OIR Use of Force Review

UOF Review 2-15-22 JH Unit H



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Contents

Summary of Facts1
Lawful Requirements for Use of OC2
Quantum of Force
Type of Force Used2
Amount of Force Used3
Governmental Interest
Severity of the Crime at Issue
Whether the Suspect Posed an Immediate Threat to the Safety of the Officers or Others4
Whether the Suspect was Actively Resisting Arrest or Attempting to Evade Arrest by Flight
Balancing the Force Used Against the Need for Such Force4
Compliance with Department Procedure5
State Law5
Department Policy5
Imminent Threat and De-escalation5
Decontamination6
Notifications and Procedures Required After Use of Force Incidents7
Documentation7
Use of Force Review Board
Conclusion
Recommendations9

Summary of Facts

On February 15, 2022, at approximately 8:23 a.m., Y1 walked into the day area in Unit H at Juvenile Hall during school. As he was walking, Y1 abruptly turned to his left towards Y2, who was sitting at a desk in front of the Unit H staff desk, and began to punch Y2 in the head with closed fists. ¹ Deputy Juvenile Correctional Officer (DJCO) 1 called a Code 2 over the radio and directed all youths in the day area to "get down on the floor."² As Y1 attempted to punch Y2, Y2 got up from his desk and backed away from Y1, towards the staff desk. DJCO 2, who was positioned in between Y2's desk and the staff desk yelled for Y1 to "stop, get down," but he ignored her directives. DJCO 2 grabbed Y1's shirt in an effort to restrain him, however Y1 resisted, and used his body weight to force DJCO 2 towards the wall as she struggled to control Y1. DJCO 2 then attempted to guide Y1 "to the ground to stop him from punching" Y2, "but he refused to comply." Eventually DJCO 2 was able to bring Y1 down onto the floor, but Y1 continued to struggle and prevent himself from being placed in a prone position on the floor by using his knees and arms to hold himself up.

DJCO 1 commanded Y2 to get down on the floor. Y2 complied by crouching on his hand and knees in front of the staff desk as DJCO 1 called a Code 3 over the radio.³

DJCO 3 then responded from the adjoining unit to assist DJCO 2 in restraining Y1, by taking control of Y1's right arm, applying an accordion squeeze on Y1's right wrist, and using body weight to force him to the ground. Y1 then yelled out to Y2, "That's for my dead homie. Fuck you, Strawberry. You guys killed my homie."⁴ DJCO 1 also applied an accordion squeeze for approximately 3-5 seconds as Y1 continued to struggle.

Y3, who had been sitting on the carpet (and until this point, outside of the view of the security camera), then stood up without permission and ran towards Y2 with the intention of assaulting him. Sensing the imminent assault, Y2 positioned himself on his back and began kicked up at Y3 in an attempt to keep him back. As Y3 continued punching Y2, DJCO 1 removed her Oleoresin Capsicum (OC) Spray and pointed it at Y3. DJCO 1, according to her report, told the youth to "Get down on the floor. Stop fighting or you will be sprayed." Y3 continued to punch Y2. DJCO 1 yelled "OC clear" before deploying a one-second burst of OC spray towards Y3's face from her position behind the staff desk, approximately four feet away. As DJCO 4 arrived, Y3 retreated and went into prone position on the floor with his hands behind his back. DJCO 4 then placed Y3 into handcuffs. DJCO 4 and DJCO 5 escorted Y3 to Unit G to start the decontamination process. During the decontamination, DJCO 4 and DJCO 5 were switched out with DJCO 6 and DJCO 7. Y3 started the decontamination process and ended the process by his choice. Y3 was provided clean clothing, and the contaminated clothing was placed in a water-soluble bag and labeled. Both medical and the Clinical Evaluation & Guidance Unit (CEGU) were notified, and the three youths were examined. A Supervising Juvenile Correctional Officer (SJCO) notified Y3's mother that he was involved in a Use of Force (UoF) restraint/OC spray incident.

¹ 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.

² A Code 2 indicates that there is a fight in progress. ³ A Code 3 indicates that staff needs assistance.

⁴ "Strawberry", according to the SIR prepared by DJCO 1, "is a disrespectful term towards the street gang [Ready at War, aka] RAW."

DJCO 2 was also able to place Y2 into handcuffs. DJCO 8 then crossed Y1's legs and folded them backward towards his buttocks for approximately 55 seconds. Once Y1 gave a commitment to follow directions and stop resisting, DJCO 8 returned Y1's legs to their outstretched position.

After all the youths were removed from the room, staff then escorted Y1 and Y2 back to their rooms. The entire incident lasted approximately five minutes and forty-five seconds from start to finish.

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*."⁵ 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."⁶

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."⁷

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁸ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁹ 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."¹⁰

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.¹¹

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."¹² "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."¹³

⁵ Young v. County of Los Angeles (9th Cir. 2011) 655 F.3d 1156.

⁶ Graham v. Connor (1989) 490 U.S. 386, 397; Blankenhorn v. City of Orange (9th Cir. 2007) 485 F.3d 463, 477.

⁷ Young v. County of Los Angeles (9th Cir. 2011) 655 F.3d 1156.

⁸ Davis v. City of Las Vegas (9th Cir. 2007) 478 F.3d 1048, 1054.

⁹ Davis v. City of Las Vegas (9th Cir. 2007) 478 F.3d 1048, 1054.

¹⁰ Young v. County of Los Angeles (9th Cir. 2011) 655 F.3d 1156.

¹¹*Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

¹² Young v. County of Los Angeles (9th Cir. 2011) 655 F.3d 1156.

¹³ Young v. County of Los Angeles (9th Cir. 2011) 655 F.3d 1156.

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."¹⁴

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 spray) used in this case was minimal. In total, DJCO1 deployed a one-second burst of OC at Y3 in order to stop the assault on Y2. The burst was deployed from approximately four feet away and in the direction of Y3's face.

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.¹⁵ Such is not the case here. Staff ensured that the length of time the youth felt the effects of the OC was limited. The video establishes that only approximately two minutes elapsed from the time the OC was deployed and the time that Y3 was escorted from the day area to begin the decontamination process.

Governmental Interest

Intermediate force is a "significant level of force that must be justified by the governmental interest involved."¹⁶ 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."¹⁷

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 either misdemeanor or felony offenses depending on the severity.¹⁸ Battery involving the infliction of serious bodily injury and assault by means of force likely to produce great bodily injury are both felony offenses.¹⁹ A felony battery charge focuses on the actual injury inflicted, while a 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 inflicted."²⁰ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."²¹ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."²²

Here, the reports show, and the video footage corroborates, that Y1 and Y3 were engaged in punching Y2 with closed fists. Y2 only responded with defensive actions to push Y3 away from him. Additionally,

¹⁴ Young v. County of Los Angeles (9th Cir. 2011) 655 F.3d 1156.

¹⁵ Wilson v. Bucato (E.D.Cal. Dec. 7, 2023, No. 1:23-cv-00023-HBK (PC)) 2023 U.S.Dist.LEXIS 218539.

¹⁶ Bryan v. MacPherson (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁷ Graham v. Connor (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁸ Pen. Code, §§ 240, 242, 243(a).

¹⁹ Pen. Code, §§ 242, 243(d), 245(a).

²⁰ People v. Hopkins (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²¹ People v. Hopkins (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

²² Reaza v. County of Riverside (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S.Dist.LEXIS 198653.

Y3's attack on Y2 occurred immediately as Y1 was being detained on the ground nearby, giving the inference of a coordinated attack between Y1 and Y3.

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

The Ninth Circuit Court of Appeal has 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.²³ The reports for this incident, corroborated by the video footage, make clear that Y3 posed an immediate threat to Y2 by continuously throwing throw closed fist punches towards his face. According to the reports, Y3 ignored commands to "get down on the floor" and a warning that he would be sprayed if he didn't stop. These facts establish that but for DJCOs' intervention, the assault of Y2 would have continued. DJCO 1's deployment of OC was intended to stop Y3's continued assault, with closed fists, on Y2. At the time that OC was deployed, Y3's assault clearly posed an immediate and ongoing threat to Y2's safety.

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

While the youths in this incident were not attempting to evade the DJCOs, they were clearly resisting arrest by failing to comply with the DJCOs commands. DJCO 1 indicated in her report that she gave commands to Y3 to stop prior to the deployment of OC. DJCO 1 even warned Y3 that if he did not stop fighting that he would be sprayed. While Y3 was not attempting to evade the DJCOs, he was clearly refusing to comply with DJCO 1's commands to stop and get down. The fact that Y3 continued to fight after the OC was deployed showed that he was willfully refusing to comply with force necessary to get him to submit to DJCO 1's authority to take him into custody.

DJCO 1's decision to deploy OC spray towards Y3 to stop the assault on Y2 was impliedly corroborated by DJCO 3. While DJCO 1 was in the process of deploying her OC, DJCO 3 also drew her OC canister preparing to deploy OC spray towards Y3. According to DJCO 3's SIR, she "yelled out 'OC Clear' and was about to spray however [DJCO 1] sprayed from behind the desk."

Balancing the Force Used Against the Need for Such Force

In order to determine whether force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²⁴ 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."²⁵ That is not the situation that confronted DJCO 1 in this incident.

As previously stated, Y3 was engaged in, at a minimum, a violent misdemeanor, and potentially a violent felony, and clearly disobeyed the DJCOs' order to get down and continued to assault Y2. The most

²³ Chew v. Gates (9th Cir. 1994) 27 F.3d 1432.

²⁴ Espinosa v. City & County of San Francisco (9th Cir. 2010) 598 F.3d 528.

²⁵ *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

important distinction, however, is the fact that by continuing his assault on Y2, Y3 clearly posted a threat to Y2.

The victim of these assaults, Y2, was under the custody and care of the Probation Department. As such, the Probation Department had an obligation to protect him from harm. At the time of the deployment of OC, Y3 posed an immediate threat to Y2. The harm that could have occurred to Y2 from closed-fist strikes justified the use of a one-second burst of OC, particularly considering Y3's refusal to follow commands to stop.

Compliance with Department Procedure

State Law

The State of California has set forth the requirements that a facility, which authorizes the use of chemical agents as a force option, must have in their policies and procedures.²⁶ 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 reasonably possible;²⁷ 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;²⁸ 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;²⁹ 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.³⁰

Department Policy

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.³¹ 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."³² This verbiage is consistent with state law.

As detailed previously, Y3's continued throwing of closed fist punches towards the head and body area of Y2 was an imminent threat to the safety of Y2. DJCO 1 attempted to de-escalate the situation by commanding Y3 to "Get down on the floor. Stop fighting or you will be sprayed." However, Y3 ignored DJCO 1's commands. As a result, DJCO gave another notice to Y3 that she was about to deploy OC spray

²⁶ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁹ Cal. Code Regs., tit. 15, § 1357(b)(4).

³⁰ Cal. Code Regs., tit. 15, § 1357(b)(5).

³¹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities; Procedure Manual Item 3-1-015 Use of Force – Facilities.

³² Procedure Manual Item 3-1-056 I(C) General Information.

by yelling "OC clear." DJCO 1 then deployed a one second burst of OC while Y3 was still assaulting Y2. Clearly, the use of OC occurred during an imminent threat and only after attempts at de-escalation failed.

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."³³ The OC Procedure further states that youth shall be placed, "fully 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."³⁴

DJCO 1's report indicates Y3 was sent to Unit G showers for decontamination after all three youths involved in the altercation were secured and all non-involved youths were sent down to their rooms. A review of the video, and timeline included with DJCO 1's report, shows that Y3 was escorted to begin the decontamination process within approximately two minutes of the OC deployment.

DJCO 1's report indicates that Y3 was escorted to the showers by DJCO 4 and DJCO 5. According to DJCO 4's SIR, after arriving at the showers, he removed the handcuffs and Y3 "began decontamination." DJCO 4 then indicated that because he had some OC on him, that DJCO 6 and DJCO 7 "took over the 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 disposed of in a marked plastic bag.³⁵ DJCO 5 completed an SIR, indicating that once they arrived at the showers, Y3's handcuffs were removed and Y3 stepped into the shower. According to DJCO 5's SIR, the decontamination was supervised by DJCO 4 and DJCO 6. DJCO 5's SIR goes on to indicate that as Y3 was decontaminating, Y6 provided Y3 "with clean new clothes to change into once decontamination was completed. The decontaminated clothing was placed in a water-soluble bag and labeled."

Staff are also required to be with "the youth throughout the entire decontamination process."³⁶ A review of the records related to this use of force indicate that both DJCO 4 and DJCO 5 left during Y3's decontamination, leaving DJCO 6 and DJCO 7 to take "over supervision of" Y3. However, no reports appear to have been prepared by DJCO 6 and DJCO 7 related to their involvement in supervising Y3 during the 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.

³³ 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.)

³⁴ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

³⁵ Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

Notifications 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.³⁷ 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."³⁸ The responsibility for contacting the youth's parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁹ 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 accomplish this task.⁴⁰

The reports indicate that a SJCO was present on scene and aware of the deployment of OC. DJCO 1's report documented that "[m]edical was called for all three youth at 0827 hours," and a review of various reports indicated that all three youth were seen by medical between 0837 and 0842. DJCO 1's SIR also indicated that a supervisor attempted to notify Y2 and Y3's mother by leaving a voicemail for each, while a DJCO notified Y1's grandfather of his restraint. Finally, DJCO 1's SIR indicated that "CEGU was notified of the physical altercation between all youth at 0833 hours," and that all three youths were seen by CEGU.

Recommendation

Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.

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).⁴¹ Further, the procedure requires that a SIR and Use of Force Report must include a clear and factual justification for the use of OC, efforts to de-escalate prior to use and reasons why de-escalation was not reasonably possible, the youth and staff involved, the date, time and location of use, decontamination procedures applied, and identification of any injuries and medical treatment.⁴²

DJCO 1 completed the main SIR for this incident and seven other DJCOs prepared supplemental incident reports. The main SIR narrative identified the youths involved as well as the actions taken by DJCO 1 prior to the use of force. DJCO 1's report also identified the reason for the deployment of OC and the effect of the OC on the affected youths. DJCO 1 also completed the use of restraint/force and pepper spray portions of the SIR. Additionally, all DJCOs who used force submitted Use of Force reports.

The decontamination process was detailed extensively in the report prepared by DJCO 1. However, since DJCO 1 was not present for the decontamination, the events recited in her report are secondhand, not from her own observation. There appears to be no firsthand information about what happened after DJCO 4 and DJCO 5 left the decontamination process.

³⁷ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁸ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁹ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

⁴⁰ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

⁴¹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

⁴² Procedure Manual Item 3-1-056 II(E)(2) Notification and Documentation.

The report regarding the decontamination process should be authored by someone with personal knowledge of the events. Staff who supervise, or who are involved in supervising, youths during the decontamination process should prepare a report documenting their involvement with each step of the decontamination process.

Recommendation

Update PMI 3-1-056 to require that all staff members assisting with decontamination, even of uninvolved youth affected by overspray, prepare reports documenting their role in the decontamination process.

The documentation related to this incident clearly laid out the activities that occurred before, during, and after the use of force, except for the observation that occurred during decontamination.

Use of Force Review Board

On March 24, 2022, the Department's Use of Force Review Board Convened and reviewed this use of force incident. The Board's Recommendation also recognized that it appeared "DJCO [5] and DJCO [4] switched with DJCO [6] and DJCO [7] just prior to the decontamination process. However, the UOF packet does not include SIR documentation from either DJCO [6] or DJCO [7]." The Board recommended "that staff who supervise youth during the decontamination process complete an SIR documenting the steps of the decontamination process." More specifically, the Board recommended "that staff who witness that the steps were followed should document compliance with the procedure in an SIR."

Conclusion

A review of the SIR and Use of Force reports, and video, make clear that the use of OC spray by DJCO 1 was a reasonable and necessary response to an attack by Y3 on Y2, and necessary to overcome Y3's resistance to commands to stop the assault. The use of OC spray by DJCO 1 was therefore within law and Department policy. However, it appears that while the findings of the Board were concurred with, no further action was taken.

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. Update PMI 3-1-056 to clearly articulate who has the responsibility to refer youth to Mental Health Staff following decontamination. This change would put DJCOs on notice as to whose responsibility it is to ensure that Mental Health staff are contacted.
- 4. Update PMI 3-1-056 to require that staff who supervise, or who are involved in supervising, youth during the decontamination process prepare a report documenting their involvement with each step of the decontamination process.