



CLOSED CASE SUMMARY

ISSUED DATE: DECEMBER 23, 2020

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0377

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	Force - Use – 8.300 – POL-11 Use of Force – 40mm Less Lethal Launcher 7. Officers Will Only Use a 40 mm LL Launcher when Objectively Reasonable, Necessary, and Proportional	Not Sustained (Lawful and Proper)
# 2	Force - Use – 8.300 – POL-11 Use of Force – 40mm Less Lethal Launcher 9. Officers Shall Consider the Rise of the 40 mm LLIM Round Causing Serious Harm When Determining Whether to Deploy	Not Sustained (Lawful and Proper)
# 3	Force - Use – 8.300 – POL-11 Use of Force – 40mm Less Lethal Launcher 3. Officers may only use 40 mm LL Impact Munitions (LLIM) in a manner consistent with the SPD UOF Policy and training provided by the Department	Not Sustained (Lawful and Proper)
# 4	Video and Audio Recording - 16.090 - In-Car and Body-Worn Video 5. Employees Recording Policy Activity b. When Employees Record Activity	Not Sustained (Training Referral)

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 she was targeted with a 40mm CS grenade by the Named Employee even after she identified herself as a member of the press. She asserted that this constituted excessive force and the improper usage of this less-lethal tool. OPA further alleged that the Named Employee may have failed to record Body Worn Video.

ANALYSIS AND CONCLUSIONS:

On June 2, 2020, Seattle entered its fifth day of demonstrations following the death of George Floyd. The Complainant was present at these protests and said that she was struck by a CS gas canister. She asserted that this was improper and a violation of policy. She initiated an OPA complaint and this investigation ensued.

In her interview with OPA, the Complainant stated that she attended the demonstration to capture the events as an independent reporter, not to join the group of demonstrators. She brought her camera, which she used to shoot video of the demonstration, as well a backpack containing other personal items. She was not wearing any identifying clothing or other markings that identified her as a member of the press. When SPD officers began to deploy CS gas to control



and clear demonstrators from the area, the Complainant became affected by the chemicals. She knelt behind a sign and reached into her backpack for a bottle of water to flush her eyes. In video the Complainant took during the incident and later provided to OPA, she could be heard asking other demonstrators to assist her with putting items back into her backpack.

The Complainant stated that, as she was reaching into her backpack, she saw pepper balls skip across the ground in front of her. To assure officers that she was not a threat she yelled that she was press and that she was retrieving water from her bag. A short while later, she was hit with a projectile that she believed to be a 40mm CS grenade. During her interview, the Complainant stated that she understood why officers might have believed that she was attempting to access a weapon when she reached into her backpack. Despite that, the Complainant believed that the officers were just as responsible for the violence that occurred during the demonstration. OPA determined that Named Employee #1 (NE#1) may have been the officer who used a 40mm launcher to impact the Complainant. He was interviewed, as was a witness officer – referred to here as Witness Officer #1 (WO#1).

On June 2, NE#1 was assigned to the Chemical Agent Response Team (CART) and was tasked with offering less-lethal support to officers on the police line. NE#1 stated that his orders that evening were to provide support to front-line officers by deploying his 40mm launcher and blast balls when necessary. Sometime after 11:00 p.m., WO#1 drew NE#1's attention to the Complainant and a group of other demonstrators who were going through a bag. In his Use of Force report and during his interview with OPA, NE#1 stated that he saw two individuals kneeling on the ground who were going through a duffel bag while attempting to conceal themselves behind a parking sign. Based on the fact that numerous dispersal orders had been given, several officers had been assaulted by projectiles, fireworks, and other items, and the groups' apparent attempts to conceal themselves behind the parking sign, NE#1 believed that the individuals were trying to locate weapons within the bag that would be used to assault officers. NE#1 fired one OC round at the parking sign the group was standing behind. He believed that the round hit the lower part of the sign. Following the deployment, the individuals left the area. NE#1 did not have Body Worn Video (BWV) footage of his deployment. He explained that, in his hurry to respond to the call to assist officers, he either failed to activate the BWV or that the camera must have been accidentally switched off as he made his way to the police line.

WO#1 recalled that he was working at the front of the police line during the June 2 demonstration. He said that he was facing a crowd he estimated to number between 200-300 people. He recalled that demonstrators were very hostile towards officers that day. Officers had been assaulted by rocks, fireworks, and bottles. He had personally been hit in the head with a rock the day before, suffering a concussion as a result. The Incident Commander ultimately declared the demonstration a riot and unlawful assembly due to the violence towards the police and dispersal orders were given but largely ignored. Around 11:00 p.m., WO#1 observed an individual – the Complainant – behind a parking sign, looking through a backpack. He stated that he saw others going through the same backpack. Given the past days' demonstrations, the crowd's demeanor and refusal to obey the dispersal order, and the actions of the individuals near the parking sign, WO#1 found this behavior troubling. He like, NE#1, believed that the individuals were searching for weapons that would be used towards officers. He informed NE#1 about what he was seeing, pointing out the Complainant and the other individuals. He did this because he was aware that NE#1 carried a 40mm launcher and could deploy munitions that would reach the area of the parking sign.

WO#1 said that NE#1 deployed his 40mm launcher towards the Complainant but that he could not see where the munition impacted. He could, however, see that the Complainant and other demonstrations around her dispersed following NE#1's deployment. WO#1 stated that he did not hear the Complainant say anything to him, including declaring that she was a member of the press.



While, as discussed above, NE#1 did not record BWV, WO#1 did so. From a review of that video, from where WO#1 was situated, it was unclear what exactly the Complainant and other demonstrators were doing at the time and what was in the backpack. The BWV did not show anyone pulling out weapons or, for that matter, using anything withdrawn from the bag towards the officers. The BWV did not capture any statement by the Complainant that she was a member of the press.

Named Employee #1 - Allegation #1

Force - Use - 8.300 - POL-11 Use of Force – 40mm Less Lethal Launcher 7. *Officers Will Only Use a 40 mm LL Launcher when Objectively Reasonable, Necessary, and Proportional*

SPD Policy 8.300-POL-11(7) states that officers may use a 40 mm launcher when there is an “immediate threat of harm to any person” or when an individual needs to be taken into custody but is resisting such that they are “likely to cause injury to the officer [...] or other force options would be likely to cause greater injury to the subject than the use of the 40 mm Less Lethal Impact Munitions (LLIM).” Additionally, such use must be objectively reasonable, necessary, and proportional. (*Id.*) In addition, SPD Policy 8.300-POL-11(9) mandates that “officers shall consider the risk of the 40 mm LLIM round causing serious harm when determining whether to deploy.” Lastly, SPD Policy 8.300-POL-11(3) states that only officers who have been trained and certified with the Department can use the 40 mm Less Lethal Launcher. 40 mm Less Lethal Impact Munitions (LLIM) may only be used, “in a manner consistent with the Seattle Police Use of Force Policy and training provided by the Department.” (*Id.*)

In evaluating this use of force, OPA notes that both the Complainant’s and NE#1’s accounts could be true and not mutually exclusive. For example, OPA has no reason to doubt that the Complainant was going through her bag in order to treat exposure to chemical agents and that the other individuals in her immediate vicinity were there to assist her. However, OPA simultaneously believes it reasonable for NE#1 and WO#1 to have been concerned with multiple individuals kneeling behind a sign and going through a backpack. To put this in context with events that had transpired just before, multiple demonstrators had thrown projectiles and fireworks at officers and these projectiles presumably were secreted in backpacks or other bags prior to being used. Indeed, the Complainant acknowledged that the officers could have perceived this during her OPA interview, even though she still thought the force was improper.

Ultimately, when considering the propriety of force, OPA must apply a reasonable officer standard. This means that OPA considers what a reasonable officer with similar training, education, and experience would have done if confronted with the same facts and circumstances as NE#1 and whether NE#1’s actions were consistent with this. In addition, SPD policy and caselaw prohibit OPA from applying 20/20 hindsight. This means that OPA cannot look at evidence that was unknown to NE#1 or that would not have been considered by a reasonable officer and use that to second guess the actions that NE#1 took. What this means is that, even if NE#1’s belief that the Complainant and the other individuals were accessing a weapon was incorrect, this would not, in and of itself, cause his force to be infirm as long as it was objectively reasonable.

Based on OPA’s review of the totality of the evidence and, again, when applying an objective reasonableness standard, OPA finds that NE#1’s 40mm deployment was consistent with policy. Based on NE#1’s own experiences earlier in the demonstration, the refusal of the crowd to follow the multiple dispersal orders given, and the actions of the Complainant and other demonstrators as perceived by both NE#1 and WO#1, OPA concludes that NE#1 was reasonable in his belief that the group may have been seeking projectiles and preparing to assault officers. Had the



officers been aware that the Complainant was a member of the press, this could impact the reasonableness of the force; however, the video simply did not capture any statement to this extent that would have been audible to the officers. Accordingly, NE#1 was permitted to use force to prevent this from occurring and that force was reasonable.

For the same reasons, the force was necessary. Given the demonstrators' refusal to follow numerous dispersal orders and their use of fireworks, projectiles, and other items against officers, there did not appear to be any reasonable alternative available to NE#1 other than the use of force to combat such threats. In addition, the force used was of a reasonable degree and was only that needed to disperse the target group.

Lastly, OPA finds that the force was proportional. NE#1 deployed one round aimed near the Complainant and other demonstrators. While the Complainant said that she was struck by the deployment, NE#1 denied that this was the case and said that he aimed at and struck the stop sign. Ultimately, the BWV did not conclusively establish what the 40mm struck. Moreover, when he saw that the deployment had the desired effect of dispersing the group, he did not further deploy, thus modulating his force.

While OPA certainly regrets the Complainant being impacted in this manner, OPA finds that the use of the 40mm was consistent with policy and recommends that this allegation, as well as Allegations #2 and #3, be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #2

Force - Use - 8.300 - POL-11 Use of Force – 40mm Less Lethal Launcher 9. *Officers Shall Consider the Risk of the 40 mm LLIM Round Causing Serious Harm When Determining Whether to Deploy*

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

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

Named Employee #1 - Allegation #3

Force - Use - 8.300 - POL-11 Use of Force – 40mm Less Lethal Launcher 3. *ETS Trains and Certifies 40 mm LL Launcher Operators Annually*

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

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

Named Employee #1 - Allegation #4

Video and Audio Recording - 16.090 - In-Car and Body-Worn Video 5. *Employees Recording Policy Activity b. When Employees Record Activity*

SPD Policy 16.090-POL-5 requires that SPD employees record police activity in certain delineated circumstances using both (or either, in some cases) their In-Car Video (ICV) and Body Worn Video (BWV) systems. Inherent in this



requirement is that there be both video and audio on the recording. Where a recording has no audio or video, the employee has potentially not complied with the policy. SPD Policy 16.090-POL-1(5)(b) states that when safe and practical, employees will record their law enforcement conduct, including: “on-view infractions and criminal activity.”

As discussed above, NE#1 verified that he did not record BWV during this incident. He opined that, in his haste to assist other officers, he either forgot to activate his camera or it inadvertently de-activated when he put on his gear. He stated that he did not recognize that he had failed to record until a later lull in the interaction between officers and demonstrators.

Given the circumstances, OPA finds no evidence supporting the conclusion that NE#1 intentionally failed to record. Indeed, NE#1 recorded BWV on multiple other occasions during the protests, including capturing uses of force. Moreover, NE#1 has no prior disciplinary history for failing to record either BWV or ICV. Given these facts and when considering past precedent, this informs OPA’s decision that retraining rather than discipline is the appropriate remedy here. As such, OPA recommends that this allegation be Not Sustained and issues the below Training Referral.

- **Training Referral:** NE#1 should be reminded of the obligation that he records BWV when required. This is particularly important when he uses force as it allows that force to be critically evaluated. NE#1 should be informed that future failures to record video could result in a Sustained finding. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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