

# OIR Use of Force Review

*UOF Review 12-31-22 YLA-1*



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## Summary of Facts

On December 31, 2022, at approximately 8:45 p.m. in the dayroom of the Youth Leadership Academy (YLA), Deputy Juvenile Correctional Officer (DJCO) 1, DJCO 2, and DJCO 3 were supervising a group of youths who had just completed their indoor free time.<sup>1</sup> There were four youths still in the dayroom. The group was being directed to return to their rooms for the evening. Y1 was seated on the carpet area and Y2 was sitting in a chair close to the youths' rooms. Y1 stood up to go to his room. As Y1 began to walk towards his room, Y2 stood up and ran towards Y1. Y2 began to punch Y1 in the head and upper torso with closed fists. Y1 fought back by also throwing closed fist punches at Y2's head and upper torso.

DJCO 1 directed Y1 and Y2 to "stop fighting" and to "get down." Both youths continued to strike each other in the head and face as they continued to move towards the wall near the youths' rooms. DJCO 2 applied the foot block shoulder drag technique to take Y1 to the ground. As Y1 went down into a prone position on the floor, Y2 continued to attempt to get to Y1 to continue the assault while DJCO 2 was in between the two youths. When DJCO 2 observed Y2 attempting to get to Y1, while he was on the ground, she kept Y2 at bay by pushing him in the chest with both of her hands.

While DJCO 2 was holding Y2 at bay, DJCO 1 unholstered her OC spray and yelled "OC clear." DJCO 1 then deployed a one second burst directed at Y2's face.<sup>2</sup> Y2 then went down to the floor and into a prone position. DJCO 3 assisted DJCO 1 in securing Y2 in handcuffs. Y1 was not affected by the OC deployment. Responding staff directed all uninvolved youth to return to their rooms.

DJCO 4 arrived to assist and escorted Y2 to the Unit YLA showers for decontamination once the room was cleared. Y2 began decontamination at 8:52 p.m., within seven minutes of the OC deployment. The decontamination was supervised by DJCO 4, DJCO 5, and DJCO 6. Y2 was provided with clean clothing, and his contaminated clothing was bagged and labeled accordingly.

## Lawful Requirements for Use of OC

In determining whether a particular use of force was appropriate, courts analyze the use of force "under the Fourth Amendment's prohibition against unreasonable seizures using the framework articulated in *Graham v. Connor*."<sup>3</sup> The reasonableness of a seizure turns on whether the use of force was "objectively reasonable in light of the facts and circumstances confronting [the user of force], without regard to their underlying intent or motivation."<sup>4</sup>

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<sup>1</sup> All information regarding the incident is taken from DJCO reports and video provided to the OIR. All information regarding statements made or commands given were taken from reports because the video contains no audio.

<sup>2</sup> In her Use of Force report, DJCO 1 indicated that the distance from which she deployed the OC spray was "5 to 6 feet." This video footage does not support DJCO 1's Use of Force Report. The distance between DJCO 1's outstretched arm and Y2's face at what appears to be the moment of deployment, is much closer to two feet. At the time of the incident the OC Procedure, Procedure Manual Item 3-1-056, did not proscribe minimum or maximum distances for the deployment of OC spray. The Procedure has since been amended to prohibit deployments from less than three feet or more than 10 feet. (Procedure Manual Item 3-1-056 II(C)(5) (a) Use of OC Spray)

<sup>3</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>4</sup> *Graham v. Connor* (1989) 490 U.S. 386, 397; *Blankenhorn v. City of Orange* (9th Cir. 2007) 485 F.3d 463, 477.

Reasonableness is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."<sup>5</sup>

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."<sup>6</sup> The second step is to measure "the governmental interests at stake by evaluating a range of factors."<sup>7</sup> Finally, the third step is to balance the quantum of force used on the individual against "the government's need for that intrusion to determine whether it was constitutionally reasonable."<sup>8</sup>

### Quantum of Force

Assessing the quantum of force used requires analyzing the nature and quality of the intrusion on the individual's Fourth Amendment interests, which, in turn, requires the fact finder to evaluate both the type of force inflicted, and the amount of force used.<sup>9</sup>

### Type of Force Used

In this incident, the force used was Oleoresin Capsicum (OC), commonly known as pepper spray. OC is an oily organic resin derived from the fruit of plants in the Capsicum genus, such as chili peppers.

The Ninth Circuit has clearly held that pepper spray is a form of "force capable of inflicting significant pain and causing serious injury."<sup>10</sup> "Pepper spray 'is *designed* to cause intense pain,' and inflicts 'a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,' as well as 'disorientation, anxiety, and panic.'"<sup>11</sup> As such, pepper spray is regarded as "intermediate force" that, "while less severe than deadly force, nonetheless present[s] a significant intrusion upon an individual's liberty interests."<sup>12</sup>

### Recommendation

Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.

### Amount of Force Used

The amount of "intermediate force" (OC) used in this case was minimal. There was a single deployment of OC. The reports and video reflect that the deployment was one second in length and directed at Y2's face. The deployment of OC occurred while Y2 was advancing towards Y1 (who was in a prone position on the floor, being shielded somewhat by DJCO 2) to continue the assault.

Some courts have also held that the failure to act by not properly decontaminating a person exposed to OC can rise to the level of a constitutional violation.<sup>13</sup> Such is not the case here. Staff ensured that the length of time that the youth felt the effects of the OC was limited. As soon as the youths were secured,

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<sup>5</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>6</sup> *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

<sup>7</sup> *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

<sup>8</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>9</sup> *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

<sup>10</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>11</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>12</sup> *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

<sup>13</sup> *Wilson v. Bucato* (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S.Dist.LEXIS 218539.

Y2 was escorted to the Unit YLA showers to decontaminate. Y2 began decontamination within seven minutes of the OC deployment.

### Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”<sup>14</sup> In evaluating the government’s interest in the use of force, courts look to: “(1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.”<sup>15</sup>

### Severity of the Crime at Issue

The crimes at issue in this incident were violent crimes of assault and battery. Under California law, assault and battery are misdemeanor offenses.<sup>16</sup> However, battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.<sup>17</sup> The felony battery charge focuses on the actual injury inflicted, while the felony assault charge focuses on the force used and not whether the force produced great bodily injury. “The crime of assault by means of force likely to produce great bodily injury is completed before any injury is inflicted.”<sup>18</sup> “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”<sup>19</sup> Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”<sup>20</sup>

Here, the video and reports show that Y1 and Y2 were striking each other in the head and face with closed fists. When DJCO 1 deployed the OC, Y1 was in a prone position on the floor and Y2 was attempting to continue to assault him, which could result in serious injury. The assaults by Y1 and Y2 should be considered severe.

### Whether the Suspect Posed an Immediate Threat to the Safety of the Officers or Others

Courts have said that the most important element of the *Graham* factors is whether the suspect poses an immediate threat to the safety of the officers or others.<sup>21</sup> Here, the reports make clear that Y2 posed an immediate threat to Y1. Both Y1 and Y2 were actively engaged in assaulting each other when DJCO 2 pulled Y1 away and onto the ground. Y1 assumed the prone position by laying on his stomach. Y2, however, continued to advance and attempted to get to Y1 while he was on the ground. Y2 continued to pose an immediate threat to Y1 as DJCO 2 attempted to block Y2’s access to Y1. DJCO 2 tried to hold Y2 at bay by continuously pushing him away from Y1. Y2 continued to try and get to Y1 until DJCO 1 deployed the OC spray. These facts establish that but-for DJCO 1’s intervention, Y2 would have continued his attempt to assault Y1. Therefore, at the time of the OC deployment, Y2 posed an immediate and ongoing threat to Y1.

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<sup>14</sup> *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

<sup>15</sup> *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

<sup>16</sup> Pen. Code, §§ 240, 242, 243(a).

<sup>17</sup> Pen. Code, §§ 242, 243(d), 245(a).

<sup>18</sup> *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

<sup>19</sup> *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

<sup>20</sup> *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S.Dist.LEXIS 198653.

<sup>21</sup> *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432.

### Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight

While Y2 was not attempting to evade the DJCOs, he was actively resisting their attempts to take control of him by refusing to comply with their commands and submit to their authority. DJCO 1 directed both youths to “stop fighting” and to “get down.” Both youths ignored these commands and continued their mutual assault. DJCO 2 then physically separated the two youths by applying the foot-block shoulder drag on Y1 to get him onto the ground. However, Y2 advanced towards Y1 to continue to try and strike him further. Even when DJCO 2 tried to keep Y2 at bay by pushing him away from Y1, Y2 continued to try and advance towards Y1. It was only after Y2 was sprayed with OC spray that he submitted to the DJCOs’ authority and laid down on the ground in the prone position.

### Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if force used was excessive, courts “balance the gravity of the intrusion on the individual against the government’s need for that intrusion.”<sup>22</sup> Put another way, does the government’s need for the force used, based on the severity of the crime, the threat to safety, and the resistance of the subject, outweigh the type and amount of force used?

The Ninth Circuit has said that the law is clearly established “that police officers employ excessive force in violation of the Fourth Amendment when they use pepper spray upon an individual who is engaged in the commission of a non-violent misdemeanor and who is disobeying a police officer's order but otherwise poses no threat to the officer or others.”<sup>23</sup> That is not the situation that confronted the DJCOs in this incident.

As previously stated, the youths were engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and they clearly disobeyed the DJCOs’ order to get down and continued to fight. The most important distinction, however, is the fact that when Y2 continued to strike at Y1, Y2 clearly posed a threat to Y1.

The youths involved in the fight were under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect them from harm. Prior to the deployment of OC, Y2 posed an immediate threat to Y1, as well as to staff. He continued to advance towards Y1 even when Y1 was prone on the floor, being shielded by DJCO 2. The harm that could have occurred to Y1 from further strikes by Y2 justified the deployment of OC when Y2 continued to advance towards Y1. Thus, the single one-second deployment of OC targeted at Y2 was justified when considering each of the above factors.

## Compliance with Department Procedure

### State Law

The State of California has set forth requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.<sup>24</sup> Those requirements include that the policies mandate that chemical agents only be used when there is an imminent threat to the youth's safety or the safety of others and only when de-escalation efforts have been unsuccessful or are not

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<sup>22</sup> *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

<sup>23</sup> *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

<sup>24</sup> Cal. Code Regs., tit. 15, § 1357 – Use of Force.

reasonably possible;<sup>25</sup> that the policy outline the facility's approved methods and timelines for decontamination from chemical agents including that youth who have been exposed to chemical agents shall not be left unattended until that youth is fully decontaminated or is no longer suffering the effects of the chemical agent;<sup>26</sup> that the policy define the role, notification, and follow-up procedures required after a use of force incident involving chemical agents for medical, mental health staff and parents or legal guardians;<sup>27</sup> and that the policy provide for the documentation of each incident of use of chemical agents, including the reasons for which it was used, efforts to de-escalate prior to use, youth and staff involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.<sup>28</sup>

## Department Procedure

### Imminent Threat and De-escalation

The Probation Department has two procedures that address the use of OC by DJCOs in the course and scope of their duties.<sup>29</sup> The OC procedure provides that OC spray may “only be used when there is an imminent threat to the youth’s safety and/or the safety of the officer or others and only when de-escalation efforts have been unsuccessful or are not reasonably possible.”<sup>30</sup> This verbiage is consistent with state law.

The video and reports regarding this incident make clear that Y2 posed an imminent threat.

DJCO 1 attempted to verbally de-escalate the situation directing the youths to “stop fighting” and to “get down.” DJCO 2 was successful at separating the two youths by taking Y1 to the ground, however, Y2 continued to advance on Y1. DJCO 2 then positioned herself in a way that was intended to prevent Y2 from being able to reach Y1, however, Y2 continued to try and reach Y1. Finally, DJCO 2 used her hands to push Y2 away as he attempted to get to Y1. However, Y2 pushed DJCO 2’s hands away and continued to try to get past her to get to Y1. It is at this point that DJCO 1 warned Y2 that she would deploy OC spray by stating “OC clear!” Despite the DJCOs’ attempts to de-escalate, Y2 continued to try and advance towards Y1. Ultimately, the DJCOs attempts to verbally and physically de-escalate the situation, prior to DJCO 1’s deployment of OC, proved to be unsuccessful.

### Decontamination

The Probation Department’s OC Procedure requires that “[f]or youth exposed to OC spray, through a direct spray or over spray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.”<sup>31</sup> The OC Procedure further states that youth shall be placed, “fully

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<sup>25</sup> Cal. Code Regs., tit. 15, § 1357(b)(2).

<sup>26</sup> Cal. Code Regs., tit. 15, § 1357(b)(3).

<sup>27</sup> Cal. Code Regs., tit. 15, § 1357(b)(4).

<sup>28</sup> Cal. Code Regs., tit. 15, § 1357(b)(5).

<sup>29</sup> Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;

Procedure Manual Item 3-1-015 Use of Force – Facilities.

<sup>30</sup> Procedure Manual Item 3-1-056 I(C) General Information.

<sup>31</sup> Procedure Manual Item 3-1-056 II(F)(3) Decontamination/Aftercare Procedures. (The Department’s Use of Force Policy, Procedure Manual Item 3-1-015 VIII(E) Medical and Mental Health Considerations, has been renumbered and amended to include language that decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.)

clothed, into a shower, at a sink, or on the patio with the garden hose, allowing cold water to freely fall onto the youth until the youth no longer feels the effects of the OC spray.”<sup>32</sup>

According to the reports, Y2 came into direct contact with, and was affected by, the OC spray. As soon as both youths were secured, Y2 was escorted to the YLA Unit showers to decontaminate. The reports state that Y2 began decontamination seven minutes following the OC deployment.

DJCO 1 and DJCO 4 escorted Y2 for decontamination, which began at 8:52 p.m. and ended at 9:12 p.m. DJCO 3’s main Special Incident Report (SIR) narrative indicated that DJCO 5 and DJCO 6 “supervised the decontamination process for [Y2].” DJCO 5 indicates that he “assisted with [Y2] shower as he needed to be supervised because he was pepper sprayed.” DJCO 6 reported that he “assisted DJCO [5] in the supervision of [Y2] decontamination process...”

The OC Procedure also states that the youth will then remove contaminated clothing and be issued clean clothing. The contaminated clothing shall be placed in a marked plastic bag.<sup>33</sup> The reports indicate that Y2 was issued fresh clothing and that his soiled clothing was properly bagged and labeled accordingly. The main SIR, DJCO 1, and DJCO 5’s narratives, indicate that “[Y2] was given clean clothing and his contaminated clothing was bagged.” DJCO 4’s narrative reported that Y2 “was given new clothing.” Lastly, DJCO 6 indicated in his narrative that he “place[d] the youth’s soiled linen in a bag and labeled it.” DJCO 3’s Use of Force for Y2 also indicate “yes” to the statements “contaminants placed in water-soluble bag,” “bag labeled,” and “new clothing/linen issued.”

Staff are also required to be with “the youth throughout the entire decontamination process.”<sup>34</sup> The main SIR states that DJCO 5 and DJCO 6 supervised Y2 during decontamination. The supplemental report prepared by DJCO 6 states that Y2 “voluntarily ended his decontamination.” DJCO 5 also reported that the “decontamination procedure ended at the request of the youth.” These statements imply that DJCO 5 and DJCO 6 were present for the youth to alert to the fact that he was voluntarily ending his decontamination.

Although the written narratives by DJCO 5, and DJCO 6 imply that they were present for the entirety of Y2’s decontamination, it remains unclear whether each DJCO was continuously present throughout the entire decontamination process. A straightforward statement would be more helpful to the reader of their reports. For example, DJCO 4 indicated in his report that he “stood by to supervise [Y2’s] decontamination until relieved by Duty Officer (DO) [Supervising Juvenile Correctional Officer (SJCO) 1] and Institutional Security Staff.” As a result, it is understood that DJCO 4 was not present for the entire decontamination process.

### *Recommendation*

Update the portion of the Use of Force/Restraint SIR form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate which DJCO(s) stayed with each youth during the entire decontamination process.

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<sup>32</sup> Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

<sup>33</sup> Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

<sup>34</sup> Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.



### Notification and Procedures Required After Use of Force Incidents

The OC Procedure requires that a DJCO who discharges an OC canister notify his or her supervisor as soon as possible.<sup>35</sup> The OC Procedure also makes clear that “[t]he staff member who sprayed the individual is responsible for advising medical personnel or others of the decontamination procedures.”<sup>36</sup> The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.<sup>37</sup> Lastly, while the OC Procedure requires that the youth must be referred to Mental Health staff immediately following decontamination, it does not specifically identify whose responsibility it is to ensure that this section of the procedure is followed.<sup>38</sup>

DJCO 4’s SIR narrative indicates that the Duty Officer (an SJCO) was on scene, and aware of the deployment of OC, because the SJCO relieved DJCO 4 during the decontamination process.

The main SIR and Use of Force reports indicate that the medical unit was notified of the incident within three minutes of the deployment of OC. DJCO 7’s SIR narrative confirms that she “called the Medical Unit at 20:48...” The reports also indicated that Y2 was seen by medical staff approximately 30 minutes after the OC deployment. Y2 was cleared of all injuries.

DJCO 1 indicated in the main SIR that she notified Y2’s grandmother by phone call at approximately 9:00 p.m.

Finally, the main SIR indicates that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident at approximately 20:40. DJCO 7 confirmed, in her SIR narrative, that she is the one who called “the Clinical Evaluation and Guidance unit at 20:49.”

### Documentation

Department procedure related to use of force provides that any DJCO involved in, or a witness to, a use of force, which includes the use of Chemical - Oleoresin capsicum (OC) spray, shall write and submit a Special Incident Report (SIR).<sup>39</sup> Further, the procedure requires a SIR and Restraint Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use or reasons why de-escalation was not reasonably possible, youths and staff involved, the date, time and location of use, a complete description of decontamination procedures, and identification of any injuries and medical treatment.<sup>40</sup>

DJCO 3 completed the main SIR for this incident and six other DJCOs prepared supplemental incident reports. Although the main SIR indicates that DJCO 1 deployed her OC spray, it fails to provide any indication as to why DJCO 1 sprayed Y2. Similarly, neither DJCO 3’s main SIR nor DJCO 2’s SIR narrative indicate that after DJCO 2 took Y1 to the ground, Y2 continued to try to assault Y1. Additionally, DJCO 2 and DJCO 3’s reports also fail to indicate that DJCO 2 attempted to protect Y1 by pushing Y2 away and that Y2 pushed her hands away and continued to try to get at Y1. This contact immediately preceded

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<sup>35</sup> Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

<sup>36</sup> Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

<sup>37</sup> Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

<sup>38</sup> Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

<sup>39</sup> Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

<sup>40</sup> Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

the deployment of the OC spray and appears to be a key reason for the deployment, as such it should have been included in the reports.

Additionally, the OIR noted an inconsistency between DJCO 1's report and the provided video. DJCO 1 prepared a use of force report and indicated that the distance from which she deployed the OC spray was "5 to 6 feet." The video footage does not support DJCO 1's Use of Force Report. The distance between DJCO 1's outstretched arm and Y2's face, at what appears to be the moment of deployment, is much closer to two feet.

### *Recommendation*

Provide additional training reminding supervisors of the importance of making sure that DJCOs' reports are accurate and complete. Supervisors should also be reminded of their role in making sure that inconsistencies in, or between, reports are addressed before reports are approved.

The main SIR report does lay out the activities that occurred after the uses of force with the exception of whether staff members remained with Y2 throughout the decontamination process.

## Conclusion

A review of the SIRs and Use of Force report establish that the use of force (OC spray) by DJCO 1 was within law and policy. The main SIR and video show that had DJCO 1 not deployed force, Y2 may have caused serious injury to Y1. When Y1 was on the ground, in a prone position, Y2 attempted to continue his assault of Y1. DJCO 1 used verbal commands, and DJCO 2 physically placed herself in between Y1 and Y2, to de-escalate the situation. DJCO 1 deployed OC spray only after attempts to gain compliance from Y2 failed.

## Recommendations

1. Update PMI 3-1-056 to specifically state that OC spray is classified as an intermediate level of force.
2. Update the portion of the Use of Force/Restraint SIR form relating to Pepper Spray and Decontamination to add an entry field that requires the report writer to specifically indicate which DJCO(s) stayed with each youth during the entire decontamination process.
3. Provide additional training reminding supervisors of the importance of making sure that DJCOs' reports are accurate and complete. Supervisors should also be reminded of their role in making sure that inconsistencies in, or between, reports are addressed before reports are approved.