an individual from the vicinity of law enforcement activity, which include: “officer safety, the protection of the suspect or person being detained, including his or her right to privacy, and the safety of onlookers.”

As discussed above, OPA does not find that NE#1 took any actions to cause media to be targeted with force or to prevent media from observing and recording officers.

That being said, OPA notes that, at the time of this case, there was no specific policy governing how to handle media or, for that matter, legal observers and medics at demonstrations. In a separate case – 2020OPA-0403 – OPA recommended that SPD create such a policy and set clear rules of engagement surrounding media. OPA requested that this include language concerning when force could be used on or in the vicinity of members of the media (implicitly including how to best avoid inadvertent effects of force on media), what types of offenses members of the media acting in their official capacities could be arrested for, and a more robust screening process both before and after the decision to arrest. OPA also requested that the Department make sure to set forth these rules of engagement in each pre-demonstration Incident Action Plan. Lastly, OPA requested that the Department explicitly exempt trespass from those offenses for which members of the media could be arrested, absent a threat of harm to



officers or others. Since that time, SPD has developed a new policy concerning media at demonstrations that fulfills some of OPA's requests. OPA renews its recommendation that all of the provisions it identified be included in the next iteration of this policy, which will be completed later this year.

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

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

**Named Employee #1 - 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.*)

This allegation was classified against NE#1 as, if he directed officers to target media, it would represent a significant violation of public trust and would, thus, be unprofessional. However, as indicated above, there was no basis to conclude that he did so.

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

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

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

***14.090 Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls***

SPD Policy 14.090-POL-10 states that deployment of OC spray or blast balls shall have the primary objective of defending the officer, defending another, or preventing significant destruction of property. (SPD Policy 14.090-POL-10.) It further states that individual officers may deploy OC spray or blast balls “at the specific suspect(s) who are posing a threat” and that if feasible, officers must provide a verbal warning prior to deployment. (*Id.*) Finally, the policy states that when feasible, officers will provide aid to subjects exposed to OC and/or blast balls and will request medical assistance when subjects complain of continued effects from OC or blast balls. Officers will request medical assistance when a subject appears to have been injured. (*Id.*) An officer’s decision to deploy OC or blast balls must be consistent with Title 8 – Use of Force. (*Id.*)

OPA finds that NE#2’s use of force in the form of deploying OC spray against members of the press group who were walking away at the time he made the deployment violated this policy. That the individuals were retreating at the time was established by the BWV. One individual who NE#2 sprayed was walking away with his back to the officer line; the other was facing the line but walking backward as he did so. There were many obstacles in the way and a





large crowd behind the group of press, and it was reasonable under these circumstances that they could not necessarily move at the speed NE#2 or other officers may have ideally preferred.

Moreover, OPA did not identify any evidence to show that this group intentionally obstructed officers, let alone committed any violence. In fact, the weight of the evidence suggests the opposite. The Subject's livestream showed him coordinating with other members of the press group to move backward, and the Subject could be heard repeating officer instructions to keep moving to others. While NE#2 may not have been aware of this fact due to noise, OPA's review suggested that members of this group made all reasonable efforts to comply with officers' lawful commands.

The application of OC spray was improper both because the individuals were not actively obstructing officers and because they did not pose an active threat to officer safety or property. While NE#1 contended that the threat was to the integrity of the line, this did not appear to be clearly established by the BWV and did not warrant the use of OC spray given the totality of the individuals' conduct. Ultimately, though OPA recognizes that this was a dynamic protest and significant lawbreaking including assaults occurred, BWV did not show any of it coming from this group. Accordingly, OPA finds that NE#2's use of pepper spray violated policy and recommends that this allegation be Sustained.

Recommended Finding: **Sustained**

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

### ***5.160 Observation of Officers***

During his OPA interview, NE#2 denied being aware that the individuals he targeted with OC spray were media. He said that he did not know this until he received notice of this complaint.

In OPA's opinion, the totality of the video indicated that, throughout the demonstration, the individuals were recognizable as press. For example, many had press credentials or other identification on lanyards around their necks, they largely stayed grouped together, they made oral statements to officers that they were press, and most if not all had phones or cameras out and were utilizing them to record the demonstration.

The above being said, and while OPA believes that the officers staffing the protest, including NE#2, should have known that the individuals were press, OPA cannot foreclose the possibility that, given the fluidity of the moment at issue here and given that individuals in the crowd were walking away and were turned around at the time of the force, NE#2 did not recognize this. Accordingly, whether NE#2 was aware that the individuals were press and intentionally pepper sprayed them regardless, thus preventing them from carrying out their duties, is inconclusive.

However, for the same reasons as articulated in the context of Named Employee #1, this case is emblematic of why the Department needs to create a more robust policy concerning officer interactions with press during demonstrations. Accordingly, OPA recommends that this allegation be Not Sustained and refers to the above Management Action Recommendation. (See Named Employee #1 – Allegation #2.)

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





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

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

This allegation was added to evaluate the Complainant's contention that NE#2 intentionally targeted press based on the status of their employment rather than based on his perceptions of their conduct and its impact on overall officer safety. If true, this conduct would have violated the public's trust and confidence.

Based on the totality of the evidence, OPA finds no evidence to dispute NE#2's assertion that he used force on the individuals based on his perceived need to keep the integrity of the line together, not because of their status as members of the press. While OPA finds that this was not a sufficient justification for NE#2's force, this conduct is fully captured by Allegation #1 and Allegation #2.

Given this, OPA recommends that this allegation be removed.

Recommended Finding: **Allegation Removed**

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

***14.090 Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls***

As a threshold matter, OPA did not find that any of NE#3's OC spray deployments were targeted at members of the press group.

NE#3 did deploy OC spray against an individual with an umbrella who was not obeying officers' orders to move back. This deployment was consistent with SPD Policy as a dispersal order had been given for safety concerns near the precinct and this individual was actively and intentionally obstructing officers' attempts to move the crowd back. In addition, as documented on his BWV, each of NE#3's other deployments were targeted at specific obstructive or assaultive conduct.

OPA notes that NE#3's deployments that targeted the individual with the umbrella appeared to incidentally affect the Subject and potentially others when it deflected. While this was regrettable, NE#3 did not himself intend to cause the exposure. Moreover, when members of the public, including media, are in the front lines of a demonstration that is being lawfully dispersed, they accept the risk of at least some inadvertent effects from less-lethal tools.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

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

***5.160 Observation of Officers***



NE#3 did not target or use any force directed towards members of the media. As such, there is no evidence that he engaged in actions purposed to prevent them recording or observing officer actions.

Accordingly, OPA recommends that this allegation and Allegation #3, below, be Not Sustained – Unfounded.

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

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

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

For the same reasons as stated above (see Named Employee #3 – Allegation #2), OPA recommends that this allegation be Not Sustained – Unfounded.

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

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

***14.090 Crowd Management 10. Officers May Make Individual Decisions to Deploy OC Spray, and Blast Balls***

With respect to the blast ball that landed at the Subject's feet and exploded, OPA was unable to identify which officer threw the blast ball. Consequently, OPA cannot determine where the blast ball was intended to be thrown. It appeared that the blast ball hit a power line, which changed its trajectory causing it to land at the Subject's feet. However, because it cannot identify the intended target, OPA cannot determine whether the deployment was consistent with policy or not. As such, OPA recommends that this allegation be Not Sustained – Inconclusive.

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

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

***5.160 Observation of Officers***

For the same reasons as stated above (see Named Employee #4 – Allegation #1), OPA recommends that this allegation be Not Sustained – Inconclusive.

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

**Named Employee #4 - Allegation #3**

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

For the same reasons as stated above (see Named Employee #4 – Allegation #1), OPA recommends that this allegation be Not Sustained – Unfounded.

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