

OIR Use of Force Review

UOF Review 2-1-22 JH Unit H



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Summary of Facts

On February 1, 2022, at approximately 8:21 a.m., during in unit school, Deputy Juvenile Correctional Officer (DJCO) 1 passed out school packets and left to conduct a room check, leaving several youths supervised by DJCO 2, who was seated behind the staff desk. Y1 and Y2 were seated at desks positioned next to each other, with their backs towards the staff desk.

As DJCO 1 was leaving the day room area, Y1 watched her. Immediately after DJCO 1 left the day room, Y1 and Y2 began to communicate with each other. Both Y1 and Y2 then stood up from their desks and ran to assault Y3, punching him in the face.¹

DJCO 2 pressed the duress button behind the staff desk and yelled at the youths to “stop, get down.” DJCO 1 immediately returned to the day room and ran to the area where the altercation was taking place. DJCO 1 unholstered her OC (oleoresin capsicum) spray and yelled “stop, get down several times,” however Y1 and Y2 continued their assault, while Y3 fought back in self-defense.

For the safety of the youths uninvolved in the assault, DJCO 1 yelled, “OC clear” and deployed a one second burst of OC spray from three feet away towards the facial areas of Y1, Y2, and Y3 in an attempt to stop the assault. Two of the youths were hit in the eyes with the OC, and one youth was hit in the face and neck. Following the deployment of OC, all three youths stopped fighting and laid on the ground. Two uninvolved youths were hit with overspray.

Following the deployment of OC, multiple Supervising Juvenile Correctional Officers (SJCO) were present and provided instructions to escort the youths for decontamination. All five youths began the decontamination process within three and a half minutes of the OC deployment. The youths were provided with new clothing, and the soiled clothing was placed in a water-soluble bag and labeled.

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*.”² 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.”³

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.”⁴

There are three steps in conducting the balancing required by *Graham*. The first step is to assess the “the quantum of force used.”⁵ The second step is to measure “the governmental interests at stake by

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. In addition, for this particular incident, the video footage did not capture the fight or the use of OC spray.

² *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

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

⁴ *Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156.

⁵ *Davis v. City of Las Vegas* (9th Cir. 2007) 478 F.3d 1048, 1054.

evaluating a range of factors.”⁶ 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.”⁷

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.⁸

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.”⁹ “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.’”¹⁰ 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.”¹¹

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 one burst of OC gel deployed by DJCO 1. The reports indicate that the single deployment of OC occurred while the youths were actively fighting each other. The burst lasted one second and was deployed from approximately three feet away and in the direction of the faces of all three youths. After the single deployment of OC gel, the youths stopped 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.¹² Such is not the case here. Staff ensured that the length of time the youths felt the effects of the OC was limited. Only three and one-half minutes elapsed from the time OC was deployed and the time that the last youth began the decontamination process. As soon as Y1, Y2, and Y3 were secured, they were taken directly to a shower or to use a patio hose to begin the decontamination process. Y3 was escorted from the room approximately two minutes and forty seconds after the OC spray was deployed. Y2 was escorted from the room approximately two minutes and forty-five seconds after the OC spray was deployed, and Y1 was escorted from the room three minutes and fifteen seconds after the OC spray was deployed.

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

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

⁸ *Miller v. Clark County* (9th Cir. 2003) 340 F.3d 959, 964.

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

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

The two youths affected by overspray were also taken for decontamination as soon as possible. The reports and video footage reflect that Y4 was escorted from the room within approximately a minute and forty seconds after the OC spray was deployed and Y5 was escorted from the room approximately two minutes after the OC spray was deployed.

Governmental Interest

Intermediate force is a “significant level of force that must be justified by the governmental interest involved.”¹³ 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.¹⁴

Severity of the Crime at Issue

The crimes at issue in this incident are violent crimes of assault and battery. Under California law, assault and battery are misdemeanor offenses.¹⁵ 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.¹⁶ 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.”¹⁷ “It is enough that the force used is likely to cause serious bodily injury. No injury is necessary.”¹⁸ Courts have said that punching is “capable of inflicting significant pain and causing serious injury.”¹⁹

Here, the reports show that the youths were engaged in striking another youth in the facial area. Y1 and Y2 punched Y3 in the face, and as a result of the physical altercation Y3 was placed on head injury protocol by medical staff.

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.²⁰ Here, the reports make clear that Y1 and Y2 initiated the physical altercation when they simultaneously struck Y3 in the face. The reports establish that the youths continued to fight even after given several commands from two different DJCOs to “stop, get down.” These facts establish that but for the DJCOs’ intervention, the physical altercation would have continued. Therefore, at the time of the use of OC, Y1 and Y2 posed an immediate and ongoing threat to Y3.

¹³ *Bryan v. MacPherson* (9th Cir. 2010) 630 F. 3d 805, 826.

¹⁴ *Graham v. Connor* (1989) 490 U.S. 386 [109 S.Ct. 1865, 104 L.Ed.2d 443].

¹⁵ Pen. Code, §§ 240, 242, 243(a).

¹⁶ Pen. Code, §§ 242, 243(d), 245(a).

¹⁷ *People v. Hopkins* (1978) 78 Cal.App.3d 316 [142 Cal.Rptr. 572].

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

¹⁹ *Reaza v. County of Riverside* (C.D.Cal. Oct. 26, 2022, No. 5:20-cv-01188-MEMF (SPx)) 2022 U.S.Dist.LEXIS 198653.

²⁰ *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 the youths were not attempting to evade the DJCOs, they were clearly refusing to comply with DJCO 1 and DJCO 2's commands to stop fighting and get down. The youths also continued to fight after DJCO 1 warned that she would deploy OC. These facts show that Y1 and Y2 failed to submit to the DJCOs authority to take them into custody. Ultimately, to place the non-compliant combative youths into custody, DJCO 1 and DJCO 3 had to do more than simply place compliant youths into handcuffs.

Balancing the Force Used Against the Need for Such Force

Finally, in order to determine if force was excessive, courts "balance the gravity of the intrusion on the individual against the government's need for that intrusion."²¹ 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."²² 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 "stop, get down." The most important distinction, however, is the fact that Y1 and Y2 were assaulting Y3, clearly posing a threat to Y3.

The youths involved in the fights 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, the youths posed an immediate threat to each other. Additionally, the harm that could have occurred to one or more of the involved youths from closed strikes to the facial area justified the use of a one second burst of OC when the youths failed to follow commands to "stop" and "get down."

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.²³ 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;²⁴ 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;²⁵ 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

²¹ *Espinosa v. City & County of San Francisco* (9th Cir. 2010) 598 F.3d 528.

²² *Silva v. Chung* (9th Cir. 2018) 740 F.App'x 883.

²³ Cal. Code Regs., tit. 15, § 1357 – Use of Force.

²⁴ Cal. Code Regs., tit. 15, § 1357(b)(2).

²⁵ Cal. Code Regs., tit. 15, § 1357(b)(3).

parents or legal guardians;²⁶ 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.²⁷

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.²⁸ 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.”²⁹ This verbiage is consistent with state law.

The reports regarding this incident make clear that Y1 and Y2, acting in concert, assaulted and attacked Y3. Y1 and Y2 struck Y3 in the face, prompting Y3 to fight back. As a result, at the time of the use of OC, there was an imminent threat to the safety of all three youths, particularly Y3.

DJCO 1 and DJCO 2 both attempted to de-escalate the situation by providing several verbal commands to all three youths to “stop” and “get down.” None of the de-escalation efforts were successful at ending the assault. As a result, DJCO 1 deployed a one second burst of OC while the battery was occurring and only after attempts at verbal de-escalation failed.

Decontamination

The Probation Department’s OC Procedure requires that “[f]or youth exposed to OC spray, through a direct spray or overspray, decontamination measures must be undertaken as soon as practical after a youth is subdued and restrained.”³⁰ 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.”³¹

A review of the timeline included with DJCO 1’s report and the video footage of the incident shows that only three and one-half minutes elapsed from the time OC was deployed to the time that the last youth began the decontamination process.

According to DJCO 1, Y1, Y2 and Y3 were affected by the OC spray, and Y4 and Y5 were affected by overspray due to the incident occurring in a somewhat confined area. DJCO 1’s report indicates that

²⁶ Cal. Code Regs., tit. 15, § 1357(b)(4).

²⁷ Cal. Code Regs., tit. 15, § 1357(b)(5).

²⁸ Procedure Manual Item 3-1-056 Oleoresin Capsicum (OC) Spray – Facilities;
Procedure Manual Item 3-1-015 Use of Force – Facilities.

²⁹ Procedure Manual Item 3-1-056 I(C) General Information.

³⁰ 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.)

³¹ Procedure Manual Item 3-1-056 II(F)(4) Decontamination/Aftercare Procedures.

after each affected youth was secured, they were taken directly to separate Unit showers or patio areas to begin 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.³² According to the provided reports, all affected youths were provided with clean clothing and all contaminated clothing was placed in water-soluble bags and labeled.

Staff are also required to be with the youth throughout the entire decontamination process.³³ Only two of the reports (those related to Y2) specifically state that a particular DJCO stayed with the youth during the entire decontamination process. However, the remaining reports indicate that all other youth ended or concluded their decontamination “by choice.” This implies that someone was present during the decontamination process in order for each youth to alert staff to the fact that they were voluntarily ending their decontamination. However, it is unclear whether a DJCO was continuously present during each youth’s decontamination.

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.

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.³⁴ 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.”³⁵ The responsibility for contacting the youth’s parent or legal guardian is assigned to the SJCO/Duty Officer or designee.³⁶ 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.³⁷

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.

DJCO 1’s report indicates a SJCO was on scene and aware of the deployment of OC. DJCO 1’s report also indicates that the “[m]edical unit was notified of the physical altercation.” The reports completed by the involved DJCOs documented the time medical staff was notified and the time medical staff saw each youth. The reports also indicated that all the guardians for the youth were notified and when they were notified. Finally, the timeline establishes that the Clinical Evaluation Guidance Unit (CEGU) was notified

³² Procedure Manual Item 3-1-056 II(F)(7) Decontamination/Aftercare Procedures.

³³ Procedure Manual Item 3-1-056 II(F)(10) Decontamination/Aftercare Procedures.

³⁴ Procedure Manual Item 3-1-056 II(E)(1) Notification and Documentation.

³⁵ Procedure Manual Item 3-1-056 II(F)(13) Decontamination/Aftercare Procedures.

³⁶ Procedure Manual Item 3-1-056 II(F)(18) Decontamination/Aftercare Procedures.

³⁷ Procedure Manual Item 3-1-056 II(F)(17) Decontamination/Aftercare Procedures.

of the incident and youth involved shortly after the Code 2³⁸ was called. The reports for Y1 and Y2 also indicate that they were seen by mental health within 72 hours.

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 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.⁴⁰

DJCO 1 completed the main SIR for this incident and twelve 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. All DJCOs who used force submitted Use of Force reports, and DJCO 1 also completed the use of restraint/force and pepper spray portions of an SIR for each of the exposed youth. DJCO 1's report also identified the reason for the deployment of OC and the effect of the OC on the affected youths.

The reports and included timeline detailed the activities that occurred after the use of force except for whether someone remained with each youth throughout the entire decontamination process.

Use of Force Review Board

On March 10, 2022, the Department's Use of Force Review Board convened and reviewed this use of force incident. The Board found no areas in need of corrective action.

Conclusion

A review of the SIR and Use of Force reports established that the force used by DJCO 1 was within law and policy, and therefore appropriate. It is clear from the reporting that had DJCO 1 not deployed force, the youths would have continued to strike each other, possibly resulting in serious injuries.

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.

³⁸ A Code 2 indicates that there is a fight in progress.

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

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