

OIR Use of Force Review

UOF Review 6-19-22 YGC



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Summary of Facts

On June 19, 2022, at approximately 1:02 p.m., staff observed Y1 and Y2 standing close to each other and noted that they both appeared to be agitated.¹ Y1 and Y2 were in each other's faces and were exchanging words. Y1 and Y2 suddenly began to exchange closed-fist punches.

Deputy Juvenile Correctional Officer (DJCO) 1 immediately responded and attempted to intervene, while DJCO 2, radioed for assistance and called a Code 2.² DJCO 1 attempted to control Y1 by utilizing a foot block. However, Y1 continued to kick and punch at Y2 even as DJCO 1 positioned himself in between them. According to their reports, DJCO 1 and DJCO 2 "made several attempts to separate and contain both youth to no avail."

DJCO 1 then warned that he would deploy Oleoresin Capsicum (OC) spray by stating, "OC clear." The youths continued to fight, and DJCO 1 provided another "OC clear" warning. He then deployed a two-second burst of OC directed at both Y1 and Y2 from five feet away. At the same time, DJCO 2 deployed a half-second burst of OC directed at Y2's face. After these OC deployments, both youths went to the floor.

DJCO 1 placed Y1 in handcuffs. DJCO 3 arrived and assisted DJCO 2 in placing Y2 in handcuffs. A Supervising Juvenile Correctional Officer (SJCO) 1 was on scene and directed staff to escort Y2 to the gym showers for decontamination. DJCO 1 escorted Y1 to the Unit 600 showers for decontamination. Both youths began decontamination at 1:05 p.m. and were provided with clean clothing upon completion. Y2 would later report to DJCO that he believed his finger was broken because he was unable to move it. Y2 was later seen by medical staff, and later transported to Anaheim Global Medical Center for further treatment.

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*."³ 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."⁴

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."⁵

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the "the quantum of force used."⁶ The second step is to measure "the governmental interests at stake by evaluating a range of factors."⁷ Finally, the third step is to balance the quantum of force used on the

¹ All information regarding the incident is taken from DJCO reports as no video of the incident was provided.

² A Code 2 indicates that there is a fight in progress.

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

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

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

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

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

individual against “the government's need for that intrusion to determine whether it was constitutionally reasonable.”⁸

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.⁹

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.”¹⁰ “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.’”¹¹ 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.”¹²

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. There was a total of two deployments of OC, with Y2 being sprayed more than once. The deployment by DJCO 1 was for two seconds and was directed at both youths. The deployment by DJCO 2 occurred simultaneously with DJCO 1's deployment and was a half-second spray directed only at Y2. The reports indicate that both the deployments of OC occurred while Y1 and Y2 were fighting.

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.¹³ Such is not the case here. Staff ensured that the length of time that the youths felt the effects of the OC was limited. As soon as the youths were secured, they were both taken directly to the showers to begin the decontamination process. According to the reports, both youths began decontamination within three minutes of the first deployment of OC.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹⁴ 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

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

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

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

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

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

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

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

others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight."¹⁵

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.¹⁶ 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.¹⁷ 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."¹⁸ "It is enough that the force used is likely to cause serious bodily injury. No injury is necessary."¹⁹ Courts have said that punching is "capable of inflicting significant pain and causing serious injury."²⁰

Here, the reports show that Y1 and Y2 were exchanging closed-fist punches when DJCO 1 and DJCO 2 deployed the OC. Based on these facts, the force used by the two youths was likely to cause serious bodily injury. Following the deployment, both youths stopped fighting, and staff were able to secure them in handcuffs.

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.²¹ Here, the reports make clear that Y1 and Y2 were arguing and began to punch each other. Even after DJCO 1 positioned himself in between the youths, Y1 continued to punch and kick at Y2. As a result, Y1 and Y2 now not only posed an immediate threat to each other as they exchanged closed-fist punches, but they also posed a threat to DJCO 1 who was in between them. DJCO 1 warned the youths twice that OC would be deployed, and yet they continued to fight. These facts establish that at the time of the deployments of OC, the youths posed an immediate and ongoing threat to each other.

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

While the youths were not attempting to evade the DJCOs, both youths were actively resisting the DJCOs' attempts to take them into custody by continuing to punch and kick at each other while DJCO 1 was attempting to control Y1.

Ultimately, to place the combative youths into custody, the DJCOs had to do more than simply place passive youths into handcuffs. The DJCOs had to deploy OC to get the youths on the ground so that they could take them into custody.

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

¹⁶ Pen. Code, §§ 240, 242, 243(a).

¹⁷ Pen. Code, §§ 242, 243(d), 245(a).

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

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

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

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

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.”²² 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.”²³ 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 by continuing to fight, the youths clearly posed a threat to each other.

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 each deployment of OC, Y1 and Y2 posed an immediate threat to each other. Additionally, the harm that could have occurred to either youth from closed-fist strikes justified the two deployments of OC when the youths continued to fight and struggle even after being warned twice that OC would be deployed. Thus, each deployment of OC 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.²⁴ 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;²⁵ 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;²⁶ 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;²⁷ 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

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

²³ *Silva v. Chung* (9th Cir. 2018) 740 F.App’x 883.

²⁴ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(3).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(4).

involved, the date, time and location of use, decontamination procedures applied and identification of any injuries sustained as a result of such use.²⁸

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.²⁹ 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.”³⁰ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2 posed an imminent threat to each other and were already physically fighting each other when staff began to intervene.

Both DJCO 1 and DJCO 2’s reports indicate that they tried to separate the youth. According to DJCO 1’s report, he “initially was able to control youth [1] by using the foot block.” However, one of the youths made continued attempts to hit the other with punches and kicks despite DJCO 1 being positioned between them. According to DJCO 1, both he and DJCO 2 “made several attempts to separate and contain both youth to no avail.”

Neither DJCO 1 nor DJCO 2’s reports indicate that they gave any commands to verbally de-escalate the situation.

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.”³¹ 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.”³²

According to the reports, Y1 and Y2 came into direct contact with, and were affected by the OC spray. As soon as the youths were secured, Y1 was escorted to the Unit 600 showers, and Y2 was escorted to the gym showers to decontaminate. According to the reports, both youths began decontamination within three minutes of the first OC deployment.

²⁸ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁹ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

³⁰ Procedure Manual Item 3-1-056 I(C) General Information.

³¹ 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.)

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

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.³³ Both youths were provided with clean clothing, and their soiled clothing was placed in bags and labeled accordingly.

Staff are also required to be with “the youth throughout the entire decontamination process.”³⁴ The report prepared by DJCO 2 states that she and DJCO 3 “were in direct supervision of [Y2] until [she] was relieved by SJCO [1]” approximately an hour and ten minutes after Y2’s decontamination ended.

DJCO 1’s report indicates that he escorted Y1 to unit 600. DJCO 1 goes on to indicate that “[u]pon arrival, I removed the handcuffs and [Y1] then began the decontamination process at 13:05. [Y1] continued to decontaminate until 13:29.” The report does not, however, indicate that DJCO 1 stayed “with the youth throughout the entire decontamination process,” nor does it indicate who escorted the youth back to his unit after the decontamination process was complete.

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 decontamination process.

Notifications and Procedures 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.³⁵ 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.”³⁶ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁷ 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.³⁸

The main SIR indicates that an SJCO was on scene and notified medical staff of the incident. Noticeably absent from the reporting is any documentation of the time that Y1 saw medical staff. The SIR does state the time that Y2 was seen by medical. There is also no explanation for why medical was notified regarding Y1 at 13:20, while notification regarding Y2 was not made until 13:57, nearly 40 minutes later. Y2 was transported to Juvenile Hall and medical staff there determined that he needed to be sent to the hospital for treatment.

The main SIR indicates that staff notified the mothers of both Y1 and Y2 of the OC exposure.

Finally, the report establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified of the incident and that a referral was left for CEGU staff to see both youths the following day.

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

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

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

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

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

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

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).³⁹ 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.⁴⁰

DJCO 1 completed the main SIR for this incident and two other DJCOs prepared supplemental incident reports. The main SIR identified the youths involved as well as the actions taken by DJCO 1 prior to the use of force. However, both DJCOs reports were generally vague on describing certain key facts. For example, DJCO 2's report indicated that both youths "began throwing closed fist punches at each other" but failed to indicate whether any of the punches landed, and if so, where they landed on the body.

The main SIR contained a description of DJCO 1's attempt to separate and contain both youths by utilizing a foot block and positioning himself between both youths. DJCO 2's report indicates that she tried to separate the youths however, one of the youths continued kicking and punching. As a result, their attempts at de-escalating the situation were unsuccessful.

DJCO 1 and DJCO 2 also each prepared a Use of Force report to document the deployments of OC spray. However, DJCO 1 only prepared a Use of Force report for Y1, and did not prepare one for Y2, even though both youths were the target of his deployment of OC Spray. In addition, DJCO 1 in his Use of Force report, indicated that he deployed OC spray twice. However, his narrative states that he deployed OC spray only once and directed it at both Y1 and Y2. This internal inconsistency, coupled with the lack of video surveillance, makes supervisory review of this incident more difficult.

While DJCO 1's report also lays out many of the activities that occurred after the use of force, it also fails to mention whether staff members remained with Y1 throughout the decontamination process, if, and when, Y1 was seen by medical staff, and why there was a delay in notifying medical to see Y2.

It is incumbent on supervisors to ensure that all DJCOs who witnessed, or were involved in, an event document their involvement. This includes ensuring that a Use of Force report is completed for each youth that is a target of an OC deployment, clearly documenting efforts at de-escalation, documenting when youths are seen by medical staff and explaining when delays in notifications occur.

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.

³⁹ Procedure Manual Item 3-1-015 VIII(F) DJCO Responsibilities.

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

Use of Force Review Board

On October 27, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident.

The Board recognized that DJCO 1 failed to complete a Use of Force form for Y2, which was not consistent with Department Procedure related to use of force. The Board also indicated that "[t]here is no mention of 5-minute safety checks in any of the narratives."

The Board recommended that "staff identified to write the main body SIR cover all events with all youth involved within the report, with other staff providing supplementals as to their specific involvement." "Further, the information in the report should match what is included in the UOF forms and vice-versa."

Conclusion

A review of the SIRs and Use of Force reports establishes that use of force by DJCO 1 and DJCO 2 was within law and policy. It is clear from the reports that had the DJCOs not deployed the OC, Y1 and Y2 would have continued to fight, resulting in potentially serious injuries. Although the use of force in this incident was justified, the documentation, as reflected in the reports, did not conform to department policy.

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 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.