



## CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 27, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0403

### 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 (Unfounded)

**Named Employee #2**

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Unfounded)

**Named Employee #3**

Allegation(s):		Director’s Findings
# 1	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Management Action)
# 2	5.001 - Standards and Duties 6. Employees May Use Discretion	Not Sustained (Training Referral)
# 3	5.001 - Standards and Duties 14. Retaliation is prohibited	Not Sustained (Unfounded)
# 4	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Unfounded)

**Named Employee #4**

Allegation(s):		Director’s Findings
# 1	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	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 he was subjected to an improper and retaliatory arrest by Named Employee #3 and that the arrest constituted an abuse of Named Employee #3’s discretion. The Complainant also alleged that he was Subjected to excessive force by Named Employee #1, Named Employee #2, and Named Employee #3. Lastly, the Complainant alleged that Named Employee #4 treated him unprofessionally.

**ADMINISTRATIVE NOTE:**

In addition to the allegations addressed herein, the Complainant made a number of other claims that were either disproved by video evidence or that were outside of OPA’s jurisdiction. First, the Complainant alleged that the arresting officers “shackled” his legs prior to his transport to the West Precinct. This did not occur while the



Complainant was in SPD custody. Leg shackles and a belly chain were applied by King County Jail (KCJ) personnel, but such conduct is outside of OPA's jurisdiction. Second, the Complainant asserted that he was not read Miranda warnings at the time he was arrested; however, the video conclusively established that NE#1 read the Complainant Miranda warnings twice, as well as that the Complainant spoke over him and said that he did not understand. Third, the Complainant stated that, after being placed in the prisoner transport van, he was driven to a number of different locations where other prisoners were seated in the van. The collective video indicated that this did not occur, and that the Complainant was transported directly to the West Precinct from Cal Anderson Park. Fourth, the Complainant stated that he was mistreated and assaulted by KCJ staff. Again, as stated above, OPA does not have jurisdiction over these individuals and the Complainant's claims are being investigated by the KCJ's internal investigations unit under case number 2007-004.

**SUMMARY OF INVESTIGATION:**

Officers, including Named Employee #1 (NE#1), Named Employee #2 (NE#2), and Named Employee #3 (NE#3), were involved in the clearing out of Cal Anderson Park. This occurred in the early morning hours of July 1, 2020, and was pursuant to an Executive Order issued by Mayor Durkan. The order closed the entirety of the park and required SPD to enforce the closure. The order further authorized SPD to arrest anyone who was in violation of the order and refused to leave the vicinity. The order did not contain any exceptions for members of the media. Prior to the order being effectuated by SPD, an Incident Action Plan (IAP) was created and transmitted to the involved officers. The IAP generally provided guidance surrounding the terms of the order and the plans to carry it out. The IAP also contained a statement of intent from the incident commander – the Assistant Chief of the Patrol Operations Bureau. This statement included the following direction: "Those who fail to leave the area will be placed under arrest. These actions will allow us to restore order and public safety to the defined operational area." Neither the IAP nor the incident commander's statement of intent contained an exception for members of the media.

NE#3's Body Worn Video (BWV) indicated that he was involved in an interaction with the Complainant. The inception of that interaction was not recorded given that the camera was in buffer mode. The BWV showed that NE#3 was standing on the inside of crime scene tape that had been attached across several trees. He was looking towards an individual – later identified as the Complainant – who was standing on the other side of the tape and on the grass within the park. NE#3 motioned with his hand, pointing towards the sidewalk. This was corroborated by NE#1's BWV, which showed a broader view. It indicated that NE#3 spoke with another individual who was walking his dog on the grass. That individual then walked over to the sidewalk. NE#3 approached the Complainant who was standing on the grass. They were engaged in a conversation for a period of time after which NE#3 stepped under the tape and walked up to the Complainant. NE#3 took hold of the Complainant and turned him around. NE#1 walked over and held the Complainant's right arm. The Complainant was then handcuffed.

When the audio began, the Complainant could be heard telling the officers that he did not cross the police line. NE#3 responded that he had given the Complainant multiple directions to leave the grassy area and to move to the sidewalk and that the Complainant did not comply. The Complainant referenced the State Department and said several times that the officers were making a mistake and that his arrest would not be a "good look" for SPD. At this point on the video, a lanyard with a badge could be seen hanging from the Complainant's neck.

NE#1 and NE#2 walked the handcuffed Complainant over to the front of a patrol vehicle. At that time, the Complainant questioned why he was arrested, and he was told that the park was closed. The Complainant raised the fact that he was outside of the police tape. When he was placed in front of the patrol vehicle, the Complainant



asked to be read Miranda warning and to make a phone call. He was told that he would be allowed to make the phone call but not at that moment.

While facing the patrol vehicle with NE#1 and NE#2 behind him to each side, the Complainant turned his head to speak with both officers. The Complainant then turned his body to look to his back right. NE#1 told the Complainant to “quit turning,” and NE#2 took hold of his arm and moved his body so that he was again facing forward. To do so, NE#2 leaned the Complainant down over towards the hood of the patrol vehicle. NE#2 stated: “There we go. Relax.” NE#2 told the Complainant to relax several more times, including after standing the Complainant upright again. The Complainant was read his Miranda warnings and interrupted to ask why he was being arrested and to request a phone call to his attorney. He stated that he did not understand his rights. He again asserted that he should not have been arrested and handcuffed. He was told that he was arrested because he did not leave the park after being directed to do so. The Complainant responded that he was “told” that he had a First Amendment right to be in the park as a member of the media. The Complainant was read his Miranda rights a second time by NE#1. The Complainant raised that he was a member of the international media and that the officers were making a mistake. The Complainant complained of tightness to one of handcuffs that he said was causing numbness to his wrist. NE#2 adjusted the handcuffs.

During this same time, NE#3 screened the Complainant’s arrest with a Sergeant. NE#3 stated the following:

Basically, up here on Denny, [the Complainant] steps into the park, wants to take pictures, I say, I give him the warnings – you’ve got to get back on the sidewalk, the park is closed. First, he ignores me, then he kinda argues I’m with the international media, or something...I just keep giving him warnings, you got to step back. I finally told him you’re going to get arrested. He apparently didn’t believe me, so...

In response to a follow up question from the Sergeant concerning the warnings, NE#3 said: “Several warnings, refusal to leave the park, so arrested, no use of force.” NE#3 and the Sergeant did not discuss the arrest charge at this point.

The Sergeant approached the Complainant to speak with him. NE#3 followed behind him and stood to the side. The Complainant asserted that he was arrested illegally. He told the Sergeant that he was trying to take a photograph and was behind the yellow tape. The Sergeant stated: “We have audio and video recording, so If you were behind the tape, you’ll be good to go.” NE#3 stated that they were still “setting up the tape” and that the Complainant was given “multiple warnings.” The Complainant interrupted that he was “beyond the tape” and NE#3 continued: “Listen to me. I gave you multiple warnings to go back to the sidewalk. We had this back and forth several times. I even informed you more than once that you’d be arrested. And you just continued to disobey.”

The Complainant was walked over to the prisoner processing van where he interacted with Named Employee #4 (NE#4), who was the driver. NE#4 secured the Complainant’s property and seated him into the back of the van. NE#4 got into the front seat and remarked: “God, these guys. He’s a journalist, he says. From England?” He then laughed to himself. After they arrived at the West Precinct, NE#4 went around the back of the van and opened the door. He removed the Complainant’s backpack and a pickax that was unrelated to the Complainant. NE#4 asked the Complainant whether the pickax was his while chuckling. The Complainant denied it and told NE#4 not to plant evidence on him. The Complainant was walked into the precinct and was then later transported to KCJ.



The paperwork of the arrest generated by the Sergeant indicated that it was for failure to disperse. This was consistent with what the Sergeant orally relayed to another supervisor. Another officer completed the arrest paperwork and listed the charge as failure to disperse. The charge against the Complainant was later dismissed by the Seattle City Attorney's Office.

The Complainant filed this OPA complaint through his attorney. He asserted that he was unlawfully arrested and that NE#1, NE#2, and NE#3 subjected him to excessive force. He also contended that his arrest may have been due to retaliation against him given his status as a reporter. Lastly, he asserted that NE#4's statements to him were unprofessional. This investigation ensued. As part of its investigation, OPA reviewed the BWV, arrest paperwork, and statements generated by the involved officers and supervisors. OPA also interviewed the Complainant, the Named Employees, and the Sergeant.

**ANALYSIS AND CONCLUSIONS:**

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

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

As discussed more fully below, OPA finds that there was probable cause to arrest the Complainant for trespass. This was the case even though NE#3 did not clarify that at the time and did not ensure that trespass was not the charge included on the arrest paperwork.

Given that there was probable cause to arrest the Complainant, the Named Employees were permitted to use force to take him into custody. NE#1 and NE#3 initially used force when they took hold of the Complainant's arms and placed him into handcuffs. From OPA's review of the BWV, this was not done with undue force and there was no basis to conclude that it was excessive. NE#1 and NE#2 then used force when they took hold of the Complainant's arms and walked him over to the patrol vehicle. Again, the officers did not use undue force at this time and there was no indication that it was excessive.

Lastly, and perhaps most concerning to the Complainant, while he was situated in front of the patrol vehicle, he was leaned over and down towards the hood by NE#2. The Complainant believed that this was unnecessary.

At his OPA interview, NE#2 explained that he used a trained tactic – an “underhook,” which was comprised of placing a hand around the back of the Complainant and on the top of the Complainant's shoulder and pushing down. NE#2, who is an SPD use of force trainer, said that this was what the Department instructed officers to do when dealing with arrestees that continually moved around while in custody. NE#2 explained that he used this tactic because the Complainant continued to shift his body and nearly turned completely around while the officers were holding onto him. NE#2 believed that his force was warranted under the circumstances. While OPA does not perceive that the Complainant's movements represented a threat to the officers, OPA cannot say that this low-level force was excessive, particularly given its consistency with SPD training.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded as against NE#1, NE#2, and NE#3.

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



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

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

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

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

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

***6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest***

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed.

The Complainant alleged that he was improperly arrested by NE#2. In support of this claim, the Complainant asserted that, as a member of the media, he was not required to disperse from the park and, thus, could not have been arrested for this offense.

As a threshold matter, OPA concurs that the elements of failure to disperse under SMC 12A.12.020 were not established. For example: no public safety order to disperse had been given to the Complainant; he was not congregating with a group of four people or more and conducting acts which created a substantial risk of causing injury to any person or substantial property damage; and he did not refuse a public safety order to move or disperse. Moreover, as the Complainant asserted, the ordinance explicitly exempts media from its ambit.

However, this is not where the inquiry ends as OPA finds that, even despite this, there was probable cause to arrest the Complainant for trespass from parks pursuant to SMC 18.12.279. Under this section of the code, it is an arrestable offense when an individual:

Enters, remains in, or is otherwise present within the premises of a park during hours which the park is not open to the public, unless the person is present within the park to participate in an activity either conducted by the Department or conducted pursuant to the terms of a permit issued by the Department; shall be guilty of trespass in parks, a gross misdemeanor subject to the provisions of Chapters 12A.02 and 12A.04 of the Seattle Municipal Code.

Notably, unlike with failure to disperse, there is no exception for members of the media in the trespass from parks ordinance.

As discussed above, it is undisputed that, at the time of the Complainant's arrest, there was a validly issued Mayoral order that closed the park to the general public. This order had no exception for members of the media. In addition, the order applied to the entirety of the park, including the area that the Complainant was standing in. This scope of



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the order was not impacted by the placement of the police tape. Accordingly, when the Complainant was standing on the grass in the park, he was technically in ongoing violation of both the order and this ordinance.

Moreover, the general caselaw surrounding the right of the press to record police activity does not, in OPA's analysis, yield the conclusion that the Complainant's arrest was unconstitutional. Here, the Complainant was not simply told that he could no longer document what was occurring or face arrest. He was asked to move back approximately 10 feet to the sidewalk where he could continue to photograph and document what was occurring in the park. A reasonable restriction was placed on the Complainant that would not have impeded his ability to continue to exercise his First Amendment rights. Moreover, based on the video, this was not a situation where moving back 10 feet would have prevented the Complainant from documenting ongoing police action. Indeed, there did not appear to be any active arrests or clashes between officers and demonstrators at that time.

At his OPA interview, NE#3 stated that he arrested the Complainant for trespass, not for failure to disperse. He recognized that failure to disperse was not applicable to this incident. He acknowledged that he did not convey the charge of arrest to the Sergeant when he screened the incident and asserted that the Sergeant ultimately chose the failure to disperse charge. This was corroborated by the Sergeant at his OPA interview. With regard to the arrest for trespass, NE#3 told OPA that he informed the Complainant that he was not permitted to be in the park and asked him multiple times to step back to the sidewalk, but the Complainant refused to do so. NE#3 stated that he further instructed the Complainant that, if he did not comply, he would be arrested; however, the Complainant still did not move to the sidewalk. At that point, he effectuated the arrest.

NE#3 stated that the arrest was supported by probable cause. He also stated that it was consistent with the Mayor's order, the IAP, the directions from the Assistant Chief, and pre-incident discussions during roll call.

OPA ultimately agrees with NE#3 that there was a sufficient basis to arrest the Complainant for trespassing in the park. However, that this arrest was supported by law does not make it a desirable outcome. OPA feels strongly that this arrest occurred in part because of gaps in policy and planning and also because of problems with the law. Accordingly, OPA issues the below Management Action Recommendation.

With regard to policy, OPA notes that the Department does not have any policies governing law enforcement action taken towards members of the media. Based on this case and on other demonstration investigations in which reporters have been the subjects of uses of force, OPA feels that such a policy is needed. This policy should, at a minimum, define media for purposes of the policy, discuss when reporters may be arrested, explain how they should be treated during demonstrations, and provide guidance on when force may be used on them or in their immediate vicinity. OPA recommends that the policy also require that, *prior* to a reporter being taken into custody, the arrest be both screened and approved by a supervisor. This should be recorded on BWV. OPA further recommends that this policy expressly direct that reporters are not to be arrested for failure to disperse or trespassing where they are acting in their official capacities and where they are not physically obstructing lawful efforts by officers to disperse the group or where, in the context of trespass, their ongoing presence does not pose a threat of harm to the officers or others.

With regard to planning, OPA requests that the Department expressly reference media and how reporters will be interacted with in the IAPs and statements of intent for demonstration management.



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Lastly, with regard to the law, OPA anticipates working with the Public Safety and Human Services Committee of the Seattle City Council to consider and draft legislation adding language to the trespass from parks ordinance that would expressly exempt media unless the reporter's ongoing presence in the park would pose a threat of harm to officers or others.

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

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

***5.001 - Standards and Duties 6. Employees May Use Discretion***

OPA believes that, as a legal matter, probable cause existed to arrest the Complainant for trespass. However, that NE#3 could have arrested the Complainant does not mean that he should have. Indeed, as discussed above, OPA is concerned enough with this arrest to recommend a significant change in policy, as well as to seek potential legislative action to ensure that this does not happen in the future.

As indicated in SPD Policy 5.001-POL-6, "[e]mployees are authorized and expected to use discretion in a reasonable manner consistent with the mission of the department and duties of their office and assignment." This policy further states that "[t]he scope of discretion is proportional to the severity of the crime or public safety issue being addressed." (SPD Policy 5.001-POL-6.) Here, NE#3 exercised his discretion when he chose to make the arrest of the Complainant. The question for OPA is whether that was such a poor decision that it constituted an abuse of his discretion and, thus, a violation of policy.

In evaluating this issue, OPA is dissuaded from issuing a Sustained finding for three main reasons. First, in making the arrest, NE#3 acted consistent with the general directions he was given from command staff to enforce the terms of the order and to arrest those that did not comply. Neither these directions nor the order provided any information concerning how they applied to members of the media or even referenced media at all. As such, it is unclear to OPA that NE#3 had sufficient guidance to help him make the correct decision.

Second, sustained discretion findings are rare. More importantly, OPA has no precedent for finding that an officer abused the discretion policy solely for the decision to make an arrest supported by probable cause. Illustrative of this is OPA's decision in 2017OPA-0270, where an officer was found to have abused his discretion by holding a bus at a scene for nearly 40 minutes based on a traffic violation, causing extreme inconvenience to numerous passengers. However, OPA did not conclude that the decision to make the stop, itself, even if inadvisable, constituted an abuse of discretion. In summary, the policy violation was premised on the choice to hold the bus, *not* the decision to effectuate the stop.

Third, while NE#3 made the decision to arrest the Complainant, multiple supervisors – including at least two Sergeants and a Lieutenant screened it and/or aware of it – but none raised any concerns with NE#3's exercise of discretion. Indeed, this was the case even though they believed, errantly, that the arrest was for failure to disperse. This undercuts the finding that NE#3's decision was so egregious to warrant discipline.

The above being said, OPA still finds that, even if legally permissible, NE#3 made the wrong decision under the circumstances of this case. OPA strongly believes that NE#3 could have and should have taken more time to describe the order to the Complainant, to inform him why compliance was important, and to explain why it was necessary for the Complainant to leave the grass and move to the sidewalk. Had NE#3 taken these additional steps and the



Complainant still not complied, the arrest would have been significantly more justifiable. In addition, NE#3 did not seem to consider the possible confusion held by the Complainant as the Complainant was clearly standing outside of the police tape at the time of the arrest. OPA feels that NE#3 had an obligation to exert more effort to ensure that the Complainant understood what was expected of him prior to making the decision to arrest.

While OPA does not recommend that discipline be imposed, OPA concludes that NE#3 needs retraining on this matter to make sure that he does not revisit this behavior and understands the problems with how he handled this incident.

- **Training Referral:** OPA recommends that NE#3's chain of command counsel him and retrain him concerning the above. OPA specifically requests that NE#3's chain of command caution him to use better judgment in the future and to fully think through situations, and the possible reasons for a community member's non-compliance, before taking action that cannot be reversed. NE#3 should be on notice that future similar conduct may result in a Sustained finding and the imposition of discipline. 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 14. Retaliation is Prohibited***

The Complainant asserted that his arrest may have been retaliation against him because of his status as a reporter. SPD policy precludes its employees from engaging in retaliation. (SPD Policy 5.001-POL-14.) SPD employees are specifically prohibited from retaliating against a person who engage in activities including, but not limited to, "oppos[ing] any practice that is reasonably believed to be unlawful or in violation of Department policy" or "who otherwise engages in lawful behavior." (*Id.*) Retaliatory acts are defined broadly under SPD's policy and include "discouragement, intimidation, coercion, or adverse action against any person. (*Id.*)

During his OPA interview, NE#3 denied that the Complainant's arrest was retaliatory. He explained that his father was a retired Seattle-area reporter and that he had no animus towards members of that profession. NE#3 stated that the Complainant's arrest was based solely on his conduct.

Based on a review of the video, the documentary evidence, and the interviews in this case, OPA found no indication of any acts or statements by NE#3 that suggested a retaliatory motive. Accordingly, OPA recommends that his allegation be Not Sustained – Unfounded.

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

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

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

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

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





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

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

The Complainant asserted that the comments made by NE#4 to him were unprofessional.

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.*)

OPA interviewed NE#4 about the alleged unprofessional comments he made. With regard to his first comment about the Complainant being a journalist from England, NE#4 said that he was remarking to himself that people came from all over to see the protests in Seattle. He found this humorous and did not mean it as an insult to the Complainant. He further did not think that the Complainant heard this comment, as he made it while he was in the front seat. With regard to his comment about the pickax, NE#4 said that he knew that it did not belong to the Complainant and that he was trying to lighten the mood. Once he saw the Complainant’s reaction, however, he stopped joking around.

While it may be laudable that NE#4 tries to lighten the mood during his interactions with arrestees, this is not appropriate in all circumstances and can be viewed as insensitive and unprofessional by some, including the Complainant. NE#4 needs to understand that and use better judgment. That being said, OPA does not feel that what NE#4 said was contemptuous, derogatory, or disrespectful. OPA further does not find that it was so egregious to undermine public trust and confidence. As such, instead of imposing a Sustained finding, OPA recommends that NE#4 receives the below Training Referral.

- **Training Referral:** NE#4 should be instructed that, while perhaps not his intent to be unprofessional, he needs to be mindful that some arrestees do not find it appropriate to be joked with. He should adjust his behavior accordingly. NE#4 should be on notice that future similar conduct may result in a Sustained finding and the imposition of discipline. This retraining and counseling should be documented, and this documentation should be maintained in an appropriate database.

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