



TO: MEMBERS OF THE SAN FRANCISCO POLICE COMMISSION

FROM: ALAN SCHLOSSER, SENIOR COUNSEL, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

RE: USE OF FORCE STAKEHOLDER GROUP

DATED: FEBRUARY 29, 2016

I appreciate the opportunity to participate in the Use of Force Stakeholder Group as a representative of the American Civil Liberties Union of Northern California (ACLU). I want to say at the outset that the draft General Orders appear to reflect a significant shift in the policies and practices of SFPD, a shift that the ACLU supports. The emphasis placed on “sanctity of life,” “thoughtful communication,” “de-escalation,” “proportionality,” and “duty to intervene” signals a change in policing tactics that is welcome and much-needed to restore and strengthen community trust in the SFPD.

However, these policy changes and policy declarations will only be real if they are accompanied by equally significant changes in training, improved data collection and tracking, and increased transparency and accountability. At our stakeholders’ meeting, Deputy Chiefs Sainez and Chaplin acknowledged this, and reported that these kinds of changes are being made concurrently with the drafting of the revised policies. But the Commission – and the public – must be assured that the systems of training, data collection and accountability are in place when the new policies are introduced, and there should be transparency surrounding the details and implementation of those systems.

I will cover three areas that we would like the Commission to take into consideration: 1) two recommendations with respect to draft General Order 5.01; 2) our strong recommendation that the Commission separate its consideration of the General Orders from the Bureau Order with respect to Conducted Energy Devices (CED’s) and to **not** consider the introduction of CED’s at this time; and 3) a concern that we want to raise with the Commission concerning the meet and confer process that is apparently scheduled at the conclusion of this policy enactment process.

A. DGO 5.01

1. **Minimal Level of Force Necessary** -In the current 1995 version of this DGO, it is stated very prominently that the use of force policy is to have “**minimal** reliance upon the use of physical force”, and that physical force shall be employed “to the degree **minimally** necessary to accomplish a lawful police task”. (Emphasis

added). The ACLU believes that this principle of employing the minimal level of force necessary is critical, and it appears to have been deleted from the current draft. This is troubling. The primacy that this draft DGO places on “de-escalation” and “thoughtful communication” indicates a recognition that a goal of these reforms is to shift the SFPD from a “warrior” mentality to a “guardian” mentality. As explained by the Deputy Chiefs in our meeting, this is an attempt to “slow down” the situation, to create “time and distance” in confrontations, and to train officers so they are considering alternatives to physical force. Implicit in all of this is that officers should be relying on the minimal use of force necessary to meet the policing needs of any situation. **It raises the question of why this concept was dropped from the current draft.** We urge the Commission to restore that language and the important principle that it reflects.

2. **Specific Standards for Use of Less Lethal Weapons** - With the range of weapons available to SFPD officers, some of which can result in serious injury, it is important that the officers be given specific standards for the use of different “less lethal” weapons. We believe that such standards should be explicit in the DGO, as well as taught during training. The current draft does not consistently and specifically provide such standards. For example, there is no standard provided for when an officer should use a baton to administer a strike (III.C. at p. 5). With respect to bean bags – a weapon that resulted in permanent brain damage to Oakland Occupy protestor Scott Olsen – the standard is too vague: aggressive subject who poses an immediate threat to another person or the officer in accordance with Department training.” (III.D.1 at p.6) It should be tightened to read “an immediate threat of **serious physical injury** to another person or the officer....”

B. BUREAU ORDER FOR CONDUCTED ENERGY DEVICE (CED)

At the stakeholders’ meeting, the arguments against adding CEDs to the weapons available to SFPD were articulated in some detail by, among others, Jennifer Friedenbach of the Coalition on Homelessness and Terry Bohrer of the CIT Working Group. I will not repeat their arguments except to say that the ACLU agrees with them. Whether termed “lethal” or “less lethal”, the evidence is clear that these are dangerous weapons that pose a risk of serious injury or death. Those risks are heightened for vulnerable groups such as the mentally ill, pregnant women, persons with heart conditions, and (with biased policing still a persistent problem) communities of color.

The ACLU believes that the CED Bureau Order should not be considered at the same time as the proposed General Orders, but rather be considered at a later date. I have subsequently learned that the Commission is voting on this at your meeting on March 2nd, and I therefore submit these comments in support of the proposal being made in Agenda item #4.

In our view, the addition of CEDs to the weaponry used by SFPD (even in limited circumstances) is inconsistent with the revisions that are being made to the General Orders on use of force, and also to the overall spirit that underlie these changes as articulated by Mayor Lee and Chief Suhr. The message that is being sent is one of change

- the SFPD is adopting new best practices that are going to make a significant difference. This is reflected in the fact that these best practices are set forth on the very first page of the draft Order 5.01: "Sanctity of Human Life", "Thoughtful Communication", "De-Escalation", "Proportionality", and "Duty to Intervene." But this message - both to SFPD officers and the community - is, in our view, undercut and eroded by adding a new dangerous weapon at the same time. If the City is serious about emphasizing de-escalation tactics and thoughtful communication, why is it arming officers with a new weapon that is so controversial and has led to a number of deaths?

Our concern goes beyond the message that is being sent. These policy changes are taking place along with other changes that are equally significant: changes in training, changes in data collection, and changes in accountability. We commend the City for taking this holistic approach, which is absolutely necessary if these policies are going to mean more than words on paper. But in light of these changes, it seems premature to be deciding that there is a need for the introduction of this dangerous weapon.

For example, changes and improvements in the SFPD Early Intervention System are part of the reforms that are being implemented. The Chief's and Commission's February 19th letter to the Mayor contains a pledge to "expand the Early Intervention System (EIS) to identify and intervene immediately when an officer develops behaviors which are indicators of questionable practices", which by definition includes questionable uses of force. (<http://sfmayor.org/modules/showdocument.aspx?documentid=484>) The ACLU was heavily involved from 2003 to 2007 in the effort to create EIS and win passage of the EIS General Order by the Commission. It was our understanding from that effort and from the language of the order itself that what is being promised again now is exactly what the order has already required for the last nine years.

Therefore, before new weapons options are considered and possibly introduced, the Commission should make sure that EIS is in place and fully functioning to track all uses of force. If the system has not been working as intended over the past nine years, the Commission should find out why, so that it- and the public - can be assured that any changes will become operational. It's the difference between asking the communities most impacted by police uses of force and most skeptical of the SFPD to "just trust us" as opposed to a "we're willing to show you too" attitude that demonstrates a sincere desire to earn that trust with a commitment to transparency and accountability.¹

C. MEET AND CONFER

Although this was not discussed at the stakeholders meeting, the proposed time line that we received from Sgt. Kilshaw concludes on April 13th with this final entry:

¹ In addition to EIS, the SFPD should be routinely providing comprehensive data reports to the Commission and public -- as it once did -- on the department's uses of force. If the SFPD is still doing that, we have been unable to easily locate those reports which used to track trends in types of force used over time and even included station and assignment specific breakdowns. Also, making public the last two years of the required quarterly and annual statistical reports on how the EIS has been operating would provide a much-needed glimpse into how the tracking systems have been operating to date. (See DGO 3.19, Sec. IX.A.)

“Police Commission vote on policy to move forward to meet and confer.” It thus appears that the Commission is planning to adopt the policy, and then engage in a meet and confer process with the POA. This raises some questions and concerns.

First, although I am not a labor lawyer, the case law seems clear that the changes in the Use of Force policy that are being proposed are not a mandatory subject of the meet and confer process under the Meyers-Milias-Brown Act (MMBA). This very question was before the court in *San Jose Peace Officers Association v. City of San Jose*, 78 Cal.App. 3d 935 (1978). San Jose had adopted a new policy restricting the use of firearms by police officers. The court held that such a policy was not “primarily about working conditions”, but rather “primarily a matter of public safety and therefore not a subject of meeting and conferring under the MMBA.” *Id* at 947. The court concluded: “The use of force policy is as closely akin to a managerial decision as any decision can be in running a police department, “surpassed only by the decision as to whether force will be used at all.” *Id* at 946 (emphasis added). *See also, Berkeley Police Assn. v. City of Berkeley*, 76 Cal. App. 3d 931 (1977) (police department does not have to meet and confer with police employee association before instituting new policies regarding the investigation of citizen complaints against police officers).

Whether San Francisco should be engaging in a meet and confer process with the POA about these fundamental policy changes is not just a legal question, but one that goes to the heart of the process that has been set up to provide broad public input and diversity of views. The POA is actively participating in the stakeholders group, and stated at the meeting that they would be presenting to the Commission additional comments and recommendations, expert opinions, and a poll of all their members. Why, after this process concludes and after the Commission acts, will there be another opportunity for the POA to sit down at a bargaining table to negotiate about this policy with the City? And this is not just a question of getting a second bite of the apple. The meet and confer process is not open and transparent, which the Mayor and the Commission have endorsed as important features of this decision-making process. And unlike discussions with other stakeholders, the City is required to meet and confer until impasse is reached, which then may lead to other alternative procedures.

The requirements of the MMBA are important protections for the ability of public employees to engage in bargaining around wages, hours and working conditions. But, as the courts have recognized, “[t]he forum of the bargaining table with its postures, strategies, trade-offs, modifications and compromises is no place for the delicate balancing of different interests: the protection of society from criminals, the protection of police officers safety, and the preservation of all human life, if possible.” *San Jose*, 78 Cal. App. 3d at 948 (citation omitted) In *Building Material & Construction Teamsters Union v. Farrell*, 41 Cal. 3d 651 (1986), the Supreme Court reached the same conclusion:

Decisions involving the betterment of police-community relations and the avoidance of unnecessary deadly force are of obvious importance and directly affect the quality and nature of public services. *The burden of requiring an employer to confer about such fundamental policy decisions clearly outweighs the*

benefits to employer-employee relations that bargaining would provide.” Id at 655-56. (Emphasis added).

Virtually every public statement by the Mayor, the Police Chief, and by this Commission demonstrates that the changes being made in the Use of Force policies are “fundamental policy decisions”. The collaborative review that the City has called for with the federal government in itself shows that. Therefore, in the interests of transparency, the Commission should publicly respond to these questions:

1. Is it the City’s position that these policy changes are a mandatory subject of bargaining under the MMBA? If not, has the City voluntarily agreed to participate in the meet and confer process? If so, why?
2. What is the scope of the matters that will be discussed in the meet and confer sessions, and what procedures will be followed if there is an impasse?
3. Does the scheduling of the meet and confer process after the vote on the policies by the Commission mean that the policies adopted at a public hearing are subject to revision as a result of the City’s negotiations with the POA?

It is important for the integrity of this entire policy process for the public to have answers to these questions.

Thank you again for inviting our participation in this process.

Kilshaw, Rachael (POL)

From: Alan Schlosser <aschlosser@aclunc.org>
Sent: Monday, May 02, 2016 4:37 AM
To: Kilshaw, Rachael (POL)
Subject: FW: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order
Attachments: SFPD 5 01 Use of Force corresponding comments 032116.docx; SFPD CEDSpecial Operations Bureau Order 032116 corresponding comments.docx

Sgt. Kilshaw: I am attaching GO 5.01 (see Notes 7,21 and 22) and the Bureau Order (see Note 1) with redlined changes in ACLU's positions. Let me know if you have any questions about the changes, although I am on vacation and will only have intermittent email access. Thank you for doing this.

Alan Schlosser

From: Kilshaw, Rachael (POL) [<mailto:Rachael.Kilshaw@sfgov.org>]
Sent: Thursday, April 28, 2016 2:46 PM
To: Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org>
Cc: SFPD, Commission (POL) <SFPD.Commission@sfgov.org>; Sainez, Hector (POL) <hector.sainez@sfgov.org>; Chaplin, Toney (POL) <toney.chaplin@sfgov.org>; O'Brien, Alexa (POL) <alexa.obrien@sfgov.org>; Cabrera, Alicia (CAT) <alicia.cabrera@sfgov.org>; Suzy Loftus <suzyloftus@hotmail.com>; Koski, J Trevor (CAT) <trevor.j.koski@sfgov.org>
Subject: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Good Afternoon:

In preparation for the Commission meetings on May 4th and May 11th when the draft Use of Force policies and the draft Conducted Energy Devices Bureau Order will be discussed, I am putting together a summary for the Commissioner to review that explains the areas in the policies where the stakeholders cannot come to a consensus. I have attached the most recent document where I have listed those areas (03/21/16). Can you please review and confirm that I have accurately conveyed your group's position and that I have included all of your group's positions? If you need to make corrections, please track your changes and send back to me. Once I have all of the stakeholders' comments back, I will create the summary for the Commissioners that includes a cross-reference to the stakeholder's submitted documents, and send a copy to each of you. The comments will also be posted on the Commission's website and sent to the DOJ.

As the meeting is next week, I would like to start working on this over the weekend to have the documents to send to the Commissioners on Tuesday morning at 10 am. Please send your comments to me anytime between now and Monday, May 2nd at 3:00 pm.

Thank you

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ACLU 05/02/16

DGO 5.01, Use of Force, Corresponding Comments (03/21/16 version)

1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were “rapport-building,” “effective,” “non-violent, and “positive.” POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language.
2. SFPD will incorporate the term “crisis intervention” once the DGO on CIT is adopted and the term “crisis intervention” is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term “crisis intervention” now on its website, in its training and in a Police Commission resolution.
3. SFBAR wants the opening paragraph to read: “The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary force. These are key factors in maintaining the legitimacy with the community and safeguarding the public’s trust.”

ACLU, SFBAR, OCC, Public Defender and COH want to use the term “minimal force necessary.” By using the term “reasonable force” throughout the policy and removing “minimal force” as stated in the current DGO 5.01, the Department is taking a step backwards from the current trend in policing nation-wide that goes beyond the standard set in the SCOTUS case *Graham v. Connor*. These members of the stakeholder group believe that the Department has a choice with this policy to let the community know it is committed to going beyond what is required by the law and have higher standards for its officers. They reminded the group that the Mayor, the Chief and the Commission all committed to changing the use of force policy by speaking about the principles in the PERF recommendations.

The POA, OFJ, Pride Alliance, APOA and LPOA concur with the term “reasonable force” being used throughout the policy and oppose the use of the term “minimal force.” Case law does not require officers to use minimal force; the courts require officers to use force that is objectively reasonable. These members of the stakeholder group state that PERF is not the authority on use of force, and is only one of many groups that have opinions on use of force policies, and point out that there is currently intense criticism regarding some of PERF’s recent recommendations on use of force.

There is no consensus on this issue throughout the policy. Anytime the term “reasonable force” is written in the policy or the term “minimal” is proposed by a member of the stakeholder group, the positions described above should be considered.

4. ACLU wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

5. ACLU and OCC do not believe this paragraph should be placed here. ACLU does not have a suggestion for placement.
6. SFDA/BRP, OCC, and Public Defender want a section prohibiting biased policing in this section and want the language to read: “FAIR AND UNBIASED POLICING. It is one of the Department’s guiding principles that policing occur without bias, including the use of force. Members of the Department shall carry out their duties, including with respect to use of force, in a manner free from any bias and to eliminate any perception of policing that appears to be motivated by bias. See DGO 5.17, Policy Prohibiting Biased Policing.” These members do not agree that it should be cross-referenced at the end of the policy because this is a key principle and there is a perception that the application of use of force is done in a biased manner.

POA, OFJ, LPOA, APOA and Pride Alliance recommend listing DGO 5.17, Policy Prohibiting Biased Policing, at the end of this DGO as a cross-reference.

7. The OCC, SFBAR, ACLU and COH recommend changing this sentence to read, “When feasible and safe to do so, officers shall employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance. They state without this change, the language currently written means that officers would not have to attempt de-escalation techniques in three situations, when a subject is: 1) endangering the public or officers, 2) fleeing or 3) destroying evidence.

The POA, OFJ, LPOA, APOA and Pride Alliance concur with the language as written in the current draft and ask if members of the stakeholder group expect officers to attempt de-escalation techniques when the subject is endangering the public or the officer.

8. The stakeholder group cannot reach consensus on whether to use the term “shall, when feasible,” or the term “should, when feasible” throughout the entire document. When the terms “shall, when feasible” or “should, when feasible” are written in the document, the positions described below should be considered.

The OCC, SFBAR, Coalition on Homelessness (COH), San Francisco District Attorney/Blue Ribbon Panel (SFDA/BRP), Public Defender and ACLU want to use the

term “shall, when feasible.” The POA, OJF, Pride Alliance, LPOA and APOA had concerns with this term because “shall” is a mandate, but if an officer cannot perform the action because of safety, someone might judge the situation, using 20/20 hindsight, and opine that the officer would have been able to, and therefore should have, performed the action and discipline the officer.

The POA, OFJ, LPOA, Pride Alliance and APOA want to use the term, “should, when feasible.” OCC, SFBAR, COH, SFDA/BRP, Public Defender and ACLU have concerns with that term and discussed the distinction between their understanding of the two terms: “shall, when practical” means an officer will take the action at a time when it is safe, and “should, when practical” means the officer can think about taking action, but does not have to take the action even if it is safe.

DGO 3.02, Terms and Definitions, defines both terms:

- 1) Shall/Will/Must: mandatory
- 2) Should: permissive, but recommended

9. SFBAR and OCC want a section on Crisis Intervention in the POLICY section. The language should include specific CIT procedures and training. SFPD will incorporate, at minimum, a cross-reference to the CIT DGO once DGO on CIT is adopted.
 10. POA has issues with the entire section of proportionality. They have submitted two written responses along with two Subject Matter Experts’ opinions that include: 1) the underlying offense may be minor, but an officer can use reasonable force to make the arrest, 2) the Department’s list of edged and improvised weapons are all situations where an officer could use deadly force if the suspect threatened the officer, 3) what are the principles of proportionality? and 4) it appears that the Department is stating there is only one acceptable response to a use of force incident.
 11. OCC recommends the language in this section to read: “Officers shall intervene when they reasonably believe another officer is about to use unnecessary or excessive force, or when they witness an officer using unnecessary or excessive, or engaging in other misconduct. Recommended language is underlined.
 12. OCC, ALCU, and SFBAR recommend adding additional language to item #5 to read: “to gain compliance with a lawful order, where the force is proportional to the timing and reasons for the order.” Recommended language is underlined.
- POA, APOA, LPOA, Pride Alliance, and OFJ oppose the recommendation.
13. OCC, SFBAR, CIT working group, ACLU, and COH recommend adding the following language for this section under #6. To prevent a person from injuring himself/herself. “a) Officers shall avoid or minimize the use of force against individuals who are injuring themselves and do not pose a safety risk to officers. b) In situations where some force may be warranted to prevent suicide, officers shall determine whether other tactics are

available to the officer that would cause less injury, and include the language of the prohibition from using lethal force on a person who is only a danger to himself as item c.

POA, OFJ, LPOA, APOA, and Pride Alliance oppose the recommendation. The law allows officers to use force to prevent a person from injuring himself, and the policy prohibits the use of lethal force. These members of the group question what officers are supposed to do to keep a person from hurting himself and get the person the help he needs. POA believes the list of lawful reasons to use force should be a comprehensive list of what is Constitutionally allowed, and training can cover the types of force that are reasonable when dealing with a person who is a danger to himself. POA provided case law that that may cover this area: Glenn vs. Washington City and Adams vs. City of Fremont.

14. OCC and SFBAR recommend adding language about the critical decision making model to this section and recommends the following language be added: "Officers shall use a Critical Decision Making framework in all circumstances in which the use of force might be needed. Officers shall collect information, assess the threats and risk, consider powers, policies, and other obligations, identify options and consider contingencies, and determine the best course of action."

POA, OFJ, Pride Alliance, LPOA, and APOA oppose the recommendation as it requires officers to make decisions and solve problems by using only one method. Additionally, any methods for assisting officers in decision making strategies should be taught in the Academy.

15. ACLU, Public Defender, SFBAR, and OCC believe the language of 835a PC is against the principles of what the department is trying to accomplish in the revised policy. ACLU believes this language is archaic and more aggressive than what the Department is trying to achieve with the policy. ACLU believes that quoting the law sends an incorrect message to the community and the officers that is contrary to the principles of the policy. COH states this statement sends a confusing message to officers about whether to use the principles of de-escalation. SFBAR suggests moving the language but does not have a suggestion about where to place it.

POA, Pride Alliance, and OFJ, LPOA and APOA state this is the law and in the current policy. POA points out officers are currently trained on both the law and de-escalation techniques. POA suggests moving the language about 835a PC to the FORCE OPTIONS section.

16. OCC, SFBAR, SFDA/BRP recommend adding four additional factors to the list of relevant factors, based on California Supreme Court and Ninth Circuit Court cases:
 - What other tactics if any are available to the officer
 - The ability of the officer to provide a meaningful warning before using force
 - The officer's tactical conduct and decisions preceding the use of force
 - Whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis or who is a person with a mental illness.

POA also mentioned the case Bryan vs. McPherson.

17. ACLU, SFBAR, COH and OCC want the policy to state “apply” instead of “consider. These members feel there is a distinction between the two terms: 1) apply means taking an action, and 2) consider means only having to think about the concept.
18. POA disagrees with making the requirements in this section for both officers and supervisors mandatory. There are too many proposed requirements that officers and supervisors must perform in situations that require attention to the incident.
19. SFBAR and ACLU want the policy to list the specific standards for the situations when officers can use a specific force option. SFBAR proposed using language similar to Oakland PD that reads that force is “...justified when reasonable alternatives have been exhausted, are unavailable or are impractical” in each section of the list of force options, or at least in the beginning of this section referring to all force options.

POA, LPOA, OFJ, APOA and Pride Alliance oppose the recommendation because it requires officers to use force based on a continuum, which is not the standard.

20. ACLU, OCC and SFBAR want the language to read “serious injury.”

POA, OFJ, APOA, LPOA and Pride alliance oppose the recommendation. Serious injury has a specific legal definition in PC section 243d, and training does not support the use of ERIWs only when the public is in danger of “serious bodily injury.” The use of an ERIW is the same level of force as an impact weapon.

21. OCC, SFBAR, ~~and Public Defender~~ and ACLU state CEDs should be taken out as a force option and discussed at a later time.

ACLU is opposed to the addition of CED's as a force option. The addition of this weapon that can cause death or serious injury is inconsistent with the changes in the General Orders that emphasize de-escalation, time and distance, and use of minimal force necessary. The recent officer-involved shooting deaths of Mario Woods and Luis Gongora raise serious questions as to whether these principles of de-escalation and time and distance and minimal use of force are being consistently adhered to by SFPD officers. It would be irresponsible for CED's to be added to the force options when the Early Intervention System (EIS) is clearly not functioning as intended and there is a serious lack of transparency with respect to comprehensive use of force data reports.

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COH is opposed to CEDs as force option now and at a later time. COH has submitted written response that states the vertical support for CIT within the Department has not been implemented, and COH feels the support needs to be in place before CEDs are issued. COH also states the deaths and injuries that can result from CEDs as a reason for not implementing them.

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CIT working group and SFDA/BRP take no position on CEDs as a force option. SFDA/BRP may submit a position on CEDs at some point, but the SFPD has not received as of the writing of this summary.

POA, OFJ, Pride Alliance, LPOA, and APOA are in favor of CEDs as a force option.

23.22. OCC, SFBAR, ACLU and COH would like carotid restraint to be prohibited, as proposed in the previous drafts of revised DGO 5.01.

SFDA/BRP and CIT working group take no position on the carotid restraint.

POA, OFJ, LPOA, APOA and Pride Alliance concur with the carotid restraint being a force option.

24.23. POA, OFJ, LPOA, Pride Alliance and APOA do not agree that carotid restraint can only be used in cases of lethal force, especially with a requirement to give a warning. These groups questioned the logic behind using the carotid restraint only in situations where lethal force is justified – why would the Department want an officer to get that close to the subject? The POA mentioned that there has never been a lethal outcome in SFPD with a properly applied carotid restraint. Members of these groups mentioned that the DOJ commended Seattle PD for having the carotid restraint.

25.24. ACLU wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

ACLU 05/02/16

Special Operations Bureau Order, Conducted Energy Devices, corresponding comments
(03/21/16 draft)

1. OCC, SFBAR, and Public Defender and ACLU state CEDs should be taken out as a force option and discussed at a later time. As such, these agencies have not provided recommendations about the CED policy. However, each agency was clear that a lack of recommendations from its group was not to be taken as support or opposition to CEDs as a force option, at this time.

Commented [AS1]:

Commented [AS2R1]:

Commented [AS3]: Is this accurate for OCC and Public Defender???

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ACLU is opposed to the addition of CED's as a force option. The addition of this weapon that can cause death or serious injury is inconsistent with the changes in the General Orders that emphasize de-escalation, time and distance, and use of minimal force necessary. The recent officer-involved shooting deaths of Mario Woods and Luis Goncara raise at the least serious questions as to whether these principles of de-escalation and time and distance and minimal use of force are being adhered to by SFPD officers. It would be irresponsible for CED's to be added to the force options when the Early Intervention System (EIS) is clearly not functioning as intended and there is a serious lack of transparency with respect to comprehensive use of force data reports.

4.

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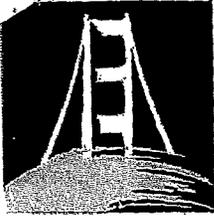
COH is opposed to CEDs as force option now and at a later time. COH has submitted written response that states the vertical support for CIT within the Department has not been implemented, and COH feels the support needs to be in place before CEDs are issued. COH also states the deaths and injuries that can result from CEDs as a reason for not implementing them. However, COH did provide some recommendations for the CED policy.

CIT working group and SFDA/BRP take no position on CEDs as a force option. However, CIT did provide some recommendations for the CED policy. SFDA/BRP may submit a position on CEDs at some point, but the SFPD has not received as of the writing of this summary.

POA, OFI, Pride Alliance, LPOA, and APOA are in favor of CEDs as a force option and would like the policy expanded to include all members of patrol.

2. SFPD will incorporate this language once the DGO on CIT is adopted and the term "crisis intervention" is defined. At this point the DGO is pending.
3. POA recommends the Department use its submitted CED draft policy. The POA is concerned that the Department's policy is too limited in its authorized uses.
4. COH recommends this sentence include stronger language as proposes either: 1) "CEDs are sometimes lethal weapons, and the risk of adverse effects can be higher for some subjects," or 2) CEDs have caused some fatalities and the risk of adverse effects can be higher on some subjects." COH believes the policy should be transparent to officers and the public that CEDS can be lethal.

5. POA, OFJ, LPOA, Pride Alliance, and APOA recommend CEDs for all members of patrol. COH is opposed to all members of patrol having CEDs.
6. CIT working group recommends having more information about AED training in this policy.
7. COH wants the policy to mention that homeless individuals and people on medication are some of the people who may have an adverse reaction to having the CED used on them.
8. POA questions why officers cannot use the CED in the drive-stun mode, which is considered a lesser use of force than deploying the probes.
9. POA, OFJ, APOA, LPOA and Pride Alliance recommend better defining when deployments and activations are determined to be a use of force.
10. POA, OFJ, APOA, LPOA and Pride Alliance want this language to remain and moved to the beginning of the policy.



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Yolanda Jackson

February 29, 2016

Memorandum to San Francisco Police Commission

From: Julie Traun, Chair, Subcommittee on Data Collection and Analysis. Bar Association of San Francisco's (BASF) Task Force on Criminal Justice

Thank you for including BASF's Criminal Justice Task at the stakeholder's meeting of February 23, 2016 to consider the proposed General Orders DGO 5.01, Use of Force, DGO 5.01.1, Use of Force Reporting, DGO 5.02, Use of Firearms and Lethal Force and the Special Operations Bureau Order on Conducted Energy Devices.

BASF's Criminal Justice Task Force:

Last year, the Bar Association gathered a diverse and dedicated group to consider many aspects of the criminal justice system, focusing primarily on policing. Members represent law enforcement, academia, prosecutors, defense and civil rights attorneys, the judiciary and members of the community. The Task Force is comprised of several subcommittees including:

- Data Collection and Analysis
- Bias
- Civilian Oversight
- Body Camera Review
- Grand Juries
- Bail Disparities (newly added in 2016)

I attended the February 23, 2016 Stakeholder meeting as chair of the Data Collection and Analysis Subcommittee. This subcommittee has studied policing research and trends and has met extensively with Chief Robert Warshaw, Compliance Monitor with Oakland Police Department, John Klofas, Ph.D., Professor of Criminal Justice, and Founder and Director of the Center for Public Safety Initiatives at Rochester Institute of Technology, Deputy Chief Jeffrey Marozik and his team at the San Jose Police Department, and we have met repeatedly with Assistant Chief Paul Figueroa, Deputy Chief Danielle Outlaw and Sgt. Tam Dinh of Oakland Police Department. All of these law enforcement experts have contributed many documents for our review as well as their time, expertise and experience with transitions to 21st Century community policing. Our work has not yet concluded for we are scheduled to meet with Richmond Police Department and once again with Oakland Police Department.



Our comments regarding the proposed General Orders are based upon what we have learned to date from our extensive work over the last year and we thank you for the opportunity to share our work with you. Our specific recommendations regarding language are few in number. But some important and overarching concerns are outlined as follows:

TRAINING

First, and as we mentioned during the stakeholder meeting: It is critical that training supports policy. It is confusing to the officers and public alike if the Department fails to revise current training considerably, not just in the Academy but we strongly suggest that retraining is essential for all officers as outlined below.

As noted below, DGO 5.01 describes what is currently referenced in 21st Century policing as “Tactical Disengagement” and we recommend the inclusion of this specific term. The revised DGOs mark an important shift in police policy, but successful implementation requires a shift in culture. Our work with other departments makes clear that a shift in culture is *not* possible in the absence of a serious commitment to training, retraining, oversight, supervision and data collection (which includes analysis and use of data in training, particularly with respect to implicit bias). To move from a “warrior” mindset to a “guardian” mindset requires not just new policy, but a top-to-bottom commitment to integration of these additional components.

Some of the 2015 PERF¹ recommendations suggest **training must** center on:

- How to evaluate the situation
- Make good decision about a wide range of options

Oakland’s Deputy Chief Outlaw more specifically describes OPD’s reform in training this way:

“...There were two key things we did to bring our numbers [use of force incidents and citizen complaints] down and to focus on de-escalation. The first was an emphasis on training to teach officers how to **manage stress** during threatening situations. The “**stress inoculation training**” involves **multiple repetitions** during the training to create “**muscle memory**” and help officers learn to observe, orient, and decide, **all before** they take action, as **second nature**.

...The other key element of our reform...was creating a **culture of self-examination**. That’s the **accountability** piece – making sure that there is a **feedback** loop for **follow-up**. On the training end...in what is a huge paradigm shift, during training we place the officers into a scenarios and say, “Ok, we’re going to asses you.” We don’t advise them in advance, but the evaluator might be **assessing them on how they de-escalate**. It might start out with your

¹ Re-Engineering Training on Police Use of Force, August 2015, Police Executive Research Forum (PERF)



role-player having a bat in hand, being very agitated, very hostile. But at some point, if the officer uses verbal commands and does what we train them to do, the role-player will drop the bat. And now the officer is evaluated on what he does after the bat is dropped and the threat is no longer present.” ...

We also use **scenario-based training in our firearms qualifications** and the scenarios don't always escalate to lethal force.

We also look at crucial incidents in terms of **whether the officers escalated the situation or created the exigency**. If that's the case, it might not be discipline that comes out of it, but there's feedback given so that the officers learn that these are things we don't want to see in the future.”²

Other departments clearly delineate the essential steps to be taken by officers this way:

- Gather information
- Assess the threat and develop a working strategy
- Consider the legal powers the officer has and the policies to be followed
- Identify options
- Take action
- Review outcome, and if necessary, begin the process again until conclusion³

Therefore as noted at the time of the Stakeholders meeting, a change in policy is insufficient. Officers and the public should be aware of the Department's commitment to **retrain** officers and the Department's organizational steps to assure supervision and accountability (See further comments under DGO 5.01.1). Surely the employment of Body-Worn-Cameras is timely and will help considerably as we know behavior by officers as well as subjects improves when each is aware the interaction is being filmed.

We are hopeful that the Department and the Commission will commit to the retraining essential to make these policies work.

General Order 5.01

1. Introductory Paragraph Comments:

As this paragraph is designed to capture the spirit and mission of the Revised Use of Force Policy, we offer a few suggestions from other Departments:

- Oakland includes this language: **“The Department is committed to accomplish the police mission with respect and minimal reliance on the use of physical force.”** Other departments and the growing

² PERF report, pages 54-55.

³ PERF report, page 40



trend nationally is to consistently include language which demonstrates a commitment to using minimal force.

- Nationally, there is growing support for and training on “**tactical disengagement**” a term not used here but we suggest its inclusion. It is a police procedure worthy of inclusion here and captures what appears to be the goal of the new DGO.
- Many departments which have updated their General Orders more recently than San Francisco did so holistically and incorporate by reference other related General Orders. Links to these related orders are provided. Surprisingly, neither the term “**Crisis Intervention**” nor reference to the anticipated new DGO on Crisis Intervention, is included here and both should be referenced, both in the introductory paragraph and subsequent sections.

These three additions may be best accomplished by changing the 3rd sentence to read:

The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using thoughtful communication, tactical disengagement which includes de-escalation principles and crisis intervention before resorting to the use of force whenever practical.

2. Paragraph I, B. THOUGHTFUL COMMUNICATION

In addition, please include the language “make a connection” in addition to “rapport” as suggested by departments in the PERF report.

So, this section should read:

Communication with non-compliant subjects is most effective when officers make a connection, establish rapport, use....

Again, as officers move from a “warrior” or “take control” mindset, retraining (using scenarios and role-playing) is essential to the success of these new policies. As many of the stakeholder officers noted on February 23rd, communication skills do not come naturally to many officers. Some are gifted, many are not. This important observation by the officers makes clear that training (scenario-based) is essential. Officers unable to rely on their communication skills will otherwise resort to force in order to control the situation.



3. Paragraph I, C. DE-ESCALATION

In the second paragraph, the word “should” is used. We suggest the word “**shall**”.

For example, Oakland’s Use of Force Order, III, A. “Verbal Persuasion” states:

“Members, **shall** consider the possibility of any language barriers, noise, other distractions, or disabilities which may impair or frustrate the member’s effort to courteously and clearly communicate with the person.”

The specific possibilities proposed in San Francisco’s DGO are preferable to Oakland’s but the use of the word “**shall**” underscores the Department’s commitment to efforts to de-escalate.

We also suggest the insertion of “calm the subject” in the last sentence, to read: “...but understanding a subject’s situation may enable officers to **calm the subject**, [OR calm the situation] to use de-escalation techniques....”

4. Paragraph I, D. Proportionality.

We take this opportunity to remind the Commission that the success of this directive will depend on: training, including implicit bias training.

We know from our work that a failure in proportionality, combined with implicit bias, too often result in “TPFs” Threat Perception Failures causing the death of unarmed men of color mistakenly believed to be armed. We refer you to the DOJ’s work in Philadelphia which documents this.⁴

Here again is where it is critical to accurately gather and report on data (race etc) and integrate this with training, policy and supervision.

5. Paragraph II, C. UNLAWFUL PURPOSE.

We suggest deleting the word “malicious” which is a legal term limiting investigation to situations in which malice can be proven. Penal Code Section 149 does not include the word “malice” and prosecution (and therefore investigation) is not limited to situations involving malice.

⁴ PERF, page 37



6. Paragraph III. FORCE OPTIONS.

We suggest reincorporating the Department's intention to de-escalate so that this list of force options is not misinterpreted by officers or the public to mean that members are relieved of their obligation to comply with the directives of the policy (thoughtful communication, de-escalation) when the situations described here occur.

By way of example, in Oakland's Use of Force General Orders, as weapons and the protocol for each is described, the department includes language like this:

"The use of an impromptu impact weapon or a weapon of necessity is justified when **reasonable alternatives have been exhausted**, are unavailable or are impractical."⁵

Therefore, it is critical to repeat the directives.

7. Paragraph III, A. 3. PROHIBITED USE OF CONTROL HOLDS.

Carotid restraint generated considerable debate among the stakeholders on February 23rd. The officers reported the control hold is used infrequently (35 times annually) and several advocated for its continued use.

While departments throughout the nation differ, we noted Deputy Chief Toney Chaplin's comments during the meeting are consistent some of the research we've seen. (In response to Lt. Ewins' statement that she has successfully used the restraint, DC Chaplin reminded us that the difference in size of the officer [she is of smaller build than DC Chaplin] can cause the restraint to become a choke hold]. We offer the following research in support of DC Chaplin's concerns:

"In their textbook, Forensic Pathology, Drs. Vincent and Dominick DiMaio observe "in theory, the carotid sleeper will cause rapid unconsciousness without injury to the individual. Unfortunately, in violently struggling individuals, a carotid sleeper hold can easily and unintentionally be converted into a choke hold, as the individual twists and turns to break the hold." (2001, p.274) In the fourteen fatalities reviewed by Dr. E.K. Kowai and the two reviewed by Reay and Eisele, this seems to have been the case.

⁵ OPD Use of Force, III. FORCE OPTIONS THAT DO NOT INCLUDE FIREARMS, Paragraph D.



It is recognized that sudden or severe pressure on the carotid arteries may, in some individuals, cause the heart to stop beating abruptly – a phenomenon that has been described as “reflex cardiac arrest.” (CMC 25). Coronary artery disease and cardiac rhythm disorders are also particularly vulnerable to reflex carotid sinus stimulation and hypoxia, and individuals with underlying cardiac disease will be at greater risk from a neck restraint than others. (Reay and Eisele, 1982, p.256). In addition, in people with diseases that affect the carotid arteries, most commonly atherosclerosis, occlusion of carotid arteries can result in thrombosis or stroke (DiMaio, 2001, p.275). As an example of this, in expert testimony to the RCMP, Dr Reay provided the Commission information about a case involving an instructor at a Florida Police Academy who suffered partial paralysis after the application of a hold in a training exercise. The paralysis was apparently caused by a stroke (Commission for Public Complaints against the RCMP, 1992, p.17). Reay and Eisele postulated that the technique also poses greater risks to the following persons:

- Men over 40
- Persons with seizure disorders
- Mentally disturbed persons
- Street drug users
- Persons taking prescription drugs⁶

General Order 5.01.1

As the historical and ongoing work of the ACLU and OCC is more thorough than that of our Task Force, we likely defer to their knowledge-base regarding policy and proposed DGO 5.01.1. However, we do know from our work, that in addition to developing a sound policy regarding use of force reporting, training and the “feedback loop” as referenced in DC Outlaw’s comments outlined at the beginning of these comments, are critical components to making this policy meaningful to officers and the public.

⁶ Calgary Police Service Neck Restraint Literature Review – Technical Report Canadian Police Research Center (2006), pp 6-7.



The use of force and complaints in Oakland has dropped dramatically (as much as 70%) through a holistic approach which includes strong policies, training, retraining and a partnership with academic professionals that train on implicit bias and review both data and use of force incidents.

Therefore we strongly suggest including – if not in this order – internal policies which incorporate outside review by those specially trained to consider the role implicit bias.

We do offer other limited suggestions:

1. **Paragraph II, b.**

We suggest inserting the words “assess the subject/situation” prior to the word de-escalate. This promotes the spirit of these new orders which asks our officers to slow down, assess the situation and consider the options before using force.

General Order 5.02

1. **Introductory Paragraph:**

We again suggest re-incorporating the same language as amended by us in the introductory paragraph of General Order 5.01 We suggest for all of the same reasons outlined above, to replace the third sentence with the following: **The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using thoughtful communication, tactical disengagement which includes de-escalation principles and crisis intervention before resorting to the use of force whenever practical.**

2. **Paragraph B.1. DE-ESCALATION**

Consistent with the recommendations made to DGO 5.01, we again recommend that in the second paragraph, the word “**shall**” be used in lieu of “**should**.”

Again and by way of example, Oakland’s Use of Force Order, III, A. “Verbal Persuasion” states:

“Members, **shall** consider the possibility of any language barriers, noise, other distractions, or disabilities which may impair or frustrate the member’s effort to courteously and clearly communicate with the person.”

The specific possibilities proposed in San Francisco’s DGO are preferable to Oakland’s, but the use of “**shall**” underscores the Department’s commitment to efforts to de-escalate.



We also suggest the insertion of “calm the subject” in the last sentence, to read: “...but understanding a subject’s situation may enable officers to **calm the subject**, [OR calm the situation] to use de-escalation techniques....”

3. Paragraph B. 2. PROPORTIONALITY

Consistent with our comments regarding DGO 5.01, we take this opportunity to remind the Commission that the success of this directive will depend on: training, including implicit bias training.

We know from our work that a failure in proportionality, combined with implicit bias, too often result in “TPFs” Threat Perception Failures causing the death of unarmed men of color mistakenly believed to be armed. We refer you to the DOJ’s work in Philadelphia which documents this.⁷

Here again is where it is critical to accurately gather and report on data (race etc) and integrate this with training, policy and supervision.

4. Paragraph 3. SUBJECTS ARMED WITH WEAPONS OTHER THAN FIREARMS.

My notes of the Stakeholder’s meeting suggest that we insert the word “**shall**” on line 5, preceding the word, call for additional resources.

In addition, we highly recommend incorporation of training modeling that of countries in which officers do not carry firearms. The PERF report documents well the importance of training without access to firearms. If the subject is not armed with a firearm, the officer should be expected to rely on training in which the subject was subdued in the absence of resort to firearms.

5. Paragraph C. 2. AUTHORIZED USES.

We begin our discussion with an important observation by DC Chief Lanier: “**First and foremost, it’s the change in thinking among the officers [that is important]. The question is not, “Can you use deadly force?” The question is, “Did you absolutely have to use deadly force?”**”⁸

We found our review of Oakland’s Use of Force Order on the use of firearms to be clearer than that proposed by SFPD.

⁷ PERF, page 37

⁸ PERF, page 17



Here is what Oakland includes:

“A. Drawing, Exhibiting and Pointing Firearms.

1. The intentional pointing of a firearm at another person is a use of force. [citing *Bryan v. MacPherson*, 630 F.3rd 805 (9th Cir. 2010)]
2. The drawing, exhibiting and intentionally pointing of a firearm at another person is threatening and intimidating and when unwarranted may cause a negative impression on members. ...”

Importantly, we further suggest inclusion of this language: “No officer shall point a firearm at in the direction of an individual unless there is a reasonable perception of a substantial risk that the situation will escalate to justify lethal force.”

The addition of the specific provisions used by Oakland, coupled with the underlined language, is important for purposes of clarity to both officers and the public.

In addition, my notes of the Stakeholder’s meeting suggest that the word “**should**” from the last line of this paragraph, be replaced with the words “**shall when practicable.**”

6. Paragraph D. 5. MOVING VEHICLES

Our work as a subcommittee did involve a number of conversations with other agencies about vehicle pursuits given the potential for harm and escalation.

There is clearly a connection between vehicle pursuit (DGO 5.05) and this subsection. Proportionality should govern and be included in DGO 5.05 and preclude pursuit altogether in non-serious cases. And proportionality considerations apply to paragraph 5 as well.

An example described in one of our visits with Oakland PD is appropriate: An officer, while issuing a traffic citation, noted the driver started to pull away to escape. The officer reached into the vehicle attempting to turn off the ignition, and was dragged by the moving vehicle. This prompted an emergency response by back up officers who then shot and killed the driver. The officer issuing the citation was disciplined for creating the exigency and endangering the life of the driver, himself, the public and responding officers.

Again, scenario based training and retraining should accompany these new DGOs and policies.



In addition, we offer some of Oakland's Order regarding Moving Vehicles because it is far more specific than the proposed language in paragraph 5. Likely more specific language is helpful to the officers as well as the public:

"2....

- a. Members are prohibited from intentionally positioning themselves in a location vulnerable to vehicle attack;
- b. Whenever possible, members shall move out of the way of the vehicle, instead of discharging his or her firearm at the operator;
- c. Members shall not discharge a firearm at the operator of the vehicle when the vehicle has passed and is attempting to escape."

7. Suggested additional section to DGO 5.02 – COUNSELING SERVICES

Both our conversations with other departments as well as our review of the General Orders of other departments make clear that the "inoculation to stress" training described by DC Danielle Outlaw in the PERF report referenced above, as well as mandatory counseling, play a very important role in successful policing and managing stress. Stress leads to the use of force. Training which inoculates officers to stress and permits them to think, assess and plan, leads to de-escalation.

Wisely, in their Use of Force Order, Oakland includes a section on Counseling. We suggest SFPD do the same. Here is what Oakland includes in their subsection C. to section V. OTHER REQUIREMENTS:

"C. Members involved in a force incident that results in a person being seriously injured or killed shall attend employee assistance and counseling services provided by the City before his/her return to normal duties. Supervisors shall verify attendance only and document completion in a SNF entry. Command officers shall ensure involved members are advised of the services available and shall direct their attendance. As needed, members and employees who witness such incidents may also be referred to counseling services."

Proposed Bureau Order on Conducted Energy Devices:

Since the stakeholder meeting, we queried our Task Force and asked them to vote on the recommendation of the stakeholder from the ACLU. Because the Proposed Bureau Order appears to



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contradict the spirit of the new DGOs he proposed that we table further discussion or review until a later date, and give the new DGOs an opportunity to work.

A majority of our Task Force responded to the inquiry and the vote (with one abstention) is unanimous: **Wait**.

Therefore, this Proposed Bureau is not further discussed here and we await a future date to weigh in on this important change to police policy on CEDs.

Conclusion:

We thank you for including us and we look forward to finalizing our work and an opportunity to present formally our additional recommendations on data collection, analysis, academic partnerships, outside review of data, and bias training.

We applaud the work of those who drafted the proposed DGOs for they mark an important step in the direction of 21st Century policing. The Commission and this police department have the opportunity and the obligation to heal the relationship with the community, provide transparency and accountability. Given our candid discussions with other departments and experts, we know this is not an easy task.

The new DGOs provide the backbone for a change in direction, a change in culture. Once training, retraining, organizational oversight and accountability are integrated, along with body cameras, and implicit bias training, we will move exactly where the national conversation is taking us. We need to be an example for the rest of the country in this important work and we know SFPD will do us proud.

Congratulations on your good work.

Please do not hesitate to contact us at any time and we very much look forward to our continued work with SFPD and the Commission.

Respectfully submitted,

Julie Traun, Chair Data Collection & Analysis
Subcommittee, BASF's Criminal Justice Task Force

Director Court Programs
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Kilshaw, Rachael (POL)

From: Julie Traun <jtraun@sfbar.org>
Sent: Monday, March 21, 2016 10:31 AM
To: Kilshaw, Rachael (POL); JulieTraun@aol.com; aschlosser@aclunc.org; fbach4@yahoo.com; jfriedenbach@cohsf.org; colin.west@morganlewis.com; Adachi, Jeff (PDR); Marion, Samara (OCC); kahlomarion@hotmail.com
Cc: Sainez, Hector (POL); Chaplin, Toney (POL)
Subject: RE: Final intro paragraph & commentary plus statement re CEDs

I did not have all the DGOs before me at the time of my email, so I'm sure you are right that this paragraph does not appear in DGO 5.01.1. So, I hope this answers your questions:

- Only where this paragraph is repeated, should you include the proposed changes. So, if 5.01.1 does not have this paragraph, it makes no sense to include it.
- I agree it's a little confusing to NOT comment on the CEDs and then urge the initial paragraph should change. But on the other hand, it makes no sense to have this very paragraph appear differently. I'm sure there is a way to communicate this. While we are not commenting on the specifics of the CEDs, given the proposed changes to the introductory paragraph to DGO 5.01 and 5.02 and for consistency,....ANY time this paragraph is used in a DGO or Bulletin, we urge adoption of the revised paragraph. Does it make sense to say it that way?

Hope this helps.

And thank you for your questions and feedback.

Julie

Julie Traun
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Lawyer Referral and Information Service
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From: Kilshaw, Rachael (POL) [mailto:Rachael.Kilshaw@sfgov.org]
Sent: Monday, March 21, 2016 9:49 AM
To: JulieTraun@aol.com; Julie Traun; aschlosser@aclunc.org; fbach4@yahoo.com; jfriedenbach@cohsf.org; colin.west@morganlewis.com; Jeff Adachi; Marion, Samara (OCC); kahlomarion@hotmail.com
Cc: Sainez, Hector (POL); Chaplin, Toney (POL)
Subject: RE: Final intro paragraph & commentary plus statement re CEDs

Dear Julie:

I have incorporated your comments into the documents that I will be sent to the DOJ and the Commission.

Regarding the comment in your email that states you want the introductory paragraph you provided to be included in "ALL the DGOs and Bureau Bulletin," I am confused on two points: 1) are you and the other stakeholders copied in this email recommending adding your proposed language to DGO 5.01.1, Use of Force Reporting – which currently has no language of this type? And 2) as your position on CEDs (and those of the others copies in this email) is that you do not want CEDs as a force option discussed at this time, and therefore are not providing any feedback, are you now providing feedback for the CED policy, which you clearly state you want the Commission and DOJ to know you have not done. Sorry if I have misunderstood, but if I were to make a comment on the CED policy of your recommendation to change to opening paragraph, it would be contrary to my other note from Friday's discussion that you all wanted made clear that you were not providing commentary on the CED policy, but did not want the DOJ or the Commission to infer

either support or opposition because of a lack of feedback, only that you wanted CEDs discussed at a later time. I hope you understand my confusion. Please clarify whether you want me to include this recommended opening paragraph in the CED Bureau Order and attribute it to you (and any others). I have included the recommended language in DGO 5.01 and DGO 5.02.

Thanks,
Rachael

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From: JulieTraun@aol.com [<mailto:JulieTraun@aol.com>]
Sent: Monday, March 21, 2016 7:40 AM
To: Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org>; jtraun@sfbay.org; aschlosser@aclunc.org; fbach4@yahoo.com; jfriedenbach@cohsf.org; colin.west@morganlewis.com; Adachi, Jeff (PDR) <jeff.adachi@sfgov.org>; Marion, Samara (OCC) <samara.marlon@sfgov.org>; kahlomarion@hotmail.com
Subject: Final intro paragraph & commentary plus statement re CEDs

Dear Rachael,

Taking the time over the weekend was time well spent. The attached, including the commentary, was fully vetted and agreed upon by the following stakeholders: ACLU, OCC, COH, SFBAR, PD and BRP (Blue Ribbon Panel.). Each are copied on this email.

Please include our commentary as written in the attached because it explains the rationale for the inclusion of the revised sentence and the adjectives. This applies to the introductory paragraphs of ALL the new DGOs and Bureau Bulletin.

Finally, with respect to the CED Bureau Bulletin, I trust you have heard from Jeff Adachi, who consulted with Rebecca Young. He informed me yesterday that "our office's position is that we do not support the inclusion of Tasers in the Use of Force Policy. While we do not generally support tasers, we believe that any policy allowing use of tasers should be taken up independently from the use of force policy that is before the Police Commission."

Please be certain to advise the Police Commission that SFBAR, ACLU and OCC did not in any way participate in any commentary to the proposed Bureau Bulletin for each stakeholder has taken the strong position, like that of the Public Defender, that any policy allowing use of CEDs should be taken up independently from the use of force policy and at a later time. We do not want the Commission misled by our lack of commentary. We have not commented because we hope to see how the new DGO's roll out first and some of us need additional time to study CEDs.

COH, the only stakeholder which offered commentary on Friday (unless you hear from the BRP) opposes the use of CEDs. Therefore the only other comments on Friday were provided by law enforcement, not any other stakeholders. We trust you are able to communicate this to the Commission as stated herein.

Thank you kindly for all your hard work.

Julie

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles using thoughtful communication, crisis intervention and de-escalation principle before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary unreasonable force. These are key factors in maintaining the legitimacy with the community and safeguarding the public's trust.

Commented [JT1]: Stakeholders (BASF, OCC, ACLU, COH, BRP (Blue Ribbon Panel) and PD) feel strongly that this sentence needs to be included in the introductory paragraphs of all Use of Force DGOs. This language committing to minimal force, is consistent with 21st Century policing, PERP's Re-engineering Use of Force, and mirrors/tracks the language of several departments including Oakland, Seattle, and Milwaukee. It is also consistent with SFPD's current use of force policy (DGO 5.01 which states, "[I]t is the policy of the SFPD to accomplish the police mission as effectively as possible with the highest regard for the dignity of all persons and with minimal reliance on the use of physical force.") The above referenced stakeholders strongly urge that deleting reference to minimal reliance on use of physical force is both a step backwards and inconsistent with current practices being urged nationally.

Commented [JT2]: Other possible adjectives include "Effective," "Appropriate," "Positive" was ruled out when Stakeholders concluded, "Drop the Weapon or I'll shoot!" could be construed as either negative or positive. Given the Department's initial inclusion of the adjective "thoughtful" (which some stakeholders felt was lacking definition), those recommending the inclusion of an adjective agreed "rapport-building" best identified the goal. All stakeholders (ACLU, OCC, SRBAR, BRP, PD and COH) concur with this adjective and commentary.

Commented [JT3]: Stakeholders (BASF, OCC, ACLU, COH, BRP and PD) urge the inclusion of "crisis intervention." Since the adoption of San Francisco Police Commission Resolution No. 11-18, mental health, homeless, and disability advocates, the OCC, and other city departments have worked in collaboration with SFPD to train officers and establish a crisis intervention team program to respond to behavioral health crisis calls. The Chief is currently reviewing a CIT DGO that the working group proposed in February 2016. The above named stakeholders agree that the Commission need not await the new CIT DGO to include the principle: crisis intervention.

Commented [JT4]: ACLU wants to use the word "unnecessary" instead of "unreasonable." ACLU states that the two terms are different. SFPD is using the term "unreasonable" to be consistent throughout the policies - reasonable and unreasonable. Stakeholders (BASF, OCC, COH, BRP and PD) join in the recommendation of the ACLU. "Unnecessary" is more consistent with the goals of the new DGOs than "unreasonable." Therefore for consistency, when "unreasonable" is used in the DGOs, the above named stakeholders urge that the word "unnecessary" replace it.



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SAN FRANCISCO

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April 6, 2016

Memorandum to San Francisco Police Commission (Hand Delivered)

From: Julie Traun, Chair, Subcommittee on Data Collection and Analysis, and Stakeholder Representative on Use of Force Working Group. Bar Association of San Francisco's (BASF) Task Force on Criminal Justice

As time is limited for public comment at tonight's Commission meeting, it is prudent to circulate a number of documents and highlight broad and important concerns in writing.

1. Proposed Bureau Order on Conducted Energy Devices:

The BASF Criminal Justice Task Force, now commencing its second year, is a diverse and dedicated group, gathered to consider many aspects of the criminal justice system, focusing primarily on policing. Members represent law enforcement, academia, prosecutors, defense and civil rights attorneys, the judiciary and members of the community. (The second attachment to this Memorandum is an article recently published in BASF's magazine which describes the membership and work of the BASF Criminal Justice Task Force.)

As outlined in our letter to the Commission and DGO Stakeholder Working Group dated February 29, 2016, the voting members of the **BASF Criminal Justice Task Force voted unanimously (with one abstention) that any discussion of Conducted Energy Devices (CEDs) should be tabled** for the following reason: It is beneficial to table further discussion or review of CEDs until a later date, to give the new DGOs an opportunity to work.

Nonetheless, on Friday, April 1, 2016, the Steering Committee of the BASF Criminal Justice Task Force agreed to form a subcommittee to thoroughly analyze the proposed Bureau Order and the use of CEDs. Therefore, **we reiterate our request to table further discussion and we include an additional reason to wait: to permit sufficient time for the Task Force to undertake this work and report out to the Commission at a later date.**

BASF is not alone in this recommendation to WAIT on CED discussion. At the final meeting of your DGO Stakeholder Working Group, all community stakeholders agreed. (See page 2 of the first attachment to this letter.) In fact, **none of your community stakeholders (with the exception of COH) have weighed in on CEDs.**



Only police representatives participated in the discussion and recommendations if any, on the proposed Bureau Order on CEDs. Therefore to act on this Bureau Order means you have done so without the benefit of most of your community stakeholders.

In the interim, there is very important work to be undertaken on the proposed Use of Force DGOs and the (1) training and (2) data collection and analysis that we believe should accompany the new DGOs (See BASF's Memorandum to this Commission dated February 29, 2016).

2. The Inclusion of Language which is Consistent with 21st Century Policing is Important and Provides Clear Direction to Officers and the Community.

This memorandum's first attachment (2 pages) is, in part, included in the packet of supporting documents on the Commission's website. However, the commentary is not only very difficult to read, some of the comments are cut off. Therefore, language proposed, by all community stakeholders, to be included in the introductory paragraphs for ALL Use of Force DGOs is attached, with edits highlighted, and it includes the supporting commentary in full. Note: **This proposed language, the edits, and the commentary have been vetted and are jointly proposed by all community stakeholders.** The commentary and edits appearing in the current version of DGOs do NOT include the finalized language and commentary from the community stakeholders. Instead the attached was submitted separately, as agreed at the final meeting of the working group, to be included for your consideration.

3. Upcoming Reports from BASF's Task Force.

Lastly, we wish to alert the Commission about upcoming reports important to your work. The Data Collection and Analysis Subcommittee has undertaken considerable work and investigation during the last year. It is nearing completion and please look forward to our report which will be based upon our interviews with a number of police departments and experts as well as our research on best practices implemented elsewhere, and therefore tested, in 21st Century policing. Our report will include detailed recommendations on how best to collect and analyze data and integrate data with risk management and training. Of particular interest to our subcommittee is the role of body cameras in training. We hope to be of significant help to the San Francisco Police Department, about which we care deeply, and this Commission. Transitioning culture in police departments is a difficult undertaking. We trust we will be of assistance to you.

Respectfully submitted,

JULIE A. TRAUN
Chair, Data Collection & Analysis Subcommittee
BASF Criminal Justice Task Force
Director of Court Programs
Lawyer Referral and Information Service

1. Introductory Paragraphs to all USE OF FORCE DGOs.

Following the last meeting, stakeholders BASF, OCC, ACLU, PD, PRP and COH submitted these edits to the Introductory Paragraphs of all Use of Force DGOs with these comments:

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles using thoughtful communication, crisis intervention and de-escalation principle before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary unreasonable force. These are key factors in maintaining the legitimacy with the community and safeguarding the public's trust.

Comment [J11]: See Comment A

Comment [J12]: See Comment B

Comment [J13]: See Comment C

Comment [J14]: See Comment D

Comment A:

Stakeholders (BASF, OCC, ACLU, COH, BRP [Blue Ribbon Panel] and PD) feel **strongly** that this sentence needs to be included in the introductory paragraphs of all Use of Force DGOs. This language, committing to **minimal force**, is consistent with 21st Century policing, PERF's Re-engineering Use of Force, and mirrors/tracks the language of several departments including Oakland, Seattle, and Milwaukee. (It is also consistent with SFPD's **current** use of force policy (DGO 5.01 which states, "[i]t is the policy of the SFPD to accomplish the police mission as effectively as possible with the highest regard for the dignity of all persons and with **minimal reliance on the use of physical force.**") The above referenced stakeholders strongly urge that deleting reference to minimal reliance on use of physical force is both a step backwards and inconsistent with current practices being urged nationally.

Comment B:

Other possible adjectives include:

"Effective," "Appropriate".

"Positive" was ruled out when Stakeholders concluded: "Drop the weapon or I'll shoot!" could be construed as either negative or positive. Given the Department's initial inclusion of the adjective "thoughtful" (which some stake holders felt was lacking definition), those recommending the inclusion of an adjective, agreed "rapport-building" best identified the goal. All stakeholders (ACLU, OCC, SFBAR, BRP, PD and COH) concur with this adjective and commentary.

Comment C:

Stakeholders (BASF, OCC, ACLU, COH, BRP and PD) urge the inclusion of "crisis intervention." Since the adoption of San Francisco Police Commission Resolution No.11-18, mental health, homeless, and disability advocates, the OCC, and other city departments have

worked in collaboration with SFPD to train officers and establish a crisis intervention team program to respond to behavioral health crisis calls. The Chief is currently reviewing a CIT DGO that the working group proposed in February 2016. The above named stakeholders agree that the Commission need not await the new CIT DGO to include the principle: crisis intervention.

Comment D:

ACLU wants to use the word “unnecessary” instead of “unreasonable”. ACLU states that the two terms are different. SFPD is using the term “unreasonable” to be consistent throughout the policies – reasonable and unreasonable.

Stakeholders (BASF, OCC, COH, BRP and PD) join in the recommendation of the ACLU. “Unnecessary” is more consistent with the goals of the new DGOs than “unreasonable.” Therefore for consistency, when “unreasonable is used in the DGOs, the above named stakeholders urge that the word “unnecessary” replace it.

2. CEDs and Stakeholders:

And the same stakeholders enumerated above, submitted these comments regarding CEDs to be included for the Commission's and DOJ's review.

“Finally, with respect to the CED Bureau Bulletin, I trust you have heard from Jeff Adachi, who consulted with Rebecca Young. He informed me yesterday that "our office's position is that we do not support the inclusion of Tasers in the Use of Force Policy. While we do not generally support tasers, we believe that any policy allowing use of tasers should be taken up independently from the use of force policy that is before the Police Commission.”

Please be certain to advise the Police Commission that SFBAR, ACLU and OCC did not in any way participate in any commentary to the proposed Bureau Bulletin for each stakeholder has taken the strong position, like that of the Public Defender, that any policy allowing use of CEDs should be taken up independently from the use of force policy and at a later time. We do not want the Commission misled by our lack of commentary. We have not commented because we hope to see how the new DGO's roll out first and some of us need additional time to study CEDs.

COH, the only stakeholder which offered commentary on Friday (unless you hear from the BRP) opposes the use of CEDs. Therefore the only other comments on Friday were provided by law enforcement, not any other stakeholders. We trust you are able to communicate this to the Commission as stated herein.”

CRIMINAL JUSTICE TASK FORCE

Addressing Community-Relationship
Issues in Policing

Sharon Woo and Tom Meyer

The Bar Association of San Francisco's (BASF) Criminal Justice Task Force began work in April 2015, in the wake of Ferguson-like police and community confrontations, to address shortcomings and the role of race in the criminal justice system. The goal was to approach these issues utilizing skills that are unique to lawyers. The task force is composed of representatives (thirty-two in all) from the San Francisco prosecutor's office, the public defender's office, the criminal defense bar, the bench, law enforcement, the mayor's office, and academia, with early input from Judge LaDoris Cordell (Ret.) and Stanford psychology Associate Professor Jennifer Eberhardt, two preeminent scholars in the field of race in the criminal justice context.

The initial focus for 2015 was threefold: (1) assisting the California state legislature pass a law prohibiting the use of criminal grand juries in cases where it is alleged that the use of excessive force by the police resulted in the death of a citizen (Senate Bill 227); (2) helping establish a data collection system in San Francisco that would serve as a model for tracking and analyzing police-citizen interactions that have racial implications; and (3) making recommendations to address implicit bias in policing.

To address these three areas, the task force members organized themselves into working subcommittees, the Grand Jury Reform Subcommittee, the Data Collection Subcommittee, and the Bias in Policing Subcommittee. To these we later added a Body Camera Subcommittee, on the need for and use of body cameras, and a Civilian Oversight Subcommittee, to address civilian review of complaints against officers.

To date, we have had two notable successes. Functioning as the northern California collaborator to SB 227's southern California backers, the Grand Jury Reform Subcommittee was instrumental in getting the bill through both houses of the legislature during the summer and

CRIMINAL JUSTICE TASK FORCE

signed into law by Governor Jerry Brown in September, taking effect on January 1, 2016. This earned the task force a thoughtful letter of appreciation from the bill's author, State Senator Holly Mitchell of Los Angeles.

The second success was attributable to the work of the Body Camera Subcommittee, which worked in conjunction with the ACLU of Northern California and the San Francisco Public Defender's Office. The San Francisco Police Commission's initial orientation was that "police should be able to view body camera footage anytime before writing their police report." This was in stark contrast to that of task force members who disapproved of such previewing by the police in instances that resulted in "a shooting, in-custody death, or criminal investigation that involves the officer in question."

A last minute compromise, felt to be a victory by most of the task force membership, includes language that prohibits officers from previewing the video in three specific instances: (1) in an officer-involved shooting or in-custody death, (2) when an officer is the subject of a criminal investigation, and (3) at the discretion of the chief of police.

Looking toward the future, the Data Collection Subcommittee is making considerable strides in summarizing the best practices available prior to reconsidering a protocol that will be an improvement over what San Francisco has been able to accomplish to date.

Another major challenge is faced by the Civilian Oversight Subcommittee, which works on the efficacy of civilian oversight of the police. It is facing a difficult to resolve situation between the police officer's union, which pits its interest in keeping police disciplinary records from public access, over rights of the citizenry under the California Public Records Act. Since the San Francisco Police Officers Association relies on language in a decision of the California Supreme Court, *Copley Press Inc. v. Superior Court of San Diego* (2006) 39 Cal.4th 1272, that it maintains frees them from such

photo by Jim Block



From left, Tom Meyer and Sharon Woo

disclosure obligations, it appears that this impasse is headed for battle in next summer's state legislature.

Finally, the Bias in Policing Subcommittee has been focusing on ongoing training that helps officers become aware of their implicit biases and work to not allow biases to negatively affect their police work. One aspect of bias that the subcommittee has looked at is the role that minimal police hiring requirements might play as a vehicle to achieve a greater number of culturally competent recruits.

Sharon Woo and Tom Meyer are coauthors of BASF's Criminal Justice Task Force. Tom Meyer is a retired defense and civil rights attorney and a national expert on grand juries who has authored textbook chapters and articles on the subject.

Sharon Woo is the chief assistant of the San Francisco District Attorney's Office. She oversees the Operations Department, which includes the Criminal Division, White Collar Crime Division, and District Attorney Investigators Division.

GRAND JURY

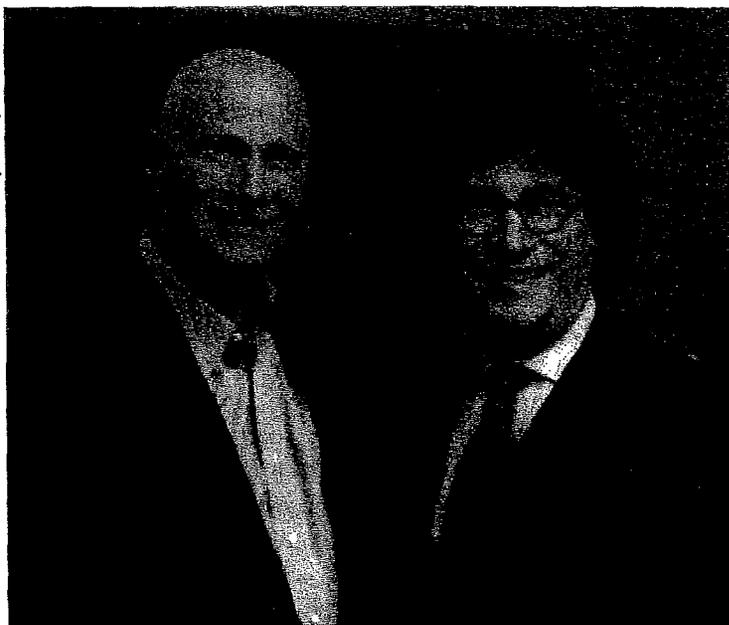
REFORM

SUBCOMMITTEE

SB 227 Passes
with Help from BASF

Tom Meyer and Frank Z. Leidman

photo by Jim Block



Back in March 2015, after the grand juries in Ferguson, Missouri, and Staten Island, New York, did not indict white police officers in the fatal shootings of unarmed black men during confrontations, protests sprouted up nationwide calling for grand jury reform. At issue were the lack of transparency and oversight in grand jury deliberations, which did not involve judges, defense attorneys, or the cross examination of witnesses, but were controlled exclusively by prosecutors who often work closely on a day-to-day basis with the very officers they were called upon to indict.

To address this fundamental flaw in California's grand jury system, State Senator Holly Mitchell of Los Angeles introduced a bill (Senate Bill 227), which prohibited the use of a criminal grand jury in cases involving the fatal use of force by police officers in California. No

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sooner had the bill been submitted, than the California District Attorneys Association (CDAА) submitted its unequivocal opposition.

This was the context in which the Grand Jury Reform Subcommittee was formed. As it turned out, the timing could not have been better as far as the prospect of the bill's passage was concerned. Subcommittee members sprang into action just as the bill needed The Bar Association of San Francisco (BASF) and its ability to mobilize its resources effectively to support SB 227.

After receiving approval from the BASF Board of Directors to support SB 227, over the next several months, the subcommittee prepared a pro-SB 227 tool kit that consisted of separate written pieces on, among other matters, the exact wording of SB 227; a list of California legislators, by district, party, and contact information (including the name of the aide in charge of staffing the bill); a synopsis of the arguments in favor of passage of the bill; a proposed op-ed piece designed for the public and nonlawyer legislators; a question and answer preparation sheet on the need for the bill; and copies of letters of support from the Criminal Trial Lawyers Association of Northern California, the California Attorneys for Criminal Justice, and concerned academics and scholars, as well as a copy of the CDAА opposition letter.

These written pieces were eventually followed up by face-to-face meetings in Sacramento with leading California Senate and Assembly members, including each member of the Assembly Public Safety Committee, the Senate Committee on Public Safety, and key legislators in the Senate and Assembly and their aides. Later, the subcommittee worked closely with Senator Holly Mitchell's chief of staff to remain abreast of developments.

In preparation for the floor votes in the Senate and Assembly, the subcommittee contacted bar association officials throughout the state to inform them of upcoming votes

and the need for each of them to reach out to their respective state legislators and let them know how important it was to have their support on this access to justice issue.

After the bill cleared both houses of the legislature, subcommittee members turned their attention to Governor Jerry Brown's staff, making sure that they met with the key advisors, bringing them, particularly those who would be making recommendations to the governor, up to date on the arguments. Governor Brown signed SB 227 into law effective January 1, 2016.

Whether or not there will be a need at some point in the future for an expansion of the crime categories a grand jury is prohibited from considering remains to be seen.

Tom Meyer and Frank Z. Leidman are cochairs of the Grand Jury Reform Subcommittee. Tom Meyer is a retired defense and civil rights attorney and a national expert on grand juries who has authored textbook chapters and articles on the subject.

Frank Z. Leidman, Law Offices of Frank Z. Leidman, specializes in civil law, criminal justice, and taxation. He can be reached at frank@leidmanlaw.com.

BODY CAMERA SUBCOMMITTEE

Making Recommendations for Body Camera Protocols

Sharon Woo

The Body Camera Subcommittee discussed the potential policies and protocols that should be included in a Body Camera policy for the San Francisco Police Department (SFPD). The subcommittee included Teresa Caffese (private criminal defense), Paul Henderson (San Francisco Mayor's Office), Judge Christopher Hite (San Francisco Superior Court), Erin Katayama (Justice & Diversity Center), Freya Horne (San Francisco Sheriff's Department), Sharon Woo (San Francisco District Attorney's Office), and Judge Laurel Beeler (U.S. Magistrate Judge).

In April 2015, San Francisco Mayor Ed Lee announced that SFPD officers would be equipped with body cameras in 2016. San Francisco Police Commission President Suzy Loftus headed the Police Commission's Working Group on Body Cameras and invited a diverse group to the table to discuss policies and the implementation of a body camera protocol. The Police Commission's Working Group on Body Cameras included members of the SFPD, police officer affinity groups, community members, the ACLU of Northern California, the San Francisco Public Defender's Office, and the Office of Citizen Complaints. Teresa Caffese was The Bar Association of San Francisco (BASF) representative on the Police Commission's Working Group.

While there was consensus on many issues, there were several issues for which divergent positions were taken. The two main issues on which the Criminal Justice Task Force subcommittee focused included (1) whether body cameras should be operating at all times or should the camera be initiated under specific circumstances, and (2) whether officers may review body camera footage prior to authoring police reports.

The Criminal Justice Task Force recommended addressing one particular issue—namely whether officers may review footage prior to authoring reports. Even within the subcommittee there was lively debate. Following a vote, the task force recommended that officers not be allowed to review footage prior to writing a report in two specific circumstances: (1) in any case where there is any use of force by the officer, and (2) when the officer is the subject or any criminal or administrative investigation. Members of the BASF Board of Directors approved sending a letter urging the Police Commission to adopt this position. BASF then held a press conference to announce its position.

On December 2, the Police Commission voted and passed a tentative body camera protocol. The protocol contained language, some of which BASF supported. The passed protocol is that an officer may not review footage in specific circumstances: (1) in an officer involved shooting or in-custody death, (2) when an officer is the subject of a criminal investigation, and (3) at the discretion of the chief of police. This language limits the officer's ability to review footage in certain circumstances, a major point for BASF, as the Police Commission began its discussions by leaning toward "review in all circumstances."

Sharon Woo is the chief assistant of the San Francisco District Attorney's Office. She oversees the Operations Department, which includes the Criminal Division, White Collar Crime Division, and District Attorney Investigators Division.

The Civilian Oversight Subcommittee originally focused on both making recommendations aimed toward developing better connections between the general San Francisco community and the Office of Citizen Complaints (OCC) and improving transparency in the OCC's interactions with citizens who make complaints against San Francisco police officers. As a result of this subcommittee's early work, the OCC has adopted several of the Civilian Oversight Subcommittee's suggestions for improving OCC's website and providing complainants the ability to easily follow the progress of their complaint and to access needed information.

While the subcommittee began with the idea of working at the local level by continuing to make recommendations to the OCC or recommending a citywide audit of the agency, it became apparent to the subcommittee that the issues confronting the OCC and San Francisco citizens could best be addressed statewide with a legislative approach aimed at changing the parameters of civilian oversight to provide greater transparency to the public. The committee has shifted its focus to possible amendments and revisions to the Police Officers Bill of Rights (POBR) and to encourage a different interpretation of the California Supreme Court decision in *Copley Press Inc. v. Superior Court of San Diego* (2006) 39 Cal.4th 1272. Subcommittee members believe this is the best way to develop further transparency regarding civilian complaints and officer discipline and to inspire public confidence in the process.

The subcommittee will be working with grassroots organizations to develop a plan to address reasonable and effective changes to *Copley* and the POBR that balance the privacy of law enforcement officers with the right of citizens to have access to information about their police department. Such changes to create greater transparency are essential to improving relationships between complainants and the OCC and developing trust between San

CIVILIAN

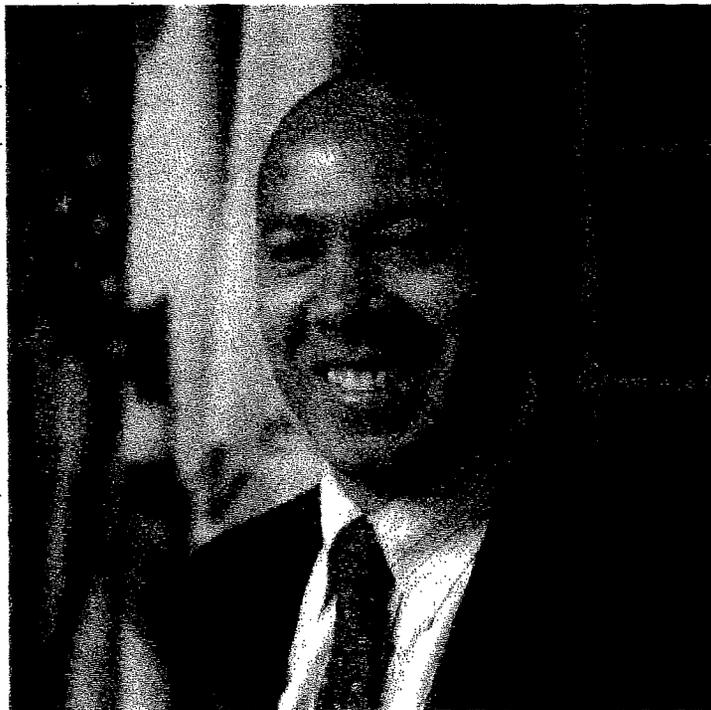
OVERSIGHT

SUBCOMMITTEE

Improving Connections
and Transparency When
Citizens Make Complaints

Judge Christopher Hite

photo by Jim Block



Francisco citizens and the San Francisco Police Department (SFPD).

In addition to improving relationships between the community and the OCC, members of the subcommittee in their “day jobs” litigated Supplemental *Pitchess* Motions in the criminal courts in San Francisco to ensure that complaints made against officers were fully disclosed within the bounds of the law. Criminal defense attorneys bring Supplemental *Pitchess* Motions when litigating several types of criminal cases but use them most often in relationship to defending resisting arrest charges. Defense attorneys use Supplemental *Pitchess* Motions to secure information about OCC’s complaints, investigations, findings, and decisions with respect to prior complaints made against the subject police personnel involved in the case. Such disclosure holds officers accountable for their prior actions and shines a light on the work done by OCC that had not been disclosed previously. Favorable rulings on Supplemental

Pitchess Motions are a significant step toward officer accountability and transparency.

In addition to focusing on the SFPD, the Civilian Oversight Subcommittee met with incumbent Sheriff Ross Mirkarimi and candidate for sheriff Vicki Hennessy prior to the election (Hennessy was elected sheriff in 2015) to begin discussions on developing civilian oversight of the San Francisco Sheriff’s Department (SFSD). The subcommittee discussion ranged from improving the current system of oversight in the SFSD, which is completely internal, to the potential of a new citywide oversight agency that would have jurisdiction over SFPD and SFSD.

Judge Christopher Hite was nominated to San Francisco Superior Court by Governor Jerry Brown in December 2015. Before ascending to the bench, Hite was a deputy public defender for the San Francisco Public Defender’s Office.

DATA COLLECTION SUBCOMMITTEE

Addressing Data and the
Driving Forces to Change
Police Departments

Julie Traun

The Data Collection Subcommittee includes a deputy chief in the San Francisco Police Department (SFPD), a federal magistrate judge, a senior attorney from the ACLU of Northern California, a community activist, an attorney with the San Francisco Office of Citizen Complaints, and a criminal defense attorney. The members’ considerable expertise stems from both the breadth of their experiences and their apparent differences, yet this subcommittee has become very efficient, with members leaving all their differences at the door, galvanized to learn all there is to learn about twenty-first century policing, data collection, and analysis.

The subcommittee first examined what the SFPD is able to collect electronically and, prior to undertaking any work or offering a single recommendation to SFPD,

CRIMINAL JUSTICE TASK FORCE

photo by Jim Block



Julie Traun (center), chair of the Data Collection Subcommittee, with, from left, subcommittee members Edwin Lindo and SFPD Deputy Chief Toney Chaplin

consulted extensively with Judge LaDoris Cordell (Ret.), former independent police auditor for the San Jose Police Department, Chief Robert Warshaw, appointed federal monitor for the Oakland Police Department (OPD), and John M. Klofas, a professor of criminal justice and founder and director of the Center for Public Safety Initiatives at the Rochester Institute of Technology. Thereafter, the subcommittee met with three members of the San Jose Police Department. Recently it concluded two meetings with Assistant Chief Paul Figueroa, Deputy Chief Danielle Outlaw, and Sergeant Tam Dinh of the Oakland Police Department.

This subcommittee is far from concluding its work, but clearly, every police department in the country, including San Francisco's, can prioritize data collection. And the timing of this subcommittee's work could not be better, for unlike any other time in history, there is the political will, the

technology, and the academic research to get it right.

It's clear to this subcommittee that a political mandate to gather data means very little without a concomitant plan to analyze the data thoroughly and tie it to risk management and training within police departments. Since Ferguson, departments have reacted either defensively or proactively, but few have been doing this work for as long or with as much professional outside help as OPD. For years, OPD has been working closely with an independent monitor to ensure stop data is utilized in a manner that promotes constitutional and effective policing practices, and the monitor continues to examine search recovery rates and other stop data categories closely. As the subcommittee learned, the stop data is presented and reviewed regularly for all patrol areas at monthly risk management meetings, and from top to bottom the department takes ownership of using, analyzing, and then implementing

data-driven information. Performance indicators such as use of force, vehicle pursuits, sick leave, and personal digital recording devices (body cameras) are analyzed, and when deficiencies are identified, the captains and lieutenants are responsible for implementing intervention plans. Perhaps most importantly, OPD developed a close yet formal research partnership and technical assistance engagement with Associate Professor Jennifer Eberhardt and Stanford University. Eberhardt and her staff are currently conducting an in-depth analysis of stop data body camera footage using a variety of different benchmarks and variables; the results are anticipated in spring 2016.

While it is politically expedient to implement a plan for data collection/analysis for every police department, this subcommittee believes there are lessons to be learned about the methodology, technology, and analysis tied to

data collection, particularly from OPD. Changing a police culture takes considerable time. Change for its own sake will get us nowhere. Changes that are thoughtful, comprehensive, and designed with the help of those who truly understand twenty-first century policing are likely to be effective; we need to get it right.

This subcommittee will soon have concluded sufficient research to make significant recommendations to the SFPD in 2016.

Julie Traun, chair of the Data Collection Subcommittee, is a criminal defense attorney and the director of BASF's Lawyer Referral and Information Service's Court Program. She can be reached at jtraun@sfbbar.org.

BIAS IN POLICING SUBCOMMITTEE

Making Recommendations
to Address Bias in Policing

Kate Chatfield

In 2002, the ACLU of Northern California released a report, *A Department in Denial—The San Francisco Police Department's Failure to Address Racial Profiling*. Although this report addressed only traffic stops and subsequent searches, it painted a disturbing picture of an organization that engaged in racial policing and that refused to address the issue of race in any meaningful way.

In the following decade, we have seen the magnitude of the problem. We have read about racist texts sent by San Francisco police officers. We have seen video of a group of police officers conducting illegal searches in hotel rooms and read their conflicting testimony about these searches. We have read declarations of African American defendants filed in federal court that suggest a persistent level of racial and sexual abuse by members of the San Francisco Police Department (SFPD). We have read of officers shooting the mentally ill and we

CRIMINAL JUSTICE TASK FORCE

have seen video of an African American man with a knife being shot at least fifteen times and killed by officers in the Bayview.

In order to address these serious issues, the Bias in Policing Subcommittee first spent months researching the solutions offered in consent decrees, settlement agreements, the U.S. President's Task Force on 21st Century Policing, and other research studies and reports issued by both governmental agencies and independent researchers. Subcommittee members also met with SFPD Chief Greg Suhr and discussed many ideas intended to address the issue of bias in policing.

The subcommittee worked on a list of draft recommendations related to (1) officer training, including training on ways to understand and limit the impact of subconscious associations and perceptions that compromise the ability to accurately and safely assess individuals, situations, and the threats that they present; (2) updating the policy and practices of police officers regarding use of force and reporting requirements related to the use of force; (3) transparency in disciplinary proceedings; and (4) employment and recruitment reform.

As with the Civilian Oversight Subcommittee, the Bias in Policing Subcommittee has begun to shift its focus to a statewide approach to curtailing abuses by police officers in our community. At the same time, we will continue to work with various organizations, including representatives of SFPD, to reach solutions to particular policing problems in San Francisco.

Kate L. Chatfield is a partner with the Law Office of Chatfield and Reisman. She represents clients facing criminal accusations in state and federal court. She worked with the poor and homeless for many years, cofounding a homeless shelter, dining room, and supportive housing program in San Bruno. She can be reached at katechatfield@gmail.com.

photo by Jim Block

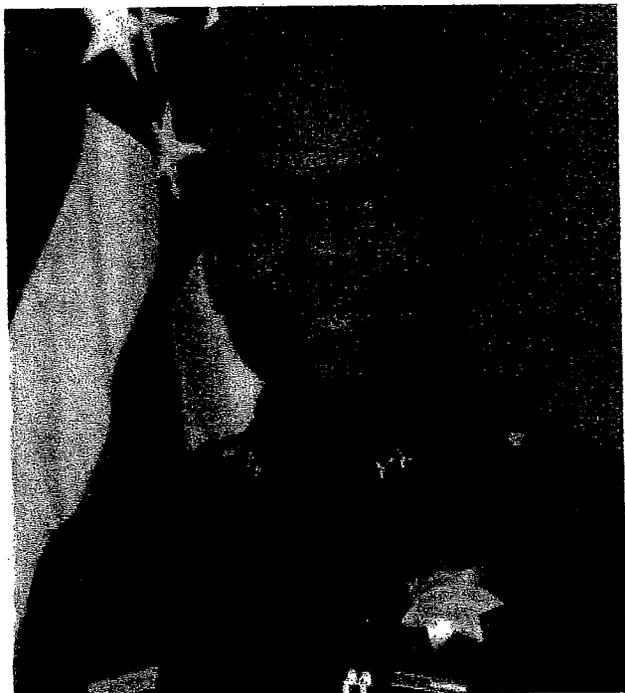


Kate Chatfield

TONY CHAPLIN NAMED DEPUTY CHIEF TO LEAD NEW BUREAU WITHIN SFPD

In the wake of Ferguson, San Francisco Police Department's (SFPD) racist texting, the death of Mario Woods, and the recent announcement of the Department of Justice's two-year comprehensive review of SFPD's policies and procedures, on February 13, 2016, BASF Criminal Justice Task Force member Commander Toney Chaplin was promoted to deputy chief and will lead Professional Standards and Principled Policing, a new bureau in SFPD. This historical development is significant, because since the formation of the Department of Homeland Security after September 11, 2001, no bureaus have been created. Chaplin's bureau will work directly with the Department of Justice (DOJ) in an effort to be proactive, rather than reactive to the DOJ's recommendations. Chaplin and Chief Greg Suhr believe changes should be initiated immediately and on an ongoing basis; waiting for final DOJ recommendations is not an option. The bureau will include the following units: behavioral science, hostage negotiation, bulletins and directives, and community youth and engagement.

Deputy Chief Chaplin is a twenty-six-year veteran of SFPD. Community engagement is not new to Chaplin; he explains he's always served communities of color and was one of the originators of TNT (Taraval Neighborhood Team), a group of police officers who developed a program to engage youth in the Oceanview neighborhood. The officers found that mentoring, along with fishing and camping trips, did more to curtail violent crime than prior police efforts that focused exclusively on law enforcement. Chaplin has since served in narcotics, gangs, and as a lieutenant with Northern Station and the homicide division. He was named commander of investigations one year ago, and part of his work included a very active role



Deputy Chief Toney Chaplin

on BASF's Criminal Justice Task Force. His commitment to and involvement with the data collection and analysis work has been essential to the work of the task force as a whole. He explains that his work with the task force "has been life altering and career defining. This task force comprises a wide array of talent; in one room and over a short time period the forward-thinking and fast-moving work has made for a fantastic experience." He will continue and expand on his work with the task force, knowing that the thoughtful and thorough work of this diverse group will play a very important role in criminal justice reform and the direction of the new bureau.

CRIMINAL JUSTICE TASK FORCE

photo by Jim Block



Chairs

Tom Meyer, Attorney at Law

Sharon Woo, San Francisco District Attorney's Office

Task Force Members

Yonina Alexander, Sanford Heisler Kimpel

Hon. Laurel Beeler, United States District Court

Teresa Caffese, Law Offices of Teresa Caffese

Deputy Chief Toney Chaplin, San Francisco Police Department

Kate Chatfield, Law Offices of Chatfield and Reisman

Susan Christian, San Francisco District Attorney's Office

Nanci Clarence, Clarence Dyer & Cohen

Eric Fleming, San Francisco District Attorney's Office

Manuel Fortes, San Francisco Office of Citizen Complaints

Matt Gonzalez, San Francisco Public Defender's Office

Stuart Hanlon, Law Offices of Stuart Hanlon

Paul Henderson, San Francisco Mayor's Office

Joyce Hicks, San Francisco Office of Citizen Complaints

Freya Horne, San Francisco Sheriff's Department

Hon. Teri Jackson, San Francisco Superior Court

Yolanda Jackson, The Bar Association of San Francisco and
Justice & Diversity Center (JDC)

Erin Katayama, JDC's Homeless Advocacy Project

Frank Z. Leidman, Law Offices of Frank Z. Leidman

Whitney Leigh, Gonzalez & Leigh

Edwin Lindo, Community Activist

Suzy Loftus, Office of the Attorney General

Sharon Meadows, University of San Francisco School of Law

Felicia Medina, Sanford Heisler Kimpel

Timothy Moppin, Bassi Edlin Huie & Blum

Alan Schlosser, ACLU of Northern California

Brian Stretch, U.S. Attorney's Office

John Trasviña, University of San Francisco School of Law

Michael Tubach, O'Melveny & Myers

Advisory Members

Clothilde Hewlett, Cal Alumni Association

Hon. Chris Hite, San Francisco Superior Court

Experts/Consultants/Presenters

Jeff Adachi, San Francisco Public Defender's Office

Jennifer Eberhardt, Stanford University

Hon. LaDoris Cordell (Ret.)

George Gascón, San Francisco District Attorney's Office

BASF Liaisons

Raquel Cabading, The Bar Association of San Francisco

Julie Traun, The Bar Association of San Francisco

Betsy Wolkin, The Bar Association of San Francisco

Kilshaw, Rachael (POL)

From: Julie Traun <jtraun@sfbar.org>
Sent: Monday, May 02, 2016 12:41 PM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); O'Brien, Alexa (POL); Cabrera, Alicia (CAT); Suzy Loftus; Koski, J Trevor (CAT)
Subject: RE: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order
Attachments: SFBAR edits to 5.01%20Use%20of%20Force%20corresponding%20comments%200321161.docx; SFBAR edits 5.01.1%20Use%20of%20Force%20Reporting%20corresponding%20%20comments%200321161.docx; SFBAR edits 5.02%20Use%20of%20Firearms%20and%20Lethal%20Force%20corresponding%20comments%200321161.docx

Dear Rachael,

I so appreciate the difficulty of your work. I just had to say that.

I'm attaching my edits to the comments. As you know, we have already outlined our position on CEDs (to "wait, given the inconsistency with intent of the new DGOs" and we are undertaking a thorough analysis currently)...so I've not returned the CED commentary.

Since completing these comments, I've seen comments submitted by Samara Marion, and those joined by Jeff Adachi. We similarly join, in addition to what's been separately written here in the attached 3 DGO comments to 5.01, 5.01.1 and 5.02. I did not have time to incorporate her edits to my own. But her thoughtfulness is always helpful and we join in.

Let me know if you have any questions.

By 3:00 today, I will be sending you another document. It's not anything you need to work from; it will be a separate submission to the Commission.

Thank you again for all that you do.

Julie

Julie Traun
Director of Court Programs
Lawyer Referral and Information Service
Bar Association of San Francisco
301 Battery Street, 3rd Floor
San Francisco, CA 94111
Tel: 415-782-8942
Fax: 415-782-8993

From: Kilshaw, Rachael (POL) [mailto:Rachael.Kilshaw@sfgov.org]
Sent: Thursday, April 28, 2016 2:46 PM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); O'Brien, Alexa (POL); Cabrera, Alicia (CAT); Suzy Loftus; Koski, J Trevor (CAT)
Subject: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Good Afternoon:

In preparation for the Commission meetings on May 4th and May 11th when the draft Use of Force policies and the draft Conducted Energy Devices Bureau Order will be discussed, I am putting together a summary for the Commissioner to review that explains the areas in the policies where the stakeholders cannot come to a consensus. I have attached the most recent document where I have listed those areas (03/21/16). Can you please review and confirm that I have accurately conveyed your group's position and that I have included all of your group's positions? If you need to make corrections, please track your changes and send back to me. Once I have all of the stakeholders' comments back, I will

create the summary for the Commissioners that includes a cross-reference to the stakeholder's submitted documents, and send a copy to each of you. The comments will also be posted on the Commission's website and sent to the DOJ.

As the meeting is next week, I would like to start working on this over the weekend to have the documents to send to the Commissioners on Tuesday morning at 10 am. Please send your comments to me anytime between now and Monday, May 2nd at 3:00 pm.

Thank you

Sergeant Rachael Kilshaw
San Francisco Police Department
Police Commission Office
1245 – 3rd Street, 6th Floor
San Francisco, California 94158
415.837.7071 phone
rachael.kilshaw@sfgov.org

SFBAR

05/02/16

DGO 5.01, Use of Force, Corresponding Comments (03/21/16 version)

1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were "rapport-building," "effective," "non-violent, and "positive." POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language. Reference to SFBAR, OCC, ACLU and COH in this comment refers to an earlier comment and it should be updated. Following 3/21/16, and with permission of the Department, SFBAR submitted what is now stated under Comment "3" below.
2. SFPD will incorporate the term "crisis intervention" once the DGO on CIT is adopted and the term "crisis intervention" is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term "crisis intervention" now on its website, in its training and in a Police Commission resolution.
3. SFBAR wants the opening paragraph to read: "The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary force. These are key factors in maintaining the legitimacy with the community and safeguarding the public's trust." Joining in SFBAR's proposed introductory paragraph, and copied on the email, and supplied in written format to the Commission on April 6, 2016 were the following stakeholders: SFBAR, OCC, ACLU, PD, BRP and COH. In addition, all of the listed stakeholders included additional commentary as follows: "Stakeholders (BASF, OCC, ACLU, COH, BRP [Blue Ribbon Panel] and PD) feel **strongly** that this sentence needs to be included in the introductory paragraphs of all Use of Forces DGOs [applicable - 5.01 and 5.02]. This language, committing to **minimal force**, is consistent with 21st Century policing, PERF's Reengineering Use of Force and mirrors/tracks the language of several departments including Oakland, Seattle and Milwaukee. (It is also consistent with SFPD's **current** use of force policy (DGO 5.01 which states, "[i]t is the policy of the SFPD to accomplish the police mission as effectively as possible with the highest regard for the dignity of all persons and with **minimal reliance on the use of physical force**.")) The above referenced stakeholders strongly urge that deleting reference to minimal reliance on the use of physical force is both a step backwards and inconsistent with current practices being urged nationally."

ACLU, SFBAR, OCC, Public Defender, Blue Ribbon Panel (per comment above) and COH want to use the term "minimal force necessary." By using the term "reasonable force" throughout the policy and removing "minimal force" as stated in the current DGO 5.01, the Department is taking a step backwards from the current trend in policing nationwide that goes beyond the standard set in the SCOTUS case *Graham v. Connor*. These

members of the stakeholder group believe that the Department has a choice with this policy to let the community know it is committed to going beyond what is required by the law and have higher standards for its officers. They reminded the group that the Mayor, the Chief and the Commission all committed to changing the use of force policy by speaking about the principles in the PERF recommendations.

The POA, OFJ, Pride Alliance, APOA and LPOA concur with the term “reasonable force” being used throughout the policy and oppose the use of the term “minimal force.” Case law does not require officers to use minimal force; the courts require officers to use force that is objectively reasonable. These members of the stakeholder group state that PERF is not the authority on use of force, and is only one of many groups that have opinions on use of force policies, and point out that there is currently intense criticism regarding some of PERF’s recent recommendations on use of force.

There is no consensus on this issue throughout the policy. Anytime the term “reasonable force” is written in the policy or the term “minimal” is proposed by a member of the stakeholder group, the positions described above should be considered.

4. ACLU and SFBAR wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

5. ACLU, SFBAR and OCC do not believe this paragraph should be placed here. ACLU does not have a suggestion for placement.
6. SFDA/BRP, OCC, and Public Defender want a section prohibiting biased policing in this section and want the language to read: “FAIR AND UNBIASED POLICING. It is one of the Department’s guiding principles that policing occur without bias, including the use of force. Members of the Department shall carry out their duties, including with respect to use of force, in a manner free from any bias and to eliminate any perception of policing that appears to be motivated by bias. See DGO 5.17, Policy Prohibiting Biased Policing.” These members do not agree that it should be cross-referenced at the end of the policy because this is a key principle and there is a perception that the application of use of force is done in a biased manner.

POA, OFJ, LPOA, APOA and Pride Alliance recommend listing DGO 5.17, Policy Prohibiting Biased Policing, at the end of this DGO as a cross-reference.

7. The OCC, SFBAR and COH recommend changing this sentence to read, "When feasible and safe to do so, officers shall employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance. They state without this change, the language currently written means that officers would not have to attempt de-escalation techniques in three situations, when a subject is: 1) endangering the public or officers, 2) fleeing or 3) destroying evidence.

The POA, OFJ, LPOA, APOA and Pride Alliance concur with the language as written in the current draft and ask if members of the stakeholder group expect officers to attempt de-escalation techniques when the subject is endangering the public or the officer.

8. The stakeholder group cannot reach consensus on whether to use the term "shall, when feasible," or the term "should, when feasible" throughout the entire document. When the terms "shall, when feasible" or "should, when feasible" are written in the document, the positions described below should be considered.

The OCC, SFBAR, Coalition on Homelessness (COH), San Francisco District Attorney/Blue Ribbon Panel (SFDA/BRP), Public Defender and ACLU want to use the term "shall, when feasible." The POA, OFJ, Pride Alliance, LPOA and APOA had concerns with this term because "shall" is a mandate, but if an officer cannot perform the action because of safety, someone might judge the situation, using 20/20 hindsight, and opine that the officer would have been able to, and therefore should have, performed the action and discipline the officer.

The POA, OFJ, LPOA, Pride Alliance and APOA want to use the term, "should, when feasible." OCC, SFBAR, COH, SFDA/BRP, Public Defender and ACLU have concerns with that term and discussed the distinction between their understanding of the two terms: "shall, when practical" means an officer will take the action at a time when it is safe, and "should, when practical" means the officer can think about taking action, but does not have to take the action even if it is safe.

DGO 3.02, Terms and Definitions, defines both terms:

- 1) Shall/Will/Must: mandatory
- 2) Should: permissive, but recommended

9. SFBAR and OCC want a section on Crisis Intervention in the POLICY section. The language should include specific CIT procedures and training. SFPD will incorporate, at minimum, a cross-reference to the CIT DGO once DGO on CIT is adopted.
10. POA has issues with the entire section of proportionality. They have submitted two written responses along with two Subject Matter Experts' opinions that include: 1) the underlying offense may be minor, but an officer can use reasonable force to make the arrest, 2) the Department's list of edged and improvised weapons are all situations where an officer could use deadly force if the suspect threatened the officer, 3) what are the principles of proportionality? and 4) it appears that the Department is stating there is only one acceptable response to a use of force incident. SFBAR has submitted a letter to the

Commission, dated May 2, 2016 which identifies and outlines serious problems with the "Proportionality" paragraph of the DGO. Original language in the Department's first draft was deleted/edited without stakeholder input. Please reference the content of the Bar Association's letter regarding "Proportionality."

~~10~~.11. OCC and SFBAR recommends the language in this section to read: "Officers shall intervene when they reasonably believe another officer is about to use unnecessary or excessive force, or when they witness an officer using unnecessary or excessive, or engaging in other misconduct. Recommended language is underlined.

~~11~~.12. OCC, ALCU, and SFBAR recommend adding additional language to item #5 to read: "to gain compliance with a lawful order, where the force is proportional to the timing and reasons for the order." Recommended language is underlined.

POA, APOA, LPOA, Pride Alliance, and OFJ oppose the recommendation.

~~12~~.13. OCC, SFBAR, CIT working group, ACLU, and COH recommend adding the following language for this section under #6. To prevent a person from injuring himself/herself. "a) Officers shall avoid or minimize the use of force against individuals who are injuring themselves and do not pose a safety risk to officers. b) In situations where some force may be warranted to prevent suicide, officers shall determine whether other tactics are available to the officer that would cause less injury, and include the language of the prohibition from using lethal force on a person who is only a danger to himself as item c.

POA, OFJ, LPOA, APOA, and Pride Alliance oppose the recommendation. The law allows officers to use force to prevent a person from injuring himself, and the policy prohibits the use of lethal force. These members of the group question what officers are supposed to do to keep a person from hurting himself and get the person the help he needs. POA believes the list of lawful reasons to use force should be a comprehensive list of what is Constitutionally allowed, and training can cover the types of force that are reasonable when dealing with a person who is a danger to himself. POA provided case law that that may cover this area: Glenn vs. Washington City and Adams vs. City of Fremont.

~~13~~.14. OCC and SFBAR recommend adding language about the critical decision making model to this section and recommends the following language be added: "Officers shall use a Critical Decision Making framework in all circumstances in which the use of force might be needed. Officers shall collect information, assess the threats and risk, consider powers, policies, and other obligations, identify options and consider contingencies, and determine the best course of action."

POA, OFJ, Pride Alliance, LPOA, and APOA oppose the recommendation as it requires officers to make decisions and solve problems by using only one method. Additionally,

any methods for assisting officers in decision making strategies should be taught in the Academy.

14.15. ACLU, Public Defender, SFBAR, and OCC believe the language of 835a PC is against the principles of what the department is trying to accomplish in the revised policy. ACLU believes this language is archaic and more aggressive than what the Department is trying to achieve with the policy. ACLU believes that quoting the law sends an incorrect message to the community and the officers that is contrary to the principles of the policy. COH states this statement sends a confusing message to officers about whether to use the principles of de-escalation. SFBAR suggests moving the language but does not have a suggestion about where to place it.

Commented [JT1]: Please delete per SFBAR.

POA, Pride Alliance, and OFJ, LPOA and APOA state this is the law and in the current policy. POA points out officers are currently trained on both the law and de-escalation techniques. POA suggests moving the language about 835a PC to the FORCE OPTIONS section.

15.16. OCC, SFBAR, SFDA/BRP recommend adding four additional factors to the list of relevant factors, based on California Supreme Court and Ninth Circuit Court cases:

- What other tactics if any are available to the officer
- The ability of the officer to provide a meaningful warning before using force
- The officer's tactical conduct and decisions preceding the use of force
- Whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis or who is a person with a mental illness.

POA also mentioned the case Bryan vs. McPherson.

16.17. ACLU, SFBAR, COH and OCC want the policy to state "apply" instead of "consider. These members feel there is a distinction between the two terms: 1) apply means taking an action, and 2) consider means only having to think about the concept.

17.18. POA disagrees with making the requirements in this section for both officers and supervisors mandatory. There are too many proposed requirements that officers and supervisors must perform in situations that require attention to the incident.

18.19. SFBAR and ACLU want the policy to list the specific standards for the situations when officers can use a specific force option. SFBAR proposed using language similar to Oakland PD that reads that force is "...justified when reasonable alternatives have been exhausted, are unavailable or are impractical" in each section of the list of force options, or at least in the beginning of this section referring to all force options.

POA, LPOA, OFJ, APOA and Pride Alliance oppose the recommendation because it requires officers to use force based on a continuum, which is not the standard.

19.20. ACLU, OCC and SFBAR want the language to read "serious injury."

POA, OFJ, APOA, LPOA and Pride alliance oppose the recommendation. Serious injury has a specific legal definition in PC section 243d, and training does not support the use of ERIWs only when the public is in danger of "serious bodily injury." The use of an ERIW is the same level of force as an impact weapon.

~~20-21.~~ OCC, SFBAR, Public Defender and ACLU state CEDs should be taken out as a force option and discussed at a later time. In their letter to the Commission dated April 6, 2016, the Bar Association stated: "It is beneficial to table further discussion or review of CEDs until a later date, to vie the new DGOs an opportunity to work. Nonetheless, on Friday, April 1, 2016, the Steering Committee of the BASF Criminal Justice Task Force agreed to form a subcommittee to thoroughly analyze the proposed Bureau Order and the use of CEs. Therefore, we reiterate our request to table further discussion and we include an additional reason to wait: to permit sufficient time for the Task Force to undertake this work and report out to the Commission at a later date."

COH is opposed to CEDs as force option now and at a later time. COH has submitted written response that states the vertical support for CIT within the Department has not been implemented, and COH feels the support needs to be in place before CEDs are issued. COH also states the deaths and injuries that can result from CEDs as a reason for not implementing them.

CIT working group and SFDA/BRP take no position on CEDs as a force option. SFDA/BRP may submit a position on CEDs at some point, but the SFPD has not received as of the writing of this summary.

POA, OFJ, Pride Alliance, LPOA, and APOA are in favor of CEDs as a force option.

~~21-22.~~ OCC, SFBAR and COH would like carotid restraint to be prohibited, as proposed in the previous drafts of revised DGO 5.01.

SFDA/BRP and CIT working group take no position on the carotid restraint.

POA, OFJ, LPOA, APOA and Pride Alliance concur with the carotid restraint being a force option.

~~22-23.~~ POA, OFJ, LPOA, Pride Alliance and APOA do not agree that carotid restraint can only be used in cases of lethal force, especially with a requirement to give a warning. These groups questioned the logic behind using the carotid restraint only in situations where lethal force is justified – why would the Department want an officer to get that close to the subject? The POA mentioned that there has never been a lethal outcome in SFPD with a properly applied carotid restraint. Members of these groups mentioned that the DOJ commended Seattle PD for having the carotid restraint. SFBAR adds to this commentary and notes the language of Seattle Police Department's order: " Neck and carotid restraints may only be used when deadly force is authorized. See 8.200 POL 10. See 8.1000.5 and .6 for guidance on when deadly force is authorized."

23.24. ACLU and SFBAR wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR (if the language remains) want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

SFBAR 05/02/16

Corresponding Comments 5.01.1, Use of Force Reporting (03/21/16 version)

1. ACLU and SFBAR wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

2. OCC and SFDA/BRP and SFBAR want a section that includes the requirement for data collection, analysis and distribution to the public. OCC recommends that the section state the following:

- The Department will collect and analyze its use of force data through the Use of Force Form that will enable electronic collection of data.
- The Department will post on a monthly basis on its website comprehensive use of force statistics and analysis.
- The Department will provide a written Use of Force report to the Police Commission annually
- The Department’s use of force statistics and analysis will include at a minimum:
 - The type of force
 - The type and degree of injury to the suspect and officer
 - Date and time
 - Location of the incident
 - Officer’s unit
 - District station
 - Officer’s assignment
 - Number of officers using force
 - Officer’s activity when force was used
 - Officer demographic (age, gender, race/ethnicity, number of years with SFPD, number of years as a police officer)
 - Suspect demographics including race/ethnicity, age, gender, gender identity, primary language and other factors such as mental illness, cognitive impairment, developmental disabilities, drug and alcohol use/addiction and homelessness.

The SFPD has committed to collecting, analyzing and reporting data in a way that promotes transparency and accountability, but the Department believes that the specific data that will be collected is better articulated in a Department Unit Order. As technology and the laws on use of force data collection change, it will be easier for the Department to codify changes in requirements in a Unit Order versus a Department

General Order. The Department is not opposed to listing the suggested items in a Unit Order.

SFBAR 05/02/16

DGO 5.02, Use of Firearms and Lethal Force, corresponding notes (03/21/16 version)

1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were "rapport-building," "effective," "non-violent, and "positive." POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language. Reference to SFBAR, OCC, ACLU and COH in this comment refers to an earlier comment and it should be updated. Following 3/21/16, and with permission of the Department, SFBAR submitted what is now stated under Comment "3" below.
2. SFPD will incorporate the term "crisis intervention" once the DGO on CIT is adopted and the term "crisis intervention" is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term "crisis intervention" now on its website, in its training and in a Police Commission resolution.
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ACLU, SFBAR, OCC, Public Defender and COH-, Blue Ribbon Panel (per comment above) want to use the term "minimal force necessary." By using the term "reasonable force" throughout the policy and removing "minimal force" as stated in the current DGO 5.01, the Department is taking a step backwards from the current trend in policing nation-

wide that goes beyond the standard set in the SCOTUS case *Graham v. Connor*. These members of the stakeholder group believe that the Department has a choice with this policy to let the community know it is committed to going beyond what is required by the law and have higher standards for its officers. They reminded the group that the Mayor, the Chief and the Commission all committed to changing the use of force policy by speaking about the principles in the PERF recommendations.

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There is no consensus on this issue throughout the policy. Anytime the term “reasonable force” is written in the policy or the term “minimal” is proposed by a member of the stakeholder group, the positions described above should be considered.

3.4. ACLU and SFBAR wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

4.5. ACLU, SFBAR and OCC do not believe this paragraph should be placed here. ACLU does not have a suggestion for placement.

5.6. OCC, SFBAR and ACLU recommend adding language based on California Supreme Court case *Hayes vs. San Diego* in DGO 5.02 if the SFPD does not include the language in DGO 5.01: “The reasonableness of the officer’s use of force includes consideration of the officer’s tactical conduct and decisions leading up to the use of force.”

6.7. ACLU, SFBAR, COH and OCC want the policy to state “apply” instead of “consider.” These members feel there is a distinction between the two terms: 1) apply means taking an action, and 2) consider means only having to think about the concept.

7.8. The POA questions whether the Department believes firearms are the only deadly weapons and has concerns that the Department has created a two-tiered system of response for deadly weapons: 1) firearms and 2) edged and other weapons.

~~8.9.~~ The stakeholder group cannot reach consensus on whether to use the term “shall, when feasible,” or the term “should, when feasible” throughout the entire document. When the terms “shall, when feasible” or “should, when feasible” are written in the document, the positions described below should be considered.

The OCC, SFBAR, Coalition on Homelessness (COH), San Francisco District Attorney/Blue Ribbon Panel (SFDA/BRP), Public Defender and ACLU want to use the term “shall, when feasible.” The POA, OFJ, Pride Alliance, LPOA and APOA had concerns with this term because “shall” is a mandate, but if an officer cannot perform the action because of safety, someone might judge the situation, using 20/20 hindsight, and opine that the officer would have been able to, and therefore should have, performed the action and discipline the officer.

The POA, OFJ, LPOA, Pride Alliance and APOA want to use the term, “should, when feasible.” OCC, SFBAR, COH, SFDA/BRP, Public Defender and ACLU have concerns with that term and discussed the distinction between their understanding of the two terms: “shall, when practical” means an officer will take the action at a time when it is safe, and “should, when practical” means the officer can think about taking action, but does not have to take the action even if it is safe.

DGO 3.02, Terms and Definitions, defines both terms:

- 1) Shall/Will/Must: mandatory
- 2) Should: permissive, but recommended

~~9.10.~~ _____ The POA asks the Department if it expects officers, when faced with imminent threat of death or serious bodily injury to themselves or an innocent member of the public, to attempt de-escalation techniques.

~~10.11.~~ _____ The OCC, Public Defender and SFBAR recommend revising this section and including a section titled “Pointing a Firearm at a Person” and include the following language: “The pointing of a firearm at a person is a seizure and requires legal justification. No officer shall point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation will escalate to justify lethal force.”

POA, OFJ, LPOA, APOA and Pride Alliance are opposed to the recommended language and state the law does not support the statement that the situation will escalate to lethal force in order for an officer to point a firearm. The POA also state that while they know the pointing of a firearm is a use of force, they question why the Department has made it a reportable use of force.

~~11.12.~~ _____ POA, OFJ, APOA, LPOA, and Pride Alliance would like the policy to be consistent with current 5.02 policy drafted in 2011. The POA lists examples where an officer would have to use his/her firearm to save his/her life or the life of another, but would be out of policy:

- A vehicle is driving toward the officer and the officer has no reasonable means or apparent way to retreat or move out to a place of safety.
- There is a driver on the sidewalk “actively plowing through a crowd of people.”

~~12.13.~~ _____ SFBAR suggests adding more specific language: 1) members are prohibited from intentionally positioning themselves in a location vulnerable to vehicle attack, 2) whenever possible, members shall move out of the way of the vehicle, instead of discharging his or her firearm at the operator, and 3) members shall not discharge a firearm at the operator of the vehicle when the vehicle has passed and is attempting to escape. This language mirror's Oakland's policy on vehicle pursuit of 2014 which Oakland PD reports has resulted in decreases in shootings/deaths.

~~13.14.~~ _____ ACLU and SFBAR wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR (if the language remains) want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

Kilshaw, Rachael (POL)

From: Julie Traun <jtraun@sfbay.org>
Sent: Monday, May 02, 2016 3:01 PM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); O'Brien, Alexa (POL); Cabrera, Alicia (CAT); Suzy Loftus; Koski, J Trevor (CAT)
Subject: RE: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order
Attachments: BASF May 2, 2016 Memorandum to Commission Re Use of Force DGOs.pdf

Dear Rachael,

As promised, attached is a separate document. This is a letter to the Commission, which we ask for inclusion with their materials for the meeting on Wednesday. You need not incorporate these comments in your commentary, which I know was the goal of the 3:00 deadline today. I sent those edits to commentary earlier today.

Let me know if you have any questions.

And again, thank you for your help, as always.

Julie

Julie Traun
Director of Court Programs
Lawyer Referral and Information Service
Bar Association of San Francisco
301 Battery Street, 3rd Floor
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Tel: 415-782-8942
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From: Kilshaw, Rachael (POL) [mailto:Rachael.Kilshaw@sfgov.org]
Sent: Thursday, April 28, 2016 2:46 PM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); O'Brien, Alexa (POL); Cabrera, Alicia (CAT); Suzy Loftus; Koski, J Trevor (CAT)
Subject: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Good Afternoon:

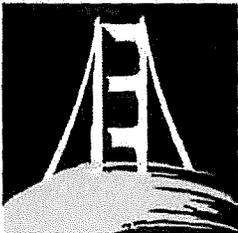
In preparation for the Commission meetings on May 4th and May 11th when the draft Use of Force policies and the draft Conducted Energy Devices Bureau Order will be discussed, I am putting together a summary for the Commissioner to review that explains the areas in the policies where the stakeholders cannot come to a consensus. I have attached the most recent document where I have listed those areas (03/21/16). Can you please review and confirm that I have accurately conveyed your group's position and that I have included all of your group's positions? If you need to make corrections, please track your changes and send back to me. Once I have all of the stakeholders' comments back, I will create the summary for the Commissioners that includes a cross-reference to the stakeholder's submitted documents, and send a copy to each of you. The comments will also be posted on the Commission's website and sent to the DOJ.

As the meeting is next week, I would like to start working on this over the weekend to have the documents to send to the Commissioners on Tuesday morning at 10 am. Please send your comments to me anytime between now and Monday, May 2nd at 3:00 pm.

Thank you

Sergeant Rachael Kilshaw

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1245 – 3rd Street, 6th Floor
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THE BAR ASSOCIATION OF
SAN FRANCISCO

2016 OFFICERS AND
BOARD OF DIRECTORS

May 2, 2016

Michael F. Tubach
President

Memorandum to San Francisco Police Commission

Merri A. Baldwin
President-Elect

From: Julie Traun, Chair, Subcommittee on Data Collection and Analysis, and Stakeholder Representatives on Use of Force Working Group, Bar Association of San Francisco's (BASF) Task Force on Criminal Justice.

Malcolm A. Heinicke
Treasurer

Doris Cheng
Secretary

This Memorandum is prepared in response to the Department's/Commission's April 28, 2016 email to all stakeholders seeking edits/feedback to the summary of areas in which stakeholders were unable to come to a consensus. We ask that this Memorandum be provided as written, in full, to the Commission.

Marvin K. Anderson
Teresa Caffese
David A. Carrillo
Alicia M. Gámez
Karen Kimmey
Peter C. Meier
Theodore B. Miller
Ann N. Nguyen
Danielle Ochs
Natalie Pierce
Vidhya Prabhakaran
Jennifer Redmond
Teresa Renaker
Maulik G. Shah
Charlene (Chuck) Shimada
Quyên Ta
William F. Tarantino
John S. Worden

As the Commission now undertakes the task of finalizing the San Francisco Police Department's Use of Force policies, and as a stakeholder representing a very diverse and large constituency, we take this opportunity to (a) highlight recent national and local developments on Use of Force policy, (b) report on experiences of other police departments which have undertaken this work, (c) contextualize and summarize the DGOs and the stakeholder process, including deletions/edits made by non-stakeholders, in an effort to further highlight critical areas of concern, and (d) outline the primary areas of consensus and concern which we hope may serve as a guide to you as you approach your work.

BARRISTERS CLUB
OFFICERS

Blair K. Walsh
President

Adam I. Kaplan
President-Elect

Jason J. Galek
Treasurer

Diana Kruze
Secretary

EXECUTIVE DIRECTOR AND
GENERAL COUNSEL

Yolanda Jackson

A. National and Local Developments on Use of Force Policy:

First, we welcome the Department of Justice, Office of Community Oriented Policing Service's (DOJ/COPS) set of "Goals and Objectives Statement for the Collaborative Reform Initiative for Technical Assistance with the San Francisco Police Department" released on today's date and believe this Memorandum is consistent with and supportive of the recommended goals and objectives.¹

¹ http://www.cops.usdoj.gov/pdf/crita/SanFrancisco_Goal_and_Objectives.pdf



In addition, this Memorandum serves to highlight relevant sections of the recently released (March 2016) Police Executive Research Forum (PERF) report: “Guiding Principles on Use of Force.”² This report, which was not released in time for stakeholder use, represents “the culmination of 18 months of research, field work, and national discussions on police use of force, especially in situations involving persons with mental illness and cases where subjects do not have firearms.” Portions of the March 2016 PERF Report are briefly summarized in this memorandum because PERF’s guiding principles address the very topics at issue in SFPD’s proposed Use of Force policies.

As emphasized by PERF Executive Director Chuck Wexler, “*[i]n 2016, no issue is of greater consequence to the policing profession, or to the communities we serve, than the issue of police use of force.*”³ Therefore the importance of the work of this Commission as it finalizes policy on Use of Force cannot be understated. We urge each of you to thoughtfully and thoroughly weigh through this process so that San Francisco adopts a Use of Force policy that is consistent with 21st Century policing and reflects the best of San Francisco.

The stakeholder process created by the Commission was an important one. We listened carefully and thoughtfully to the concerns raised by individual members of the department, including strongly held concerns of the Police Officers Association (POA). In reading the most recent PERF report, we recognized the voices of the officers and POA were echoed. At the heart of the officers’ concern, as voiced during the stakeholder meetings, is officer safety. There is an understandable and recognized fear that “any changes to current use-of-force practices could put officers in danger.”⁴

Research, however, has led to “an alternative conclusion: that changing how agencies approach certain types of critical incidents can *increase officer safety* in those situations. Rather than unnecessarily pushing officers into harm’s way in some circumstances, there may be opportunities to slow those situations down, bring more resources to the scene, and utilize sound decision-making that is designed to keep officers safe, while also protecting the public. Through de-escalation, effective tactics and appropriate equipment, officers can prevent situations from ever reaching the point where anyone’s

² PERF, Guiding Principles on Use of Force, March 16, 2016.
<http://www.policeforum.org/assets/30%20guiding%20principles.pdf>

³ Id., at Page 1.

⁴ PERF, “Guiding Principles On Use of Force,” March 2016, at page 14.



life is in danger and where the officers have little choice but to use deadly force.”⁵
Clearly this is the goal of the new DGOs as originally proposed by the police department.

One need only look at Seattle's use of Crisis Intervention training and de-escalation strategies - particularly when facing individuals with mental illness, drug addiction, or other conditions that cause erratic and threatening behavior, to know that our efforts to change policy, culture and training will accomplish what all San Franciscans, including law enforcement, hope for. In 2015, Seattle reported 2,516 incidents involving "significant challenges...posed to officers;" these incidents included 96 individuals with knives, 16 with guns and 109 with other weapons. Yet Seattle officers used force in only 51 cases and "[n]one of the 51 uses of force in the 2,516 incidents were Type III, the highest level, which includes deadly force or any use of force that causes loss of consciousness or substantial bodily harm."⁶ There is no reason San Francisco cannot achieve similar outcomes if reforms are undertaken.

We are in a position to better protect the public as well as safeguard officers. The goal of this work, from the perspective (1) of the officer at the scene using force and (2) the department, was well summarized by Chief Steve Anderson, Nashville Police Department:

We owe it to our officers to safeguard not only their physical safety, but also protect them from the mental and emotional anguish that will ensue in the aftermath of any significant use of force. The headlines, the internal investigations, and the inevitable civil rights lawsuit will impact their lives forever. A brief discussion with any officer who has had that cloud of interrogatories, depositions and pending court dates hanging over their head, seemingly forever, punctuated by the daily public scrutiny, will convince any law enforcement leader that uses of force that can safely be avoided should be avoided.

We all have to come to some decision as to what policies, procedures, training, and practices will be embraced by our own departments. As decisions such as these are being made, it is sometimes helpful to imagine yourself sitting in the witness chair in federal court or behind a podium addressing public inquiry about use of force policies and practices. Would you be more comfortable quoting a

⁵ Ibid.

⁶ Pursuant to 2012 Consent Decree and in May 2015 Seattle began using a three-page form called the "Crisis Template" to capture every police contact with individuals in crisis. PERF, "Guiding Principles On Use of Force," March 2016, at Page 58.



policy that takes into account the 30 Guiding Principles, or attempting to explain the Graham test of objective reasonableness?⁷

Repeatedly, stakeholder officers expressed their concern about “confusion” and “danger” in the field given policy change. Therefore we owe it to the officers to weave policy changes with training; we must to teach, not tell them how to accomplish new Use of Force policies to create a sound and second nature response designed to accomplish the new policy goals. We urge the Commission to insist that scenario-based training accompany policy to best protect the officer *and* the public.

Graham v. Connor: Given lengthy discussions of the *Graham v. Connor* standard during the stakeholder meetings and the POA’s hope to continue reliance on this minimal standard, a brief discussion of the standard is appropriate. The most recent PERF report provides considerable insight and discussion which often tracked our own discussions during our stakeholder meetings.

As noted, “The U.S. Supreme Court’s landmark 1989 decision in *Graham v. Connor* outlines broad principles regarding what police officers can legally do in possible use-of-force situations, but it does not provide specific guidance on what officers *should* do. It is up to individual police agencies to determine how to incorporate the Court’s principles into their own policies and training.”⁸ More importantly, the Supreme Court decision, now more than 25 years old, offers “**little guidance, other than the four sentences⁹ on how police agencies should devise their policies, strategies, tactics, and training regarding the wide range of use-of-force issues.**”¹⁰

⁷ PERF, “Guiding Principles On Use of Force,” March 2016, at Page 73

⁸ PERF, “Guiding Principles On Use of Force,” March 2016, at Page 15.

⁹ “Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.... Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,... its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.... The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.... The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁰ PERF, “Guiding Principles On Use of Force,” March 2016 at Page 16, (Emphasis original)



Today, police departments reengineering their Use of Force policies understand the limitations of *Graham v. Connor* and now ask, (in the words of Chief Cathy Lanier of the Metropolitan Police Department of Washington D.C.) “The question is not, “*Can you use deadly force?*” The question is “*Did you absolutely have to use deadly force?*”...And the decisions *leading up* to the moment when you fired a shot ultimately determine whether you had to or not.”¹¹

In 1995, San Francisco Police Department’s DGO 5.01 stated: “[i]t is the policy of the SFPD to accomplish the police mission as effectively as possible with the highest regard for the dignity off all persons and with *minimal* reliance on the use of physical force.” (Emphasis added.) Remarkably, in the proposed DGO, SFPD eliminated this important language which all non-police stakeholders (BASF, OCC, ACLU, COH DA/BRP and PD) strongly insisted be included in the introductory policy statement of each applicable DGO.¹² San Francisco cannot go backward at a time when the entire nation is moving forward. It is the Commission’s responsibility to adopt a policy for 21st Century policing and insist on coupling policy with comprehensive training designed to accomplish the goals. The DOJ/COPS goal for San Francisco to improve “community-oriented policing practices, transparency, professionalism and accountability” are better advanced and supported with 21st Century policing.¹³

We believe that the officers are entitled to rely on sound policy and training. Policy and training cannot be piecemealed, but must be part of an interwoven fabric designed to protect the public and the officers called upon to carry out the work of this department. We appreciate and heard the concerns of the officers which must in turn, inform the training process going forward.

¹¹ PERF, “Guiding Principles On Use of Force,” March 2016, at Page 16.

¹² As provided to the Commission at the April 6, 2016 meeting all enumerated stakeholders proposed the following introductory paragraph: “*The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary force. These are key factors in maintaining the legitimacy with the community and safeguarding the public’s trust.*”

¹³ http://www.cops.usdoj.gov/pdf/crita/SanFrancisco_Goal_and_Objectives.pdf, Page 1.



the nation so that this Commission is able to rely on both research and tested implementation. The Commission can rest assured that reliance on (1) “minimal force” language, (2) “mandatory language concerning Officers’ duty to use de-escalation and other tactics before using force” and (3) policies on “point[ing] a firearm at an individual only when the officer or another is in danger of death or great bodily injury” are all well supported in practice elsewhere.

C. A Summary of the Stakeholder Process – Areas of Concern:

All stakeholders were presented with draft DGOs bearing the date of 2/10/16. We met at length (often 6 hours at a time) on three occasions. The final drafts with comments bear the date: 3/21/16.

We appreciate that it was understandably difficult to capture the full conversation and context of the comments. However, we were remarkably surprised by startling edits appearing in the version discussed at the third meeting.

At the third meeting, it became clear that language which had been included in the original draft – and there had been no agreement to delete language – had disappeared from the draft presented for discussion at this final meeting. This is especially true of language regarding proportionality and other key provisions important to many stakeholders. Many of us asked: “What happened?” and we were informed that the “City Attorney” had deleted unnecessary/repetitive language and/or language that concerned them from the standpoint of potential legal liability. As the City Attorney was not included as a stakeholder in this process, and because these deletions/changes occurred outside the stakeholder process, we object to the role and the outcome of this involvement. Legal liability and policy are different and separate and must be approached as such.

We are informed that the role of the City Attorney which impacted the drafts here is contrary to common past practice for collaborative policy crafting with SFPD and the Police Commission. Policy standards are designed to “promote the general welfare” and are not enacted to create any right to equitable relief or damages. In fact DGO 8.10, Section XII reflects this important distinction:

GUIDELINES LIMITED TO PROMOTION OF GENERAL WELFARE

In undertaking the adoption and enforcement of these guidelines, the San Francisco Police Department is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on the City, Police Commission, Department officials, or employees, a duty or obligation to any



person for equitable relief, money damages, or any other relief based on a claim that a breach will cause or has proximately caused injury

This Memorandum supplies some examples of City Attorney involvement, but it is certainly not exhaustive. For example, we learned that it was the City Attorney, not the stakeholders that deleted the descriptive word “thoughtful” to describe “communication” referenced in the first set of DGOs. During the third meeting, discovery of this deletion led to discussion of re-including the intent of the language originally included. We believe that by including “thoughtful” communication, the department intended the communication would serve to create time, distance and rapport in order to deescalate. These recommendations are now included in the proposed introductory paragraph from the vast majority of stakeholders, but remain deleted from the original draft by the Department.

However, there were other important deletions/revisions that were not fully or timely captured by the stakeholders. Another example of non-stakeholder edits concerns paragraph “**D. Proportionality.**” The original version read:

“It is important that an officer’s level of force be proportional to the severity of the offense committed or the threat posed to human life for which the officer is taking action. It is critical officers apply the principles of proportionality when encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other object. Officers **may only use** the degree of force that is reasonable and **necessary** to accomplish their lawful duties.”

This language is more directive, descriptive and it includes mandatory language. Though it includes *Graham v. Connor*’s “reasonable” standard, it also adds that the degree of force must also be “necessary.”

At the third stakeholder meeting, much of this language changed – but not as a result of agreed upon suggestions from stakeholders. And unlike the discussion of the deleted word “thoughtful,” the stakeholders didn’t focus as fully, for many of these deletions/edits were difficult to identify and discuss during our meetings. Currently, the draft resorts to the threshold *Graham v. Connor* standard and it guts the intent and spirit of the original proposed policy on proportionality.

“The Department requires that officers use only the degree of force that is **reasonable** for the purpose of accomplishing their duties. The degree and kind of force used **should** be proportional to the severity of the offense committed or the threat posed to human life; however the principal of proportionality **does not**



require officers to refrain from using reasonable force to overcome a threat to the safety of the public of officers or to overcome resistance.”

The mandatory language (“may only use”) was deleted from the first version and replaced with permissible language (“should”); “necessary” was deleted and replaced with “reasonable.” The original intent of the first draft is consistent with important components of 21st Century policing. There is absolutely no way for the Commission to know that this process – conducted wholly outside of the stakeholders’ meetings – occurred. It was not known to the stakeholders until the questions were asked at the third meeting and these edits/deletions are not captured in the comments accompanying the draft DGOs. The Commission needs to know that this process occurred and it occurred outside the stakeholder meetings.

Therefore, in addition to the work before you as you weigh through sections of each General Order, and in light of the attached commentary provided by the Department, we encourage you to compare the first version with the final version. If there are no comments explaining the changes, the changes were not made by the stakeholders.

Finally, while we find that the comments which accompany the draft DGOs are helpful and essential to this process, we suspect they may not be as helpful as an outline addressing primary areas of concerns. The following is offered to guide you through this process and we trust it will be of assistance to you.

D. Primary Areas of Consensus and Concern; A Proposed Outline to Guide the Commission:

1. The Important Role of Introductory Paragraphs, Consistent Language and Goals

The stakeholders spent considerable time on the language of the introductory paragraph to DGO 5.01 and 5.02 set out on page 5, footnote 12 of this Memorandum. As you approach your work, we recommend that the framing of goals of each Order is important and should be reflected in the introductory paragraphs. In addition, we encourage consistency of language which supports the goals of DOJ/COPS for San Francisco announced today: “increase[d] public trust through improvements in community-oriented policing practices, transparency, professionalism and accountability while taking into account national standards, best practices, current and emerging research, and community expectations. Critical to this effort is ensuring that the SFPD is engaged with community of San Francisco in an open, transparent process centered on building trust and confidence with the department, particularly in communities of color and other disenfranchised communities.”¹⁴ We suspect that you

¹⁴http://www.cops.usdoj.gov/pdf/crita/SanFrancisco_Goal_and_Objectives.pdf, Page 1.



will find, as we did, that keeping goals and consistency of language in mind, will assist you considerably.

2. Incorporate Minimal Reliance on the Use of Force

PERF recommends under its Guiding Principle #2 that “agencies should continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of Graham v. Connor.”¹⁵ Consistent with PERF’s recommendation to “move policing to a higher standard when it comes to how and when officers use force,”¹⁶ several law enforcement agencies across the nation have Use of Force policies that rely upon minimal force. For example, the New Orleans Police Department instructs officers to:

use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the members or others. Members are advised that the Department places restrictions on officer use of force that go beyond the restrictions set forth under the Constitution or state law.

The Las Vegas Metropolitan Police Department instructs its officers to place “minimal reliance upon the use of force.” Washington, D.C.’s Metropolitan Police Department informs its officers to use “the minimum amount of force that the objectively reasonable officer would use.” The Chicago Police Department states that it expects officers to develop and display skills...to resolve confrontations without resorting to force...or by using the least amount of appropriate force.” The Portland Police Department instructs officers to “accomplish its mission as effectively as possible with as little reliance on force as practical.” Albuquerque Police Department’s Use of Force policy provides that officers are to “de-escalate situations without using force when possible...and whenever feasible, to use the minimum amount of force necessary within that range to effect lawful objectives.” Use of Force policies for Seattle and Oakland Police Departments require a “minimal reliance” on the use of physical force. The Milwaukee Police Department’s Code of Conduct’s core values and guiding principles is “Restraint: We use the minimal force and authority necessary to accomplish a proper police purpose.” (See April 6, 2016 OCC Recommendations and Research Concerning Three Use of Force Principles, pages 1-7, for a discussion of Use of Force policies in ten police departments that incorporate a standard of minimal force.)

¹⁵ See PERF’s “Guiding Principles On Use of Force,” March 2016, pages 35-38; see also PERF’s “Use of Force: Taking Policing to a Higher Standard,” January 29, 2016, Policy #2.

¹⁶ See PERF’s “Guiding Principles On Use of Force,” March 2016, page 5.



For over two decades, SFPD instructed officers to accomplish its mission with minimal reliance on the use of physical force. SFPD's Use of Force policy that was adopted in 1995 and is currently in effect instructs officers to accomplish the police mission "with minimal reliance upon the use of physical force." In February 2016 when SFPD proposed its revisions to DGO 5.01, it omitted in its policy statement any reference to "minimal reliance on the use of physical force. However, under Force Options, it instructed officers to "consider requesting additional resources to the scene to resolve the situation with a minimal amount of force." (See DGO 5.01, Rev. 02/10/16). When non-police stakeholders pointed out that SFPD's revisions included a minimal reliance on force under Force Options, SFPD subsequently deleted this language in its revised draft of March 17, 2016.

3. Incorporate Mandatory Language Concerning Officers' Duty to Use De-Escalation and Other Tactics Before Using Force.

Several law enforcement agencies use mandatory language when describing an officers' responsibilities to use de-escalation and other techniques before resorting to force. These agencies recognize that there will be occasions when de-escalation and other techniques will not be possible and thus include a qualifying phrase such as "when feasible" or "when practical" or "when possible."

For example, New Orleans Police Department's Use of Force policy statement states, "when feasible based on the circumstances, *officers will use* de-escalation techniques, disengagement; area containment; surveillance, waiting out a subject; summoning reinforcements; and/or calling in specialized units such as mental health and crisis resources, in order to reduce the need for force, and increase officer and civilian safety." Albuquerque Police Department's policy states that "*officers shall use* advisements, warnings, verbal persuasion, and other tactics and alternatives to higher levels of force, if feasible." Chicago Police Department's Use of Force policy provides, "*Officers will* de-escalate and use Force Mitigation principles whenever possible and appropriate, before resorting to force and to reduce the need for force." The Cleveland Police Department (CPD) also uses mandatory language concerning an officer's responsibility to use de-escalation and other tactics before using force. (See April 6, 2016 OCC Recommendations and Research Concerning Three Use of Force Principles, pages 7-10, for a discussion of Use of Force policies in four police departments that use mandatory language to describe officers' responsibilities to use de-escalation and other techniques before resorting to force.)

SFPD's proposed use of force policy predominantly uses the term "should" rather than "shall" in describing officers' duties, especially pertaining to de-escalation and other tactics before using force. Several stakeholders including the Bar Association of San Francisco, the Office of Citizen Complaints, the Coalition on Homelessness, the Northern California American Civil Liberties Union, and other non-law enforcement stakeholders recommend that the duty to use de-escalation and other



tactics before using force be a mandatory duty that permits exceptions by including a qualifying phrase such as “when feasible” or “when practical” or “when possible.”

4. Incorporate A Restricted Shooting At Vehicle Policy

PERF’s Guiding Principle #8 provides that law enforcement agencies should adopt a strict prohibition against shooting at or from a moving vehicle unless someone in the vehicle is using or threatening deadly force by means other than the moving vehicle itself.¹⁷ For more than 40 years the New York City Police Department (NYPD) has restricted officers from shooting at or from a moving vehicle. After adopting its restrictive policy in 1972, within a year NYPD experienced a 33-percent reduction from its nearly 1,000 shooting at car incidents to 665 the following year. Car shootings have declined significantly within NYPD, dropping to fewer than 100 per year today with no indication that officer safety was in any way jeopardized by the change in policy.¹⁸ In addition to NYPD, Boston Police Department, Chicago Police Department, Cincinnati Police Department, Denver Police Department, Philadelphia Police Department, and Washington, DC Metropolitan Police Department restrict the shooting at or from a moving vehicle.¹⁹

As reflected in Commentary, the Bar Association also noted helpful language adopted by Oakland Police Department in 2014 which contributed to a decline in shootings/deaths stemming from vehicle pursuit.

5. Include Proportionality As An Essential Component of Police Use of Force

The March 2016 PERF report explains that the concept of proportionality considers whether a particular police use of force is appropriate in light of the threat faced by the officers and the totality of the circumstances. Proportionality requires officers to consider whether they are using the level of force necessary to mitigate the threat and safely achieve a lawful objective. Proportionality also requires officers to determine whether there is another, less injurious option available that will safely and effectively achieve the same objective. For example, the PERF report explains that in a situation involving a person with a mental illness holding a knife at his side, a proportional response could be to tactically reposition (i.e. moving away from the threat and using cover, such as a squad car) and bringing additional resources to the scene such as a specially trained officer.²⁰ Police Scotland Sergeant Jim Young aptly describes proportionality as “Why use a sledgehammer to crack a nut....In the end,

¹⁷ See PERF’s “Guiding Principles On Use of Force,” March 2016, page 26; see also PERF’s “Use of Force: Taking Policing to a Higher Standard,” January 29, 2016, Policy #8.

¹⁸ See PERF’s “Guiding Principles On Use of Force,” March 2016, page 26.

¹⁹ See PERF’s “Guiding Principles On Use of Force,” March 2016, page 44-46.

²⁰ See PERF’s “Guiding Principles On Use of Force,” March 2016, page 22, 38-40.



the question is, “Was the force used the minimum amount or least injurious to achieve the lawful aim? And if that’s not the case, then we would judge that not to be proportionate.”²¹

SFPD’s originally proposed provision about proportionality reflected this PERF’s definition of proportionality. (See SFPD’s February 10, 2016 proposed revisions to DGO 5.01, Section I (D).) As discussed in Section C. **A Summary of the Stakeholder Process – Areas of Concern**, on page 6 of this Memorandum language was changed by the City Attorney.

6. Permit Officers to Point A Firearm At an Individual Only When The Officer or Another Person is In Danger of Death or Great Bodily Injury.

Several police departments—including New Orleans, Washington, DC Metropolitan, Los Angeles, Denver, and Oakland—permit an officer to point a firearm at an individual only when the officer reasonably believes that the situation may escalate to a point where deadly force may be justified. For example, the New Orleans Police Department’s Use of Force policy states, “*Officers shall not draw or exhibit a firearm unless the circumstances surrounding the incident create an objectively reasonable belief that a situation may escalate to the point at which lethal force would be authorized.*” The D.C. Metropolitan Police Department’s Use of Force policy states, “*No member shall draw and point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal force would be permitted.*” The Los Angeles Police Department’s policy instructs officers that “unnecessarily or prematurely drawing or exhibiting a firearm limits an officer’s alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm.” Both LAPD and Denver’s policies state, “*an officer’s decision to draw or exhibit a firearm should be based on the tactical situation and the officer’s reasonable belief there is a substantial risk that the situation may escalate to the point where deadly force may be justified.*”

SFPD’s Field Training Manual states:

Officers may draw and be ready to use their firearms *anytime they have reasonable cause to believe that they or another person is in danger of death or great bodily injury.* (SFPD’s Peace Officer Field Training Manual, June 2013 Edition, Firearms Use, Week 1, Page 65, emphasis added.)

²¹ See PERF’s “Guiding Principles On Use of Force, March 2016, page 40.



SFPD should incorporate the higher standard from its field training manual and require a threat of death or great bodily injury to justify an officer's pointing of a firearm at an individual.

(See April 6, 2016 OCC Recommendations and Research Concerning Three Use of Force Principles, pages 11-13, for a discussion of Use of Force policies in five police departments that require a higher standard than "officer safety" to permit an officer to point a firearm at an individual.)

7. Provide The Infrastructure To Identify, Train And Deploy Crisis Intervention Teams As First Responders To Mental Health Crisis Calls And To Collect Data To Evaluate CIT Response To Crisis Calls.

As part of its recommendations concerning response to mental health crisis calls, PERF Guiding Principle #19 discusses the importance of Crisis Intervention Teams. It recommends providing in-depth training (for example, the 40-hour Crisis Intervention Team or CIT training) to a subset of officers and field supervisors (preferably those who have indicated an interest in the area), with the goal of having CIT-trained personnel on duty and available to respond at all times. PERF also emphasizes that "[t]his training should focus heavily on communication and de-escalation strategies.²² Moreover, PERF stresses that "officers should be trained to work as a team, and not as individual actors, when responding to tense situations involving persons with mental illness."²³

As noted above on page 2 of this Memorandum, the PERF report also featured Seattle Police Department's successful use of "specialized, highly trained officers" to respond to crisis intervention incidents. Additionally, the PERF report underscored that by requiring Seattle officers to use a three-page form called "Crisis Template" to capture data on every police contact with an individual in crisis, the Department's data demonstrated how the crisis intervention team training reduced officers' use of force.²⁴

8. State That The Reasonableness Of An Officer's Use Of Force Includes Consideration Of The Officer's Tactical Conduct And Decisions Leading Up To The Use Of Force.

SFPD's Use of Force policies, its analysis of all use of force incidents, and its training should consider the officer's tactical conduct and decision-making that lead up to the use of force when determining the reasonableness of the officer's use of force. In *Hayes v. San Diego* (2013) 57 Cal.4th 622, the California Supreme Court ruled that

²² See PERF's Guiding Principles On Use of Force, March 2016, page 57.

²³ See PERF's Guiding Principles On Use of Force, March 2016, page 60.

²⁴ See PERF's Guiding Principles On Use of Force, March 2016, pages 58-59.



under California negligence law, the tactical conduct and decisions preceding an officer's use of deadly force are relevant considerations in determining whether the use of deadly force is reasonable. In light of *Hayes*, the Los Angeles Police Department amended its use of force procedures to state, "the reasonableness of an officer's use of deadly force includes consideration of the officer's tactical conduct and decisions leading up to the use of deadly force." (See LAPD, Use of Force Policy, 556.10). While the *Hayes* court addressed the importance of evaluating the officer's tactical conduct and decision-making that preceded the use of deadly force, this evaluation is equally important when evaluating the reasonableness of an officer's use of force in circumstances that do not result in death.

In *Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, the 9th Circuit reiterated its previous ruling that police are "required to consider [w]hat other tactics if any were available to effect an arrest." *McPherson* involved a §1983 lawsuit that alleged that the officer used excessive force for using a taser during a traffic stop for a seatbelt infraction. The Ninth Circuit noted that the arresting officer had not issued a warning before using the taser and had not considered the less intrusive means of effecting Bryan's arrest by waiting for additional officers he knew were enroute to the scene.

The following provision should be added to determine the reasonableness of an officer's use of force used. These factors are based on Ninth Circuit and California Supreme Court decisions.

1. What other tactics if any are available to the officer;
2. The ability of the officer to provide a meaningful warning before using force;
3. The officer's tactical conduct and decisions preceding the use of force;
4. Whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis or who is a person with a mental illness.

9. Provide A Prompt Supervisory Response To Any Incident Involving A Weapon, Where A Person Is Experiencing A Mental Health Crisis Or Potential For Significant Use Of Force.

PERF's Guiding Principle #22 recommends prompt supervisory response to any scene involving a weapon, a person in mental health crisis, or where a dispatcher or officer believes there is a potential for significant use of force. SFPD's currently proposed DGO does not incorporate this level of supervisory response.

10. Regularly Collect, Analyze and Report to the Public Use of Force Data

It is impossible to provide either transparency or accountability (two enumerated goals by DOJ/COPS for San Francisco) in the absence of data collection and analysis. Our neighboring police departments studied by the BASF's Subcommittee on Data Collection and Analysis, boast of their ability to collect and analyze data. The data is



regularly reviewed and analyzed by outside, independent analysts to bring an additional level of understanding as well as accountability and it is made public. For Oakland, years of data collection and reform have resulted in a considerable downturn in their Use of Force as noted in recent publications

(<http://www.sfchronicle.com/bayarea/article/Sharp-downturn-in-use-of-force-at-Oakland-Police-6481637.php>)

PERF's Guiding Principle #11 states, "to build understanding and trust, agencies should issue regular reports to the public on use of force."²⁵ PERF recommends that law enforcements regularly public reports on their officers' use of force, including demographic information about the officers and subjects involved, the circumstances, and also efforts to prevent all types of bias and discrimination. PERF cites as examples LAPD's "Use of Force Year-End Review, NYPD's Annual Firearms Discharge Report and Palm Beach County Sheriff's Office, Division of Internal Affairs Annual Report."

For both transparency and accountability—goals that are underscored by the President's Task Force on 21st Century Policing and PERF's Guiding Principles On Use Of Force, and are now included as goals from the DOJ/COPS set of "Goals and Objectives Statement for the Collaborative Reform Initiative for Technical Assistance with the San Francisco Police Department" —SFPD's DGO 5.01.01 should include provisions that describe the type of use of force data SFPD will collect, analyze and provide for monthly posting of its use of force data on its website and a yearly Use of Force Report to the Police Commission. DGO 5.01.01 be amended to include provisions that state:

- The Department will collect and analyze its use of force data through a Use of Force form that will enable electronic collection of data.
- The Department will post a monthly basis on its website comprehensive use of force statistics and analysis.
- The Department will provide a written Use of Force report to the Police Commission annually.
- The Department's Use of force statistics and analysis will include at a minimum:
 1. The type of force
 2. The type and degree of injury to suspect and/or officer
 3. Date and time
 4. Location of the incident
 5. Officer's unit (i.e. Violence Reduction Task Force, plainclothes)
 6. District station
 7. Officer's assignment

²⁵ See PERF's "Guiding Principles On Use of Force, March 2016, page 49.



8. Number of officers using force in the incident
9. Officer's activity when force was used (ex. handcuffing, search warrant, pursuit)
10. Officer demographics (age, gender, race/ethnicity, rank, number of years with SFPD, number of years as a police officer)
11. Suspect demographics including race/ethnicity, age, gender, gender identity, primary language and other factors such as mental illness, cognitive impairment, developmental disability, drug and alcohol use/addiction, veteran status, and homelessness.

Conclusion:

We are gratified that the San Francisco Police Department has undertaken the hard work to redraft San Francisco's policies on Use of Force; their work is clearly aimed at bringing our department into 21st Century policing. We believe that the stakeholder process, created by the Commission was an important one, in which we learned considerably. The Bar Association's Task Force remains available to you as you move forward and we hope that this Memorandum is helpful to you.

Respectfully submitted,

JULIE A. TRAUN

Chair, Subcommittee on Data Collection & Analysis

BASF Task Force on Criminal Justice

Director of Court Programs

Lawyer Referral and Information Service

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From: West, Colin C. <colin.west@morganlewis.com>
Sent: Monday, February 29, 2016 9:54 AM
To: Kilshaw, Rachael (POL); Sainez, Hector (POL); Chaplin, Toney (POL); Fabbri, Carl (POL); suzyloftus@hotmail.com; Cabrera, Alicia (CAT)
Cc: Wang, Lucy; Chiu, Michelle Park; Chapman, Ellie F.; Benedicto, Kevin M.; Stokes, Jenna; Anand Subramanian (anand@policylink.org)
Subject: Use of Force Policies
Attachments: (29857413)_(1)_REVISED UOF 5 01 021016 (2).docx; (29858479)_(1)_REVISED UOF 5 01 1 02102016 (2).docx; (29858757)_(1)_REVISED UOF 5 02 02102016 (2).docx

Dear All,

On behalf of the Blue Ribbon Panel on Transparency, Accountability and Fairness in Law Enforcement, we appreciate the opportunity to comment on the proposed revisions to the San Francisco Police Department's use of force policies. Attached please find our comments and suggestions, in redline to Word versions of the proposed revised policies. Judge Tevrizian notes that individual training and implementation of the policies by the officers should be a focus of discussion going forward.

Our comments were necessarily limited by time constraints, and we may provide additional suggestions over the next few days after we have had the opportunity to consider the policies further.

Thank you,

Colin C. West

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USE OF FORCE

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using thoughtful communication, and de-escalation principles before resorting to the use of force, whenever practical. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

I. POLICY

- A. SANCTITY OF HUMAN LIFE.** The Department is committed to the sanctity and preservation of all human life, human rights, and human dignity.
- B. THOUGHTFUL COMMUNICATION.** Communication with non-compliant subjects is most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to diffuse conflict and achieve voluntary compliance before resorting to force options.
- C. DE-ESCALATION.** In situations where a subject is not actively endangering the safety of the public or an officer, fleeing or destroying evidence, officers ~~should~~ shall, where practical employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and to increase the likelihood of voluntary compliance.

Officers ~~should~~ shall, where practical, consider the possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to use de-escalation techniques while maintaining public safety and officer safety.

The following de-escalation tactics ~~should~~ shall be used, when safe and practical under the totality of the circumstances:

1. Stabilize the situation by isolating and containing the subject;
2. Create time and distance from the subject by establishing a buffer zone ("reaction gap") and utilizing cover to avoid creating an immediate threat that may require the use of force;
3. Call a supervisor to assume command and request additional resources, such as Crisis Intervention Team (CIT) trained officers; Crisis/Hostage

Negotiation Team, Conducted Energy Devices, or Extended Range Impact Weapon;

4. Designate an officer to engage in thoughtful communication with the subject without time constraint;
5. Tactically re-position as often as necessary to maintain the reaction gap, protect the public, and preserve officer safety;
6. Continue de-escalation techniques and take as much time as necessary to resolve the incident, if practical.

Other options, not listed above, may be available to assist in de-escalating the situation.

D. PROPORTIONALITY. Officers must use a level of force that is proportional to the severity of the offense committed or the threat posed to human life for which the officer is taking action. Officers shall apply the principles of proportionality when encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other object. Officers may only use the degree of force that is proportional, objectively reasonable and necessary to accomplish their lawful duties.

E. DUTY TO INTERVENE. Officers shall intervene when they reasonably believe another officer is about to use, or is using, excessive force. Officers shall promptly report any use of excessive force and the efforts made to intervene to a supervisor.

E.F. FAIR AND UNBIASED POLICING. It is one of the Department's guiding principles that policing occur without bias, including the use of force. See DGO 5.17. Members of the Department shall carry out their duties, including with respect to the use of force, in a manner free from any bias and to eliminate any perception of policing that appears to be motivated by bias.

II. CONSIDERATIONS GOVERNING ALL USES OF FORCE.

A. USE OF FORCE MUST BE FOR A LAWFUL PURPOSE. Officers may use reasonable force in the performance of their duties, for the following purposes:

1. To effect a lawful arrest, detention, or search, or to prevent escape.
2. To prevent the commission of a public offense.
3. In defense of others or in self-defense.
4. To gain compliance with a lawful order.
5. To prevent a person from injuring himself/herself, unless the person also poses an imminent danger of death or serious bodily injury to another life or officer. See DGO 5.02, Use of Firearms and Lethal Force.

B. USE OF FORCE MUST BE REASONABLE. Under the Fourth Amendment of the United States Constitution and California Penal Code section 835(a), an officer's decision to use force, and to use a particular type and degree of force,

must be objectively reasonable under the totality of the circumstances. An officer must be able to clearly articulate the objective reasons, based on the information available to the officer at the time, why a particular force option was used. Relevant factors include but are not limited to:

1. Whether the subject poses an immediate threat to the safety of the public or officers, and the degree of that threat;
2. Proximity, access to and type of weapons available to the subject;
3. Time available to an officer to make a decision;
4. Availability of additional officers or resources to de-escalate the situation;
5. Any force should be proportional to the severity of the offense committed for which the officer is taking action;
6. Environmental factors and/or other exigent circumstances;
7. Severity of the crime(s) at issue;
8. Whether the subject is attempting to evade arrest by flight or is actively resisting, and the degree of that resistance;
9. Whether the subject's escape could pose a future safety risk.

Not all of the above factors may be present or relevant in a particular situation, and there may be additional factors not listed.

- C. UNLAWFUL PURPOSES.** Penal Code Section 149 provides criminal penalties for every public officer who "under color of authority, without lawful necessity, assaults or beats any person." When any degree of force is utilized as summary punishment or for vengeance, it is clearly improper and unlawful. Any malicious assaults and batteries committed by officers constitute gross and unlawful misconduct and will be criminally investigated.
- D. DUTY TO RENDER FIRST AID.** Officers shall render first aid when a subject is injured or claims injury caused by an officer's use of force unless first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid.
- E. DUTY TO PROVIDE MEDICAL ASSESSMENT.** Officers shall arrange for a medical assessment by emergency medical personnel when a subject is injured or complains of injury caused by a use of force, or complains of pain that persists beyond the use of a physical control hold, and the scene is safe. If the subject requires medical evaluation, the subject shall be transported to a medical facility. If the emergency medical response is excessively delayed under the circumstances, officers should contact a supervisor to coordinate and expedite the medical assessment or evaluation of the subject.
- F. SUPERVISOR'S RESPONSIBILITY.** When officers are dispatched to or on-view a subject with a weapon, a supervisor shall immediately:
1. Notify DEM, monitor radio communications, respond to the incident (e.g., "3X100, I'm monitoring the incident and responding.");

2. Remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources;
3. Upon arrival, assume command, and ensure appropriate resources are on-scene or are responding.

III. FORCE OPTIONS

The force options authorized by the Department are physical controls, personal body weapons, chemical agents, impact weapons, extended range impact weapons, vehicle interventions, conducted energy devices, and firearms.

- A. PHYSICAL CONTROLS/PERSONAL BODY WEAPONS.** Physical controls, such as control holds, takedowns, strikes with "personal body weapons" (i.e., body parts such as a hand, foot, knee, elbow, head butt, etc.), and other weaponless techniques are designed to incapacitate and subdue subjects.
1. **PURPOSE.** Officers should consider the relative size and possible physical capabilities of the subject compared to the size, physical capabilities, skills, and experience of the officer. When faced with a situation that may necessitate the use of physical controls, officers should consider requesting additional resources to the scene to resolve the situation with a minimal amount of force. Different physical controls involve different levels of force and risk of injury to a subject or to an officer. Some physical controls may actually involve a greater risk of injury or pain to a subject than other force options.
 2. **USE.** When a subject offers some degree of passive or active resistance to a lawful order, in addition to thoughtful communication, officers may use physical controls to gain compliance, consistent with Department training. A subject's level of resistance and the threat posed by the subject are important factors in determining what type of physical controls or personal body weapons should be used.
 3. **PROHIBITED USE OF CONTROL HOLDS.** Officers are prohibited from using the following control holds:
 - a. Carotid restraint; and
 - b. Choke hold.
 4. **MANDATORY MEDICAL ASSESSMENT.** Any subject who has been injured or complains of an injury shall be medically assessed by emergency medical personnel. (See Section II.B.)
 5. **REPORTING.** Officers shall report any use of force involving physical controls where the subject is injured, complains of injury in the presence of officers, or complains of pain that persists beyond the use of a physical control hold from personal body weapons, chemical agents, impact weapons, extended range impact weapons, vehicle interventions, conducted energy devices, and firearms. Additionally, officers shall report the intentional pointing of conducted energy devices and firearms at a subject. Use of physical controls is a reportable use of force when the

subject is injured, complains of injury in the presence of officers, or complains of pain that persists beyond the use of a physical control hold. Striking a subject with a personal body weapon (i.e., body parts such as a hand, foot, knee, elbow, head butt, etc.) is a reportable use of force. (See DGO 5.01.1)

Commented [KB1]: Adjusted so that 5.01 and 5.01.1 use consistent language

Commented [MPC2]: All permissible types of chemical agents should be articulated.

B. CHEMICAL AGENTS. Chemical agents, such as Oleoresin Capsicum (OC) Spray, are designed to cause irritation and temporarily incapacitate a subject.

1. **PURPOSE.** Chemical agents can be used to subdue an unarmed attacker or to overcome resistance (unarmed or armed with a weapon other than a firearm) that is likely to result in injury to either the subject or the officer. In many instances, chemical agents can reduce or eliminate the necessity to use other force options to gain compliance, consistent with Department training.
2. **WARNING.** Officers shall provide a warning prior to deploying a chemical agent, if practical:
 - a. Announce a warning to the subject and other officers of the intent to deploy the chemical agent if the subject does not comply with officer commands; and
 - b. Give the subject a reasonable opportunity to voluntarily comply unless it would pose a risk to the community or the officer, or permit the subject to undermine the deployment of the chemical agent.
3. **MANDATORY FIRST AID.** At the scene or as soon as possible, officers shall administer first aid by:
 - a. Seating the subject or other person(s) exposed to a chemical agent in an upright position, and
 - b. Flushing his/her eyes out with clean water and ventilate with fresh air.
4. **MANDATORY MEDICAL ASSESSMENT.** Any person exposed to a chemical agent shall be medically assessed by emergency medical personnel. (See Section ILE.) Any exposed person shall be kept under direct visual observation until he/she has been medically assessed. If an exposed person loses consciousness or has difficulty breathing, that information shall be provided to dispatch to expedite emergency medical personnel.
5. **TRANSPORTATION.** Subjects in custody exposed to a chemical agent must be transported in an upright position by two officers. The passenger officer shall closely monitor the subject for any signs of distress. If the subject loses consciousness or has difficulty breathing, officers shall seek emergency medical attention. Hobble cords or similar types of restraints shall only be used to secure a subject's legs together. They shall not be used to connect the subject's legs to his/her waist or hands in a "trussed" manner or to a fixed object.
6. **BOOKING FORM.** Officers shall note on the booking form that the subject has been exposed to a chemical agent.

7. **REPORTING.** If an officer deploys or attempts to deploy a chemical agent on or near someone, it is a reportable use of force. (See DGO 5.01.1)

C. IMPACT WEAPON. Impact weapons, such as a baton, are designed to temporarily incapacitate a subject.

Commented [MPC3]: All permissible types of impact weapons should be articulated.

1. **PURPOSE.** An impact weapon may be used to administer strikes to non-vital areas of the body, which can subdue an aggressive subject in accordance with Department training. Only Department issued or authorized impact weapons shall be used. If under unusual circumstances, officers need to resort to the use of other objects as impact weapons, such as a flashlight or police radio, officers shall articulate the reason for doing so. Whenever possible, strikes to vital areas, including the head, neck, face, throat, spine, groin, or kidneys should be avoided.
2. **WARNING.** When using an impact weapon, an officer shall, if practical:
 - a. Announce a warning to the subject of the intent to use the impact weapon if the subject does not comply with officer's commands; and
 - b. Give the subject a reasonable opportunity to voluntarily comply, except that officers need not do so where it would pose a risk to the community or the officer or permit the subject to undermine the use of the impact weapon.
3. **PROHIBITED USES.** Officers shall not:
 - a. Use the impact weapon to intimidate a subject(s) or person(s), such as slapping the palm of their hand with an impact weapon or;
 - b. Strike a handcuffed prisoner with an impact weapon.
 - c. Raise an impact weapon above the head to strike a subject.
4. **MANDATORY MEDICAL ASSESSMENT.** Any officer who strikes a subject with an impact weapon shall ensure the subject is medically assessed. (See Section I.I.E.)
5. **REPORTING.** If an officer strikes a subject with an impact weapon, it is a reportable use of force. (See DGO 5.01.1)

D. EXTENDED RANGE IMPACT WEAPON (ERIW). An Extended Range Impact Weapon (ERIW), such as a beanbag shotgun, is a weapon that fires a bean bag or other projectile designed to temporarily incapacitate a subject. An ERIW is generally not considered to be a lethal weapon when used at a range of 15 feet or more.

Commented [MPC4]: All permissible types of ERIWs should be articulated.

1. **PURPOSE.** The ERIW may be used on a subject who is armed with a weapon, other than a firearm, that could cause serious injury or death. This includes, but is not limited to, subjects who are armed with edged weapons and improvised weapons such as baseball bats, bricks, bottles, or other objects. The ERIW may be used to subdue an aggressive subject who poses an immediate threat to another person or the officer in accordance with Department training.

2. **USE.** The ERIW shall be properly loaded and locked in the shotgun rack of the passenger compartment of the vehicle. Officers should observe the following guidelines:
 - a. An ERIW officer shall always have a lethal cover officer. When more than one officer is deploying an ERIW, good tactical judgment in accordance with Department training will dictate the appropriate number of lethal cover officers. In most circumstances, there should be fewer lethal cover officers than the number of ERIWs deployed.
 - b. The ERIW officer's point of aim should be Zone 2 (waist and below). Zone 1 (waist and above) may be targeted if Zone 2 is unavailable or if shots to Zone 2 have been ineffective. Keep in mind that ERIW strikes have the potential to cause serious injury or death if vital areas are struck or if the subject is physically frail.
 - c. The ERIW officer shall assess the effect of the ERIW after each shot. If subsequent ERIW rounds are needed, the officer should aim at a different target area.
3. **LIMITED USES.** The ERIW should not normally be used in the following circumstances:
 - a. The subject is at the extremes of age (elderly and children) or physically frail.
 - b. The subject is in an elevated position where a fall is likely to cause serious injury or death.
 - c. The subject is known to be pregnant.
 - d. At ranges of less than 15 feet.
4. **WARNING.** When using the ERIW, an officer shall, if practical:
 - a. Announce to other officers the intent to use the ERIW by stating "Red Light! Less Lethal! Less Lethal!"
 - b. All other officers at scene to acknowledge imminent deployment of ERIW by echoing, "Red Light! Less Lethal! Less Lethal!"
 - c. Announce a warning to the subject that the ERIW will be used if the subject does not comply with officer commands;
 - d. Give the subject a reasonable opportunity to voluntarily comply unless it would pose a risk to the community or the officer, or permit the subject to undermine the deployment of the ERIW.
5. **MANDATORY MEDICAL ASSESSMENT.** Any subject who has been struck by an ERIW round shall be medically assessed by emergency medical personnel. (See Section II.E.)
6. **BOOKING FORM.** Persons who have been struck by an ERIW round shall have that noted on the booking form.
7. **REPORTING.** Discharge of an ERIW is a reportable use of force. (See DGO 5.01.1)

E. VEHICLE INTERVENTIONS. An officer's use of a police vehicle as a "deflection" technique, creation of a roadblock by any means, or deployment of spike strips, or any other interventions resulting in the intentional contact with a noncompliant subject's vehicle for the purpose of making a detention or arrest,

are considered a use of force and must be reasonable under the circumstances. The Department's policies concerning such vehicle intervention tactics are set forth in DGO 5.05, Response and Pursuit Driving.

Commented [MPC5]: Are these reportable uses of force?

F. CONDUCTED ENERGY DEVICE (CED). See Special Operations Bureau Order on use of CED.

G. FIREARMS. See DGO 5.02, Use of Firearms and Lethal Force.

The Department's highest priority is safeguarding the sanctity of all human life. The purpose of the policy is not to restrict officers from using sufficient force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority. If exceptional circumstances occur, not contemplated by this order, an officer's use of force shall be reasonably necessary to protect others or himself or herself. The officer shall articulate the reasons for employing such use of force.

H. CANINES?

Commented [MPC6]: Should there be a canine policy included?

USE OF FORCE REPORTING

The purpose of this order is to set forth Departmental police and procedures for reporting, evaluating, reviewing, and managing use of force incidents involving Department members.

I. POLICY

- A. **REPORTABLE USES OF FORCE.** Officers shall report any use of force involving physical controls where the subject is injured, complaints of injury in the presence of officers, or complaints of pain that persists beyond the use of a physical control hold from or claims to be injured, personal body weapons, chemical agents, impact weapons, extended range impact weapons, vehicle interventions, conducted energy devices, and firearms. Additionally, officers shall report the intentional pointing of conducted energy devices and firearms at a subject.
- B. **NOTIFICATION OF USE OF FORCE.** An officer shall notify his/her supervisor immediately or as soon as practical of any reportable use of force and whenever a subject makes allegations of excessive force.
- C. **EVALUATION OF USE OF FORCE.** A supervisor shall conduct a use of force evaluation in all cases involving a reportable use of force as set forth in DGO. 5.01, Use of Force.
- D. **EXCESSIVE USE OF FORCE.** Every allegation of excessive force shall be subject to the reporting and investigative requirements of this General Order.

Commented [KB1]: Adjusted so that 5.01 and 5.01.1 use consistent language

II. PROCEDURES

- A. **OFFICER'S RESPONSIBILITY.** Any reportable use of force shall be documented in detail in an incident report. Descriptions shall be in plain language and shall be as specific as possible.
 - 1. When the officer using force is preparing the incident report, the officer shall include the following information:
 - a. The subject's action necessitating the use of force, including the threat presented by the subject;
 - b. Efforts to de-escalate prior to the use of force;
 - c. Any warning given and if not, why not;
 - d. The type of force used;
 - e. Injury sustained by the subject as set forth in DGO 5.01.II.E, Use of Force;
 - e.f. The gender, race, and age of the subject;

Commented [MPC2]: The policy is not clear on who should be reporting the use of force.

Commented [MPC3]: This information should be recorded regardless of whether it is by the officer using force or not. If the officer that used force is not preparing the incident report, that officer's account of the circumstances should be recorded in some way.

- f.g. Injury sustained by the officer(s);
- g.h. Information regarding medical assessment or evaluation, including whether the subject refused;
- h.i. The supervisor's name, rank, star number and the time notified. If applicable, the supervisor's reason for not responding to the scene shall also be included.

2. In the event that the officer using force is not the officer preparing the incident report, the officer using the force shall:
 - a. Ensure that he/she is clearly identified in the incident report; and
 - b. Prepare a supplemental report or a statement form with the above information.

Commented [MPC4]: Under what circumstances would the report not be prepared by the officer that was involved in the use of force? This should be clarified explicitly.

In the event that an officer cannot document his/her use of force due to exceptional circumstances, another officer shall document this use of force in an incident report, supplemental incident report or statement form at the direction of a supervisor.

B. SUPERVISOR'S RESPONSIBILITY. When notified of the use of force, or of allegations of excessive force, the supervisor shall conduct a supervisory evaluation to determine whether the force used appears reasonable, necessary, and within the provisions of this order. The supervisor shall:

1. Immediately respond to the scene unless a response is impractical, poses a danger, or where officers' continued presence creates a risk. When more than one supervisor responds, the responsibility shall fall on the senior supervisor;
2. Observe the scene and injured subjects or officers;
3. Ensure that witnesses (including officers) are identified and interviewed, and that this information is included in the incident report. Uncertain situations or the number of witnesses may preclude identification and interview of all witnesses;
4. Ensure photographs of ~~injuries the subject, including any injuries,~~ are taken and all other evidence is booked;
5. ~~Remain available to review the officer's incident report, supplemental incident report and written statement at the direction of the superior officer.~~ A supervisor shall not approve an incident report or written statement involving a use of force that does not comply with the requirements as set forth in IIA above;
6. Complete and submit the Supervisory Use of Force Evaluation form, indicating whether the force used appears reasonable and necessary, by the end of watch;
7. Complete the Use of Force Log (SFPD 128) and attach one copy of the incident report.

When a supervisor has determined that a member's use of force is excessive or unnecessary force or that an officer has applied force that results in serious bodily injury or death, the supervisor shall notify his/her superior officer.

Commented [KBS]: Language here might seem too much like the superior officer investigating the use of force is also adjudicating whether the use of force is appropriate.

C. **SUPERIOR OFFICER'S RESPONSIBILITY.** When a superior officer is notified of excessive or unnecessary force or force that results in serious bodily injury or death, the superior officer shall:

1. Respond to the scene and assume command, as practical;
2. Notify commanding officer and ensure all other notifications are made;
3. Determine which unit(s) will be responsible for the on-going investigation(s);
4. Prepare a report containing preliminary findings, conclusions and/or recommendations, if appropriate.

III. OTHER REQUIREMENTS.

A. **USE OF FORCE LOG.** The following units shall maintain a Use of Force Log:

1. District Stations
2. Airport Bureau
3. Department Operations Center

B. **RECORDING PROCEDURES.** A reportable use of force shall be recorded in the Use of Force Log at the District Station where the use of force occurred, except as noted below:

Commented [MPC6]: It is not clear who is recording the use of force in the log. This should be made explicit. The policy also does not state how soon after the use of force the event should be recorded in the log.

1. Any use of force occurring outside the city limits, except at the San Francisco International Airport, shall be recorded in the Department Operations Center's Use of Force Log.
2. Any use of force occurring at the San Francisco International Airport shall be recorded in the Airport Bureau's Use of Force Log.

Commented [MPC7]: The Use of Force Log should be maintained electronically, and not in hard copy. The Use of Force Logs should be made available to the public with identifying information redacted.

C. **DOCUMENT ROUTING.**

1. Commanding officers shall forward original completed Supervisor's Use of Force Evaluation Form(s) to the Commanding Officer of Risk Management and one copy to the Commanding Officer of the Training Division and another to the officer's Bureau Deputy Chief.
2. On the 1st and 15th of each month, commanding officers shall sign the Use of Force Log and send it, along with one copy of the incident report, to their respective Bureau Deputy Chief and the Commanding Officer of the Training Division.

D. **TRAINING DIVISION RESPONSIBILITIES.** The Commanding Officer of the Training Division will maintain controls that assure all Use of Force Logs and Supervisor Evaluations are received, and shall perform a non-punitive review to ascertain the number, types, proper application and effectiveness of uses of force. The information developed shall be used to identify training needs. The

Commanding Officer of the Training Division shall report to the Chief of Police quarterly on the use of force by members of the Department.

USE OF FIREARMS AND LETHAL FORCE

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using thoughtful communication, and de-escalation principles before resorting to the use of force, whenever practical. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

This order establishes policies and reporting procedures regarding the use of firearms and lethal force. Officers' use of firearms and any other lethal force shall be in accordance with DGO 5.01, Use of Force, and this General Order.

I. POLICY

A. GENERAL. The Department is committed to the sanctity and preservation of all human life, human rights, and human dignity. It is the policy of this Department to discharge a firearm or use other lethal force only when other force options would be ineffective or inadequate to protect the safety of the public and the safety of police officers. Lethal force is any use of force designed to and likely to cause death or serious physical injury, including but not limited to the discharge of a firearm, the use of impact weapons under some circumstances (see DGO 5.01, Use of Force), and certain interventions to stop a subject's vehicle (see DGO 5.05, Response and Pursuit Driving).

B. PRIOR TO THE DISCHARGE OF FIREARM OR LETHAL FORCE. When safe and practical under the totality of circumstances, officers shall consider other force options before discharging a firearm or using other lethal force.

1. DE-ESCALATION. As stated and more fully described in DGO 5.01, Use of Force, de-escalation techniques are actions used by officers, when safe to do so, that seek to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance.

Officers shall, where practical, consider the possible reasons why a subject may not be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's

situation may enable officers to use de-escalation techniques while maintaining public safety and officer safety.

2. **PROPORTIONALITY.** ~~Officers must use a~~ ~~It is important that an~~ ~~officer's~~ level of force ~~be that is~~ proportional to the severity of the offense committed or the threat to human life for which the officer is taking action. Officers ~~may~~ shall only use the degree of force that is proportional objectively reasonable and necessary to accomplish their lawful duties.
3. **SUBJECTS ARMED WITH WEAPONS OTHER THAN FIREARMS.** It is critical officers apply the principles of proportionality when encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other object. Where officers can safely mitigate the immediacy of threat, and there are no exigent circumstances, officers should isolate and contain the subject, call for additional resources and engage in appropriate de-escalation techniques without time constraints. It is far more important to take as much time as needed to resolve the incident in keeping with the Department's highest priority of safeguarding all human life. Except where circumstances make it reasonable for an officer to take action to protect human life or prevent serious bodily injury, immediately disarming the subject and taking the subject into custody is a lower priority than preserving the sanctity of human life. Officers who proceed accordingly and delay taking a subject into custody, while keeping the public and officers safe, will not be found to have neglected their duty. They will be found to have fulfilled it.
4. **SUPERVISOR'S RESPONSIBILITY TO ASSUME COMMAND.** When officers are dispatched to or on-view a subject with a weapon, a supervisor shall immediately:
 - a. Notify DEM, monitor radio communications, respond to the incident (e.g., "3X100, I'm monitoring the incident and responding.");
 - b. Remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources;
 - c. Upon arrival, assume command, and ensure appropriate resources are on-scene or are responding.

C. HANDLING AND DRAWING FIREARMS.

1. **HANDLING FIREARMS.** An officer shall handle and manipulate a firearm in accordance with Department-approved firearms training. An officer shall not manually cock the hammer of the Department-issued handgun to defeat the first shot double-action feature.

2. **AUTHORIZED USES.** An officer may draw or exhibit a firearm in the line of duty when the officer has reasonable cause to believe it may be necessary for the safety of others or for his or her own safety. When an officer determines that the threat is over, the officer shall holster his or her firearm or shoulder the weapon in the port arms position pointed or slung in a manner consistent with Department-approved firearms training. If an officer points a firearm at a person, if practical, the primary officer should advise the subject the reason why the officer(s) pointed the firearm.
3. **DRAWING OTHERWISE PROHIBITED.** Except for maintenance, safekeeping, inspection by a superior officer, Department-approved training, or as otherwise authorized by this order, an officer shall not draw a Department-issued firearm.
4. **REPORTING.** When an officer intentionally points any firearm at a person, it shall be considered a reportable use of force. Such use of force must be reasonable under the objective facts and circumstances.

D. DISCHARGE OF FIREARMS OR OTHER USE OF LETHAL FORCE.

1. **PERMISSIBLE CIRCUMSTANCES.** Except as limited by Sections D.4 and D.5., an officer may discharge a firearm or use other lethal force in any of the following circumstances:
 - a. In self-defense when the officer has reasonable cause to believe that he or she is in imminent danger of death or serious bodily injury; or
 - b. In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury. However, an officer may not discharge a firearm at, or use lethal force against, a person who presents a danger only to him or herself, and there is no reasonable cause to believe that the person poses an imminent danger of death or serious bodily injury to the officer or any other person; or
 - c. To apprehend a person when both of the following circumstances exist:
 - i. The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of lethal force; AND
 - ii. The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed; or
 - d. To kill a dangerous animal. To kill an animal that is so badly injured that humanity requires its removal from further suffering where other alternatives are impractical and the owner, if present, gives permission; or

- e. To signal for help for an urgent purpose when no other reasonable means can be used.

The above circumstances (D.1 a-e) apply to each and every discharge of a firearm or application of lethal force. Officers ~~should~~ shall constantly reassess the situation, as practical, to determine whether the subject continues to pose an active threat.

- 2. **VERBAL WARNING.** If practical, and if doing so would not increase the danger to the officer or others, an officer shall give a verbal warning to submit to the authority of the officer before discharging a firearm or using other lethal force.
- 3. **REASONABLE CARE FOR THE PUBLIC.** To the extent practical, an officer shall take reasonable care when discharging his or her firearm so as not to jeopardize the safety of the public or officers.
- 4. **PROHIBITED CIRCUMSTANCE.** Officers shall not discharge their firearm:
 - a. As a warning; or
 - b. At a person who presents a danger only to him or herself.
- 5. **MOVING VEHICLES.** An officer shall not discharge a firearm at the operator or occupant of a moving vehicle unless the operator or occupant poses an immediate threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle.
- 6. **REPORTING.**
 - a. **DISCHARGE OF FIREARMS.** Except for firearm discharges at an approved range or during lawful recreational activity, an officer who discharges a firearm, either on or off duty, shall report the discharge as required under DGO 8.11, Investigation of Officer Involved Shootings and Discharges. This includes an intentional or unintentional discharge, either within or outside the City and County of San Francisco.
 - b. **OTHER LETHAL FORCE.** An officer who applies other force that results in death shall report the force to the officer's supervisor, and it shall be investigated as required under DGO 8.12, In Custody Deaths. An officer who applies other lethal force that results in serious bodily injury shall report the force to the officer's supervisor. The supervisor shall, regardless whether possible misconduct occurred, immediately report the force to their superior officer and their commanding officer, who shall determine

which unit shall be responsible for further investigation. An officer who applies other lethal force that does not result in serious bodily injury shall report the force as provided in DGO 5.01.1, Reporting and Evaluating Use of Force.

The Department's highest priority is safeguarding the sanctity of all human life. The purpose of the policy is not to restrict officers from using sufficient force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority. If exceptional circumstances occur, not contemplated by this order, an officer's use of force shall be reasonably necessary to protect others or himself or herself. The officer shall articulate the reasons for employing such use of force.

References

DGO 5.01, Use of Force

DGO 5.05, Response and Pursuit Driving

DGO 8.11, Investigation of Officer Involved Shootings And Discharges

DGO 8.12, In Custody Deaths

BUREAU ORDER

UNIT
INDEX
NUMBER

DRAFT

DATE
ISSUED

02/10/16

SUBJECT:

Conducted Energy Devices

ISSUED

TO:

Special Operations Bureau

ISSUED

BY:

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using thoughtful communication, and de-escalation principles before resorting to the use of force, whenever practical. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

This order establishes policies and reporting procedures regarding the issuance and use of Conducted Energy Devices (CED), and the supervisory responses required after the use of a CED. Officers' use of CEDs shall be in accordance with DGO 5.01, Use of Force, and DGO 5.01.1, Use of Force Reporting.

I. POLICY

- A. GENERAL.** The Department is committed to the sanctity and preservation of all human life, human rights, and human dignity. It is the policy of this Department to only use CEDs to protect the public and officers from serious injury or death by a subject armed with a weapon other than a firearm. The CED is not recommended for use on a subject armed with a firearm.

In addition to the policies and procedures outlined in this Bureau Order, officers equipped with CEDs shall adhere to the policies and procedures outlined in Department General Order (DGO) 5.01, Use of Force.

- B. PRIOR TO THE USE OF A CED.** When safe and practical under the totality of circumstances, officers shall consider other available options before using a CED.

- DE-ESCALATION.** As stated in DGO 5.01, Use of Force, de-escalation techniques are actions used by officers, when safe to do so, that seek to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance. These techniques are more fully described in DGO 5.01, Use of Force.

Officers shall, where practical, consider the possible reasons that a subject may be noncompliant or resisting arrest. A subject may not be capable of

Commented [KB1]: The Panel is concerned about the vagueness of de-escalation principles. They are not clearly defined in this bureau order. Ideally they should be clearly defined and documented, and linked to developed de-escalation training modules that are created with consultation and certification from POST

Commented [KB2]: A May 2011 DOJ Report warned agencies of over-reliance and over-use of CEDs. Consider adding language that addresses the concern. Officers should not rely on CEDs rather than using conflict resolution skills or even necessary hands-on applications.

Commented [KB3]: For clarity the techniques should be defined and not merely be a cross reference to another DGO

understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to use de-escalation techniques that will be more effective while maintaining public safety and officer safety.

2. **PROPORTIONALITY.** Officers must use ~~It is important that an officer's~~ a level of force ~~be that is~~ proportional to the severity of the offense committed or the threat to human life for which the officer is taking action posed to human life. Officers ~~may~~ shall only use the degree of force that is proportional, objectively reasonable and necessary to accomplish these lawful duties.

~~It is critical~~ Officers shall apply the principles of proportionality when encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other dangerous object. Where officers can safely mitigate the immediacy of threat, and there are no exigent circumstances, officers should isolate and contain the subject, call for additional resources and engage in appropriate de-escalation techniques without time constraints. It is far more important to take as much time as needed to resolve the incident in keeping with the Department's highest priority of safeguarding all human life. Officers who proceed accordingly and delay taking a subject into custody, while keeping the public and officers safe, will not be found to have neglected their duty. They will be found to have fulfilled it.

II. DEFINITIONS

- A. **ACTIVATION.** Depressing the trigger of the CED causing an arc or the firing of probes.
- B. **CONDUCTED ENERGY DEVICE.** Any Department-issued device that fires darts, i.e., electrodes that are attached by wire to the main body of the device held by an officer, and that through these electrodes emits an electrical charge or current intended to temporarily disable a person.
- C. **DEPLOYMENT.** Removal of the CED from the holster and pointing it at a subject.
- D. **DISPLAYING THE ARC.** Displaying the electrical current to a subject by first removing the cartridge and then depressing the trigger of the CED.

III. PROCEDURES

- A. **ISSUANCE AND CARRYING CEDS.** Only officers assigned to the Tactical Company or the Specialist Team are authorized to carry Department-issued CEDs after having successfully completing the Department's Crisis Intervention Team

Commented [KB4]: The policy does not clearly define this objective proportional standard; the standard should be clear to officers and supplemented by training modules.

Commented [KB5]: Definitions should include a definition for "Drive Stun Mode."

Commented [MPC6]: Consider adding a section regarding how CEDs are to be calibrated, including how often, and how the logs are maintained. For example, the San Jose Police Department Policy includes provisions for such calibration.

(CIT) training and all other required Department-approved CED training. Officers shall only use Department-issued CEDs and cartridges.

Officers who have been issued the CED shall wear the device in a Department-approved holster and carry the CED in a weak-side holster on the side opposite their duty weapon to reduce the chances of accidentally drawing and/or firing their firearm.

Officers no longer assigned to the Tactical Company or the Specialist Team are not authorized to carry the CED and shall immediately surrender the CED to the Commanding Officer of the Tactical Company upon re-assignment.

B. INSPECTION. Officers carrying the CED shall perform an inspection of the CED at the beginning of every shift and:

1. Perform a daily spark test on the CED;
2. Ensure the CED is clearly and distinctly marked to differentiate it from the duty weapon and any other device;
3. Whenever practical, officers should carry two or more cartridges on their person when carrying the CED;
4. Officers shall be responsible for ensuring that their issued CED is properly maintained and in good working order. If an officer discovers that the CED is damaged or inoperable, the officer shall cease its use and promptly notify his/her supervisor and document the specific damage or inoperability issue in a memorandum. The supervisor shall facilitate a replacement CED as soon as practical;
5. Officer shall not alter the CED from the original factory specifications and markings;
6. Officers shall not hold both a firearm and a CED at the same time;
7. Due to the flammable contents in some chemical agent containers, officers shall only carry Department-issued Oleoresin Capsicum (OC) which is non-flammable (water based and will not ignite); and
8. Officers carrying the CED shall have an Automated External Defibrillator (AED) readily available when carrying the CED. The AED may be secured in the officer's Department vehicle or other secure location that would be reasonably accessible to the officer while performing his or her duties.

C. VERBAL AND VISUAL WARNINGS. Officers shall provide a verbal warning prior to using the CED, if practical, to:

1. Announce a warning to the subject and other officers of the intent to deploy the CED if the subject does not comply with an officer's command; and
2. Give the subject a reasonable opportunity to voluntarily comply unless it would pose a risk to the community, the officer or permit the subject to undermine the use of the CED.

Commented [KB7]: Consider requiring that the inspection of CEDs be documented; the documentation should be easily retrievable by department personnel.

If, after a verbal warning, a subject is unwilling to voluntarily comply with an officer's lawful orders and it appears both reasonable and practical under the circumstances, the officer may, but is not required to, display the electrical arc (provided that a cartridge has not been loaded into the device), or the laser in a further attempt to gain compliance prior to the application of the CED. The aiming laser should never be intentionally directed into the eyes of another as it may permanently impair his/her vision.

The officer deploying the CED shall document that a verbal or other warning was given, or the reason a warning was not given, in the incident report or written statement.

- D. AUTHORIZED USE OF THE CED.** An officer may activate the CED when a subject is armed with a weapon other than a firearm, such as an edged weapon or blunt object, and the subject poses an immediate threat to the safety of the public or the officer(s).

It is essential that officers evaluate whether the use of the CED is objectively reasonable to subdue or control the subject, based the totality of the circumstances known to the officer at the time of the incident. In some cases, other force options may be more appropriate as determined by the threat posed by the subject.

- E. SPECIAL CONSIDERATIONS.** The activation of the CED on certain subjects should generally be avoided unless the totality of the circumstances indicates that other available force options would be ineffective or would present a greater danger to the public, the subject or the officer, and the officer reasonably believes that the need to subdue the subject outweighs the risk of using the device.

Subjects who maybe under the influence of drugs/alcohol or exhibiting symptoms of altered mental state (e.g., nudity, profuse sweating, irrational behavior, extraordinary strength beyond physical characteristics or impervious to pain) may be more susceptible to collateral problems. Officers shall closely monitor these subjects following the application of the CED until they can be examined by emergency medical personnel.

- F. PROHIBITED USE.** Officer are prohibited from using the CED:

1. On an unarmed subject;
2. On the following subjects armed with a weapon other than a firearm:
 - a. On a subject who is only a danger to him/herself;
 - b. Female subjects who are obviously pregnant;
 - c. Subjects who are visibly frail;
 - d. Children (who appear under 14 years of age);
 - e. Subjects whose position or activity may result in collateral injury (e.g., falls from height; operating an automobile, motorcycle or bicycle);
 - f. On a fleeing subject;
 - g. On a subject who is passively resisting;

Commented [KB8]: There is nothing in this draft that talks about the ideal distance from which a CED should be used. Subject matter experts indicate usable distance is within 21 feet and that ideal range is 7-15 feet.

Commented [KB9]: Taser International's Law Enforcement Bulletin lists the following circumstances where use should be avoided, consider adding these to PROHIBITED USE

- On a subject who:
1. Is on an elevated or unstable surface (e.g., tree, roof, ladder, ledge, balcony, porch, bridge, or stair);
 2. Could fall and suffer impact injury to the head or other area;
 3. Could fall on a sharp object or surface (e.g., holding a knife, falling on or through glass);
 4. Is less able to catch or protect self in a fall (e.g., restrained, handcuffed, incapacitated, or immobilized);
 5. Has impaired reflexes (e.g., from alcohol and drugs and medications);
 6. Is running, in motion, or moving under momentum ;
 7. Is operating or riding any mode of transportation (e.g., vehicle, bicycle, motorcycle, or train); and,
 8. Is located in water, or mud environment.

h. Subjects who have recently been sprayed with a flammable chemical agent or who are otherwise in close proximity to any known combustible vapor or flammable material, including alcohol-based OC spray.

3. To prevent a subject from destroying evidence, such as placing evidence in his/her mouth;
4. To psychologically torment, punish or inflict undue pain on a subject;
5. For interrogation purposes or to elicit statements;
6. As a prod or escort device;
7. To rouse unconscious, impaired or intoxicated subjects;
8. In the drive stun mode - activating the CED with the cartridge removed and placing the electrodes upon the skin or clothing of the subject; and
9. Subjects who are handcuffed or otherwise restrained.

G. TARGET AREAS. Reasonable efforts should be made to target lower center mass and avoid the head, neck, chest and groin. If the dynamics of a situation or officer safety does not permit the officer to limit the application of the CED probes to a precise target area, officers shall monitor the condition of the subject if one or more probes strikes the head, neck, chest or groin until the subject is examined by emergency medical personnel.

H. SUBSEQUENT APPLICATIONS OF THE CED. Officers ~~should~~must apply the CED for only one standard cycle. Thereafter, officers shall evaluate the situation before applying any subsequent cycle. Officers ~~should~~must avoid subsequent applications of the CED against a single subject unless the officer reasonably believes that the need to subdue the subject outweighs the potentially increased risk posed by applying a subsequent cycle.

Every application of the CED is a separate use of force, and officers must be able to articulate the reason for each use of the CED.

If the first application of the CED appears to be ineffective in gaining control of a subject, before a subsequent application of the CED is applied, the officer ~~should~~must consider additional factors, including but not limited to whether:

1. The probes are making proper contact;
2. The subject has the ability and has been given a reasonable opportunity to comply; or
3. Verbal commands, other options may be more effective.

No more than one officer shall activate a CED against a single subject at the same time.

I. OFFICER REQUIREMENTS AFTER DEPLOYMENTS/ACTIVATIONS. Officers shall contact the Department of Emergency Management (DEM) and request emergency medical personnel to respond to the scene of a CED application.

Officers shall notify a supervisor of all CED deployments and activations, including all unintentional discharges; pointing the device at a person; laser activation; and arcing the device, in compliance with DGO 5.01, Use of Force.

Confetti tags should be collected and the expended cartridge, along with both probes and wire, should be submitted into evidence. The cartridge serial number should be noted and documented on the evidence paperwork. The evidence packaging should be marked "Biohazard" if the probes penetrated the subject's skin.

- J. DUTY TO RENDER FIRST AID.** Officers shall render first aid when a subject is injured or claims injury caused by an officer's use of force unless first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid. Officers shall continue to render first aid and monitor the subject until relieved by emergency medical personnel.

Only appropriate emergency medical personnel should remove CED probes from a person's body. Officers shall treat used CED probes as biohazard sharp objects, such as a used hypodermic needle, and shall use universal precautions when handling used CED probes.

- K. DUTY TO PROVIDE MEDICAL ASSESSMENT.** Officers shall arrange for a medical assessment and removal of CED probes from a person's body by emergency medical personnel.

- L. DUTY TO PROVIDE MEDICAL EVALUATION.** All subjects who have been struck by CED probes or who have been subjected to the electric discharge of the device shall be transported by emergency medical personnel for evaluation at a local medical facility as soon as practical.

If a subject refuses medical evaluation, the refusal shall be directed to the on-scene emergency medical personnel and not to the officer. Officers shall document a subject's refusal in the incident report by listing the name and identification number of the emergency medical personnel who obtained the refusal from the subject. The officer shall inform any person providing medical care and the personnel receiving custody of the subject that he or she has been subjected to the application of the CED.

- M. BOOKING OF SUSPECT.** Anyone subject to criminal charges who has been struck by CED probes or who has been subjected to the electric discharge of the device shall not be detained at a district station holding facility. Officers shall immediately book the arrested subject into the county jail upon release from the medical facility. Officers shall note the use of the CED on the field arrest card on any subject who has been struck by CED probes or who has been subjected to the electric discharge of the device.

- N. DOCUMENTATION REQUIREMENTS.** Officers shall document all CED deployments and activation, including all unintentional discharges; pointing the

Commented [KB10]: For ease of retrieval, we recommend that every CED deployment be document in an incident report with a file number

device at a person; laser activation; and arcing the device, in an incident report, supplemental incident report or a written statement. Officers shall include the following information in the incident report or written statement:

1. Date, time and location of the incident;
2. The subject's actions necessitating the use of the CED, including the weapon displayed by the subject;
3. Subject's known or suspected drug use, intoxication or other medical problems;
4. De-escalation techniques used by the officer(s);
5. Whether the officer used other force options;
6. The type and brand of CED and cartridge serial number;
7. Whether any display, laser or arc deterred a subject and gained compliance;
8. The number of CED activations, the duration of each cycle, the duration between activations, and (as best as can be determined) the duration that the subject received applications;
9. The distance at which the CED was used;
10. Location of any probe impact;
11. Description of where missed probes went;
12. Information about the medical care provided the subject;
13. Whether the subject sustained any injuries;
14. Whether any officers sustained any injuries;
15. Identification of all officers firing CEDs;
16. Identification of all witnesses; and
17. All supervisory notifications required by DGO 5.01, Use of Force.

Commanding Officer of the Tactical Company shall route a copy of all incident reports involving the use of a CED to the Commanding Officer of the Training Division.

Officers at the Police Academy Physical Techniques and Defensive Tactics staff shall analyze all incident reports involving CED use, upon receipt, to identify trends, including deterrence and effectiveness. CED information and statistics, with identifying information removed, shall be made available to the public.

- O. SUPERVISOR RESPONSIBILITIES.** Supervisors shall respond to calls when they reasonably believe there is a likelihood the CED may be used.

A supervisor shall respond to all incidents where the CED was activated, including negligent or unintentional activations. Upon arrival at the scene, the supervisor shall:

1. Conduct a supervisory evaluation regarding the CED application as required by DGO 5.01.1;
2. Notify a superior officer to initiate an immediate evaluation by the Internal Affairs Division - Admin consistent with the response to an Officer-Involved Discharge;

3. Confirm that any probes that have pierced the subject's skin are removed by medical personnel;
4. Ensure that photographs of probe sites are taken;
5. Ensure that all evidence is photographed, collected and properly booked;
6. Ensure that the subject is medically evaluated prior to being booked into any facility;
7. Ensure that the CED's memory record has been uploaded;
8. Review all incident reports and written statements;
9. Provide replacement CED cartridges to the officer, as necessary;
10. Complete and submit the Supervisory Use of Force Evaluation Form; and
11. Enter the incident into the Use of Force Log and attach one copy of the incident report.

P. OFF-DUTY CONSIDERATIONS. Officers are not authorized to carry or use Department-issued CEDs while off-duty. Officers shall ensure that CEDs are secured in a manner that will keep the device inaccessible to others.

Q. TRAINING. Officers authorized to carry the CED shall be permitted to do so only after successfully completing Crisis Intervention Team (CIT) training and Department-approved CED training. Any officer who has not carried the CED as a part of his or her assignment for a period of six months or more shall be recertified by a Department-approved CED instructor before carrying or using the device.

Proficiency training for officers who have been issued CEDs shall occur bi-annually. A reassessment of an officer's knowledge or practical skill may be required at any time if deemed appropriate by the Department-approved CED instructor. All training and proficiency for CEDs will be documented in the officer's training file.

Command staff, supervisors and investigators should receive CED training for the investigations they supervise, conduct, and review.

Officers who do not carry CEDs should receive training that is sufficient to familiarize themselves with the device and with the tactics of deployment and activation of the CEDs.

The Commanding Officer of the Training Division is responsible for ensuring that all officers who carry CEDs have received initial and bi-annual proficiency training.

[Application of CEDs during training could result in injury to personnel and should not be mandatory for certification.]

The Commanding Officer of the Training Division shall ensure that all training includes:

1. A review of this Special Operations Bureau Order;
2. A review of DGO 5.01, DGO 5.01.1, DGO 5.02;

Commented [KB11]: The May 2011 DOJ report noted that 63.7% of departments require officers to experience activation as part of CED training.

Consider adopting the majority rule of requiring CED application in training.

Even if the application is not required, this section could be rewritten to characterize application of CEDs as "optional" instead of "not mandatory," the current language might be negatively received by some in the community as the SFPD believing CEDs are too dangerous to apply to their officers but not against the public

3. Performing weak-hand draws or cross-draws to reduce the possibility of unintentionally drawing and firing a firearm;
4. Target area considerations, to include techniques or options to reduce the unintentional application of probes near the head, neck, chest and groin;
5. Handcuffing a subject during the application of the CED and transitioning to other force options;
6. Scenario-based training;
7. CIT updates;
8. De-escalation techniques; and
9. Restraint techniques that do not impair respiration following the application of the CED.

Kilshaw, Rachael (POL)

From: Benedicto, Kevin M. <kevin.benedicto@morganlewis.com>
Sent: Tuesday, May 03, 2016 4:48 PM
To: Kilshaw, Rachael (POL)
Cc: West, Colin C.; Wang, Lucy
Subject: RE: Blue Ribbon Panel Comments on Taser Policy

Sgt. Kilshaw,

Thank you for your patience as the Blue Ribbon Panel considered the SFPD's draft bureau order on CEDs. Upon further consideration, the Panel would like to withdraw the redline we previously sent regarding the draft bureau order and clarify that the Panel takes no position on CEDs. The Panel believes that policies regarding use of CEDs should be addressed separately from the current Use of Force Policy revisions so as to allow stakeholders more time to properly analyze these issues.

Please let me know if you have any questions.

Best,

Kevin M. Benedicto

Morgan, Lewis & Bockius LLP

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kevin.benedicto@morganlewis.com | www.morganlewis.com
Assistant: Lisa K. Large | +1.415.442.1642 | lisa.large@morganlewis.com

From: Kilshaw, Rachael (POL) [mailto:Rachael.Kilshaw@sfgov.org]
Sent: Monday, April 25, 2016 3:33 PM
To: Benedicto, Kevin M.
Subject: RE: Blue Ribbon Panel Comments on Taser Policy

Thanks. I'll wait to hear from you.

Rachael

Sergeant Rachael Kilshaw
San Francisco Police Department
Police Commission Office
1245 – 3rd Street, 6th Floor
San Francisco, California 94158
415.837.7071 phone
rachael.kilshaw@sfgov.org

From: Benedicto, Kevin M. [mailto:kevin.benedicto@morganlewis.com]
Sent: Monday, April 25, 2016 3:31 PM
To: Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org>
Subject: RE: Blue Ribbon Panel Comments on Taser Policy

Rachael,

Sorry, I inadvertently left you on the discussions with the working group. Please disregard the below email; we will have a response for you shortly after discussing with the panel. Thanks very much for your help.

Kevin M. Benedicto

Morgan, Lewis & Bockius LLP

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From: Benedicto, Kevin M.
Sent: Monday, April 25, 2016 3:29 PM
To: 'Kilshaw, Rachael (POL)'; West, Colin C.
Cc: Wang, Lucy (lucy.wang@morganlewis.com)
Subject: RE: Blue Ribbon Panel Comments on Taser Policy

What is our answer on this?

I think one approach we discussed (which was taken by some of the other stakeholders) is to say we believe that CEDs should be considered separately in a separate round of revisions than this one, because we have not had sufficient time to fully evaluate CED policy. However, if the department is planning on adopting the policy in this round, then these edits are what the Panel recommends.

Kevin M. Benedicto

Morgan, Lewis & Bockius LLP

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kevin.benedicto@morganlewis.com | www.morganlewis.com
Assistant: Lisa K. Large | +1.415.442.1642 | lisa.large@morganlewis.com

From: Kilshaw, Rachael (POL) [<mailto:Rachael.Kilshaw@sfgov.org>]
Sent: Monday, April 25, 2016 3:26 PM
To: Benedicto, Kevin M.; West, Colin C.
Cc: Sainez, Hector (POL); Chaplin, Toney (POL); Suzy Loftus; Woo, Sharon (DAT)
Subject: FW: Blue Ribbon Panel Comments on Taser Policy

Mr. Benedicto:

Please see the below email. Can you please clarify the Blue Ribbon Panel's (BPR) positions on Conducted Energy Devices? Does the BRP support CEDs with the proposed edits?

Thanks,
Rachael

Sergeant Rachael Kilshaw
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Police Commission Office
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rachael.kilshaw@sfgov.org

From: Kilshaw, Rachael (POL)
Sent: Friday, April 15, 2016 11:58 AM
To: 'Benedicto, Kevin M.' <kevin.benedicto@morganlewis.com>; colin.west@morganlewis.com
Cc: Sainez, Hector (POL) <hector.sainez@sfgov.org>; Chaplin, Toney (POL) <toney.chaplin@sfgov.org>; Suzy Loftus <suzyloftus@hotmail.com>
Subject: RE: Blue Ribbon Panel Comments on Taser Policy

Mr. Benedicto:

Thank you for the email. I will forward the Blue Ribbon Panel's (BRP) edits on the Conducted Energy Devices (CED) policy to the other stakeholders, post on the Commission webpage and forward to the Commissioners for review. I will ask Commissioner Loftus if she wants to send your edits to the DOJ or if she would like me to do that.

For clarification, what is the BRP's position on CEDs. At the last meeting, the BRP stated it took no position on CEDs at that time, but now is submitting edits on the policy. Does the BRP support the CED policy with the proposed edits? If the BRP has another position, please clarify for the stakeholder group and the Commissioners.

Thank you,
Rachael

Sergeant Rachael Kilshaw
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San Francisco, California 94158
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rachael.kilshaw@sfgov.org

From: Benedicto, Kevin M. [<mailto:kevin.benedicto@morganlewis.com>]
Sent: Thursday, April 14, 2016 3:21 PM
To: Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org>
Subject: Blue Ribbon Panel Comments on Taser Policy

Sergeant Kilshaw,

Attached are the redline comments of the Blue Ribbon Panel to the Special Operations CED Bureau Order. Thanks very much.

Kevin M. Benedicto
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**CIT Work Group
C/O Terezie S. Bohrer
1661 PINE STREET, # 646
SAN FRANCISCO, CA 94109**

February 29, 2016

Sgt. Rachael Kilshaw
San Francisco Police Department
Police Commission Office
1245 3rd Street, 6th floor
San Francisco, CA 94158

Dear Sergeant Kilshaw:

Due to time constraints, the Crisis Intervention Team (CIT) Work Group as a whole did not review the policies. Individual members have indicated they will offer comments on the Use of Force policies and Conducted Energy Devices (CED) bulletin at the two scheduled Public Hearings in March. The 38 members of CIT Work Group diverse public and private human service agencies (listed below). The Work Group's primary focus is to develop and promote CIT training, assure the curriculum meets quality standards, and collect and utilize evaluation/feedback data for program improvement.

Based on my review of the documents and focus group meeting last week, I submit the following "word smithing" comments on the proposed policies and bulletin:

- a. Bulletin:
 - 1) Need to mention CED can be lethal
 - 2) B. 5 "Officers" plural
 - 3) B. 8 No mention of AED training
 - 4) D 2nd paragraph, insert "on" after "based"
 - 5) N. 3 change "or" to "and"
- b. Use of Force 5.01:
 - 1) Add "CIT" to opening paragraph
 - 2) Add "General Principles"
 - 3) D. 1 change "immediate" to "imminent"
 - 4) D. 3. c add "or appears to be" pregnant

CIT WORKGROUP consist of staff and volunteers from the following agencies/organizations: San Francisco Police Department; Mental Health Association of San Francisco; NAMI/San Francisco; Mental Health Board/San Francisco; Asian Americans Advancing Justice; Citywide Case Management; Tenderloin Housing Clinic; Coalition on Homelessness SF; San Francisco Public Defender; Veterans Administration; SF Police Commission; DORE Urgent Care; Disability Rights; San Francisco Suicide Prevention Center, Mayor's Office on Disability, Department of Emergency Management and Concerned Citizens.

- c. Use of Force Reporting 5.01.1 – no edits
- d. Use of Firearms and Lethal Force 5.02
 - 1) Add CIT to opening paragraph
 - 2) D. 1. Second paragraph: “and have no criminal intent” – not sure what this means?
 - 3) Agree with discussion at meeting to change “shall” to may or adding “when practical” and changing “should” to “shall”

The CIT Work Group fully recognizes the difficulty in changing culture and applauds the proposed utilization of de-escalation practices, creating time and distance, and enhancing verbal communication. Moreover, we fully support the “team” approach and the emphasis on training.

In closing, I thank you for providing the CIT Work Group with the opportunity to be part of this focus group. The members of the CIT Work Group look forward to having the opportunity to thoroughly review the revised documents and trust their individual agency/organization comments will assist the Police Commissioners and Department as they go forward.

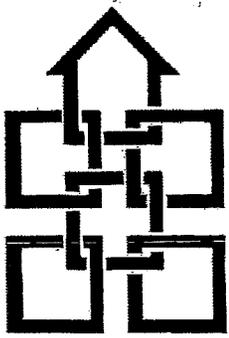
Sincerely,

/s/

Terezie S. Bohrer, RN, MSW, CLNC

Cc: CIT Work Group

CIT WORKGROUP consist of staff and volunteers from the following agencies/organizations: San Francisco Police Department; Mental Health Association of San Francisco; NAMI/San Francisco; Mental Health Board/San Francisco; Asian Americans Advancing Justice; Citywide Case Management; Tenderloin Housing Clinic; Coalition on Homelessness SF; San Francisco Public Defender; Veterans Administration; SF Police Commission; DORE Urgent Care; Disability Rights; San Francisco Suicide Prevention Center, Mayor’s Office on Disability, Department of Emergency Management and Concerned Citizens.



COALITION ON
HOMELESSNESS
SAN FRANCISCO

February 23, 2016

Chief Greg Suhr
President Loftus
Vice President Turman
Commissioner DeJesus
Commissioner Mazzucco
Commissioner Hwang
Commissioner Melara
Commissioner Marshall
Police Commission Office
San Francisco Police Headquarters
1245 3rd Street
San Francisco, CA 94158

Dearest Chief and Commissioners,

Congratulations on a wonderful direction for the SFPD! The reference to the sanctity of life, the banning of chokeholds, the inclusion of verbal de-escalation first, and the calling for a Supervisor are just some of the very positive elements of these documents.

We are in full support of the Use of Force General Orders with two exceptions:

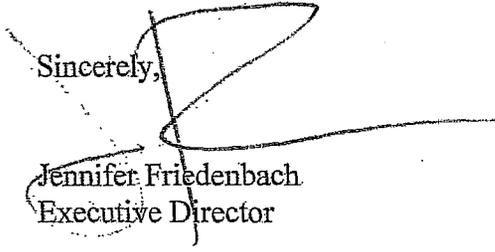
1) We very adamantly encourage you to remove the use of Electronic Control Weapons or Conducted Energy Devices from the policy. Attached for your reference is a January 5, 2016 letter we sent on this subject. We believe CIT has not been fully implemented, and the SFPD should give that a chance to work first. We are also very concerned with the SFPD further alienating the community, and introducing new weapons does just that.

2) We strongly encourage you to include the draft DGO in regards to Crisis Intervention Team as part of this process. The Mental Health CIT working group has sent the proposed DGO for CIT to command staff. Enclosed is our analysis of what work still needs to be done on this program to fully

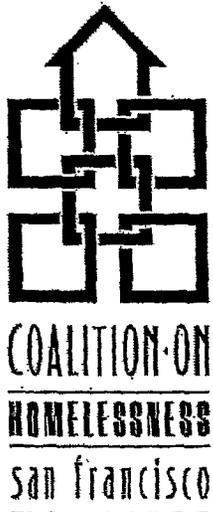
implement it. The draft DGO should contain these basic elements, as the proposed CIT DGO does, to ensure full implementation.

Thank you for your consideration.

Sincerely,



Jennifer Friedenbach
Executive Director



January 5, 2016

Chief Greg Suhr
President Loftis
Vice President Turman
Commissioner DeJesus
Commissioner Mazzucco
Commissioner Hwang
Commissioner Melara
Commissioner Marshall
Police Commission Office
San Francisco Police Headquarters
1245 3rd Street
San Francisco, CA 94158

Dearest Chief and Commissioners,

We were very dismayed to learn that Electronic Control Weapons were being introduced once again after the death of Mr. Mario Woods. We do not believe the introduction of another, often lethal, weapon is the appropriate response to this tragedy. We believe there are many other pathways this incident could have taken, such as Officers being given alternative instructions, told to slow down and wait, to back away from the subject and utilize verbal de-escalation techniques. These would have potentially led to a much different outcome.

As you know, we have looked very closely at this proposal in the past, and while at first glance, electronic control devices appear to be a good alternative to a gun, once we dug deep into the research and outcomes, we have come to the solid conclusion that they are a very unsafe option.

We need to fully implement the Crisis Intervention Team as our safeguard from officer-involved shootings. There are mainstream experts who agree. We hope you can appreciate how their expertise supports our lived experiences and you will be able see the grave mistake that introducing Tasers would be for San Franciscans, and especially for our most vulnerable populations.

What the Medical Community Says

Independent, peer-reviewed research by cardiologists leaves no doubt that Tasers are harmful and often deadly. It's easy for members of the public to be confused about how dangerous Tasers really are. This is because Taser International has spent a lot of money to control public knowledge about Tasers, paying researchers and even suing coroners who have determined Taser shock to be the cause of death. Cardiologists at UCSF say that one way

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to cut through this disinformation is to consider funding source and author affiliation when evaluating researchers' claims about Taser safety.ⁱ

During his time as Director of the Electrophysiology Laboratories and Clinics in UCSF's Cardiology Division, Dr. Byron Lee analyzed the conclusions of Taser safety studies funded by Taser International, and compared these studies to independent studies. Lee and his colleagues found that "the likelihood of a study concluding TASER® devices are safe was 75 percent higher when the studies were either funded by the manufacturer or written by authors affiliated with the company, than when studies were conducted independently."ⁱⁱ Cardiologists at UCSF caution that many studies commissioned by Taser are biased, and that Taser's conclusions do not apply to real-world situations. "When you read articles that are very favorable to the device, invariably you will see that one of authors is affiliated with the company making Tasers or sitting on the board," Dr. Lee explained.

Dr. Zian Tseng, a cardiologist at UCSF, told reporters that after he published his findings about the dangers of Tasers, representatives of the Taser company contacted him, urged him to reconsider, and even offered to fund his future research. Dr. Tseng refused this offer. He has since spoken out publicly about the harms of Tasers on many occasions.ⁱⁱⁱ

In addition, Dr. Douglas Zipes, a cardiac electrophysiologist at the University of Indiana found that Tasers have caused cardiac arrest and death in people who were shocked by police. Researchers agree that people with mental illness, especially those who may be using medications or drugs, are at even greater risk of sudden death.^{iv}

In an interview with ABC news, Dr. Zipes explained how Tasers could cause sudden death by stopping the heart. Dr. Zipes's research discussing how Tasers caused cardiac arrest was published in the peer-reviewed journal of the *American Heart Association*. Dr. Zipes told ABC news: "It is absolutely unequivocal based on my understanding of how electricity works on the heart, based on good animal data and based on numerous clinical situations that the Taser unquestionably can produce sudden cardiac arrest and death." Dr. Zipes has also been called to testify as an expert witness about the ways in which Tasers damage the human heart.^v

We're lucky to have independent medical experts right here at UCSF. We urge the commissioners to listen to what medical experts say about the potentially fatal outcome of 50,000 volts being shot into a person's heart.

We know that Tasers are harmful and often deadly, especially for the population that SFPD's Crisis Intervention Team will encounter. But some police officers might still wonder whether Tasers might reduce rates of officer injury or death by reducing the use of guns. This claim, which sounds reasonable at first, has actually been **tested and proven false by cardiologists at UCSF!**

Statistically, adding Tasers means more weapons, which translates into higher death rates. Attached is a graph of what happens when police departments get Tasers [see attachment].

Dr. Tseng and his colleagues analyzed all available data from California police departments after Tasers were introduced. They found that death rates actually increased after Tasers were introduced into departments! Dr. Tseng's findings give us a statistical picture of what happens when police departments add Tasers.

Please review these direct quotations from Dr. Tseng's article entitled, "Relation of Taser Deployment to Increase in In-Custody Sudden Deaths" which was published in the *American Journal of Cardiology* in 2009." Although Tasers are *marketed* as a safer alternative to subdue prisoners and suspects in law enforcement custody, recent reports have described a temporal association between use of stun guns and over 300 in-custody sudden deaths in North America."

In this epidemiologic study of police and sheriff departments of moderate to large cities in California using Tasers, we found a statistically significant **6.4-fold increase in the rate of in-custody sudden deaths not involving lethal (firearm) force in the first full year of Taser deployment compared with the pre-deployment period.** Although Taser use has been *advertised* to decrease Lethal Force Deaths (by firearms) and prevent Officer Injuries, we observed **no decrease** in the rate of either event after Taser deployment. To the contrary, departments had a twofold increase in the rate of Lethal Firearm Deaths in the year of Taser deployment and the first full year after deployment, whereas the rate of serious Officer Injuries requiring visits to an emergency room was unchanged." (2009: 879).
"...We speculate that early liberal use of Tasers may have contributed to these findings, possibly escalating some confrontations to the point that firearms were necessary" (Tseng et al. 2009: 879).

There have already been a number of lawsuits against Taser International for misinforming police departments about the dangers of Tasers, and against police who accidentally killed people with Tasers.⁴¹ Tasing CAN kill. We need to pay attention to what medical doctors say to protect San Francisco from these tragic consequences. Enclosed you will find a list of medical conditions that puts those individuals at great risk if tasers are used on them, and also list the need for defibrillators and training on use of defibrillators in police cars. It should be noted that medical personnel must remove the probes from individuals after administering electronic control.

What the Civil Rights Community Says

The Civil Rights community has made it very clear that they do not stand in support of Tasers being introduced to SFPD. In a report produced by the ACLU of Northern California, legal experts outline the dangers that Tasers pose to vulnerable people in the city given the shown increase in officer involved shootings after Tasers are introduced:
"Interactions with these high-risk groups, namely those in mental crisis, accounted for the substantial part of the police work in San Francisco. San Francisco's emergency dispatch center receives more than 10,000 mental health calls for service per year, about 30 mental health calls per day. Additionally, a KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent — or 11 people — of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident.

The link between elevated risks of Taser injury and these high-risk populations is virtually undisputed.”

An Amnesty International Report from 2001 and 2008 shows that African-Americans represented 45% of Taser deaths and are only 12% of the national population. The ACLU also highlights the particular risk that Tasers pose for the African-American community in San Francisco “An article investigating the SFPD found that use of force among officers was not only ‘alarmingly high,’ but that 40% of the victims of excessive force were African-Americans who make up less than 8% of San Francisco’s population” at that time.

From a national perspective, Assistant Attorney General for the Civil Rights Division Thomas E. Perez gave a press conference regarding a review of the city of Portland police department’s lethal use of Tasers against people experiencing mental health crisis. One of the more potent points in his presentation was: “Based on our review, we have concluded that, while most uses of force were lawful, there is reasonable cause to believe that PPB is engaged in a pattern or practice of using excessive force against people with mental illness, or those perceived to have mental illness. We found that encounters between PPB officers and persons living with mental illness too frequently result in a use of force, or in a higher level of force than necessary. We further found that, when dealing with people with mental illness, PPB officers use electronic control weapons, or tasers, in circumstances where the use of tasers was not justified, or deploy them more times than necessary. Finally, in situations where PPB officers arrest people with mental illness for low-level offenses, we found that there is a pattern or practice of using more force than necessary in these circumstances.”

San Francisco does not need to go down the same road as Portland who had their Tasers removed from the department after this scathing review. We have the opportunity to stop it from ever becoming a citywide problem.

Alternatives to Tasers

Nationally, there is movement towards re-imagining use of force and moving away from a reliance on weapons. This is supported by a recent report released by the Police Executive Research Forum (PERF), entitled “Re-engineering Training on Police Use of Force”. In this report they state, “As the PERF Board of Directors understood nearly a year ago in the immediate aftermath of the demonstrations in Ferguson, there has been a fundamental change in how the American people view the issue of police use of force.” They caution that many of the recommendations will be hard to hear “because leading police chiefs are saying that our practices need to change dramatically.” In summary, they recommend “its time for an overhaul of police training, policy, supervision, and culture on use of force” and they emphasize that verbal de-escalation is one of many ways in which the training of police officers can be improved.

We believe that we already have the tools needed to de-escalate and respond to people experiencing mental health and psychiatric crisis. In drop-in centers, shelters, and service provider’s offices we respond to and transform these experiences on the daily. And time and time again we have offered and provided our services and training to SFPD in effort

to shift the culture within the department. We believe that if the leadership in the department prioritized opportunities like the Crisis Intervention Team, Tasers would be a non-issue. San Francisco has made great strides in moving towards CIT, since 2012 when it was approved by the commission, and training was implemented, there has been a marked decrease in use of force incidents. However, there is a long way to go in fully implementing this program. This includes ensuring training has much higher proportion of hands on practical training in de-escalation techniques, changing the use of force general order overall and specifically for people in psychiatric crisis, and ensuring the "team" model is fully implemented, including a tactical plan at the scene, and then ensuring regular analysis of effectiveness and techniques, and folding that learning into training and planning at future incidents.

Tasers are not an alternative to guns—they are supplemental weapons with a primary purpose of harming and incapacitating a suspect through pain. The only alternative proven to save lives and reduce harm to both civilians and police officers is an effective Crisis Intervention Team. In fact, CIT programs across the country recognize that non-violent, verbal de-escalation techniques have (1) improved the crisis response time, (2) decreased the number of arrests and instances of use of force, (3) decreased patient violence and use of restraints in the ER, (4) lowered the officer injury rate when responding to crises, (5) improved cost savings, and (6) led to a "better trained and educated" police department.

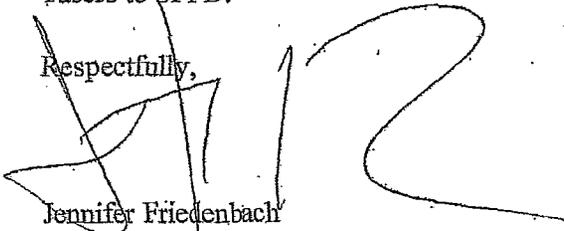
In one program, "Officer injury data has decreased by seven-fold since the program inception. University of Tennessee studies have shown that the CIT program has resulted in a decrease in arrests rates for the mentally ill, an impressive rate of diversion into the health care system, and a resulting low rate of mental illness in our jails."

No weapons, including Tasers, have had such a positive impact on a police force and the neighborhoods they patrol. CIT is the only alternative to guns and violence in which police officers and the citizenry are safer, smarter, and just.

We do not want Tasers to be a part of the SFPD. San Francisco doesn't want Tasers. San Francisco can't afford Tasers. San Francisco doesn't need Tasers.

We thank you for your service to our community and for holding open, community forums to gather the feedback and concerns from the citizens of San Francisco. We urge you to make a decision that best supports the entire city and reject this proposal for introducing Tasers to SFPD.

Respectfully,



Jennifer Friedenbach
Executive Director

ⁱ <http://www.ncbi.nlm.nih.gov/pubmed/21884872>

ⁱⁱ <http://www.universityofcalifornia.edu/news/article/25498>

ⁱⁱⁱ <http://www.cbc.ca/news/canada/british-columbia/story/2008/05/12/taser-inquiry.html?ref=rss>

^{iv} Dr. Tseng and his colleagues say that studies of Tasers based on their controlled application to healthy police officers that are lying down are not generalizable to "real world" situations (2009: 878-879). Here's a direct quote from Dr. Tseng's article: "Police suspects would be expected to have unique physiologic (hyperadrenergic state), environmental (restraint techniques, multiple Taser applications near the heart on the torso), and external (illicit drugs) influences, any of which may make them more vulnerable to sudden death" (2009: 879).

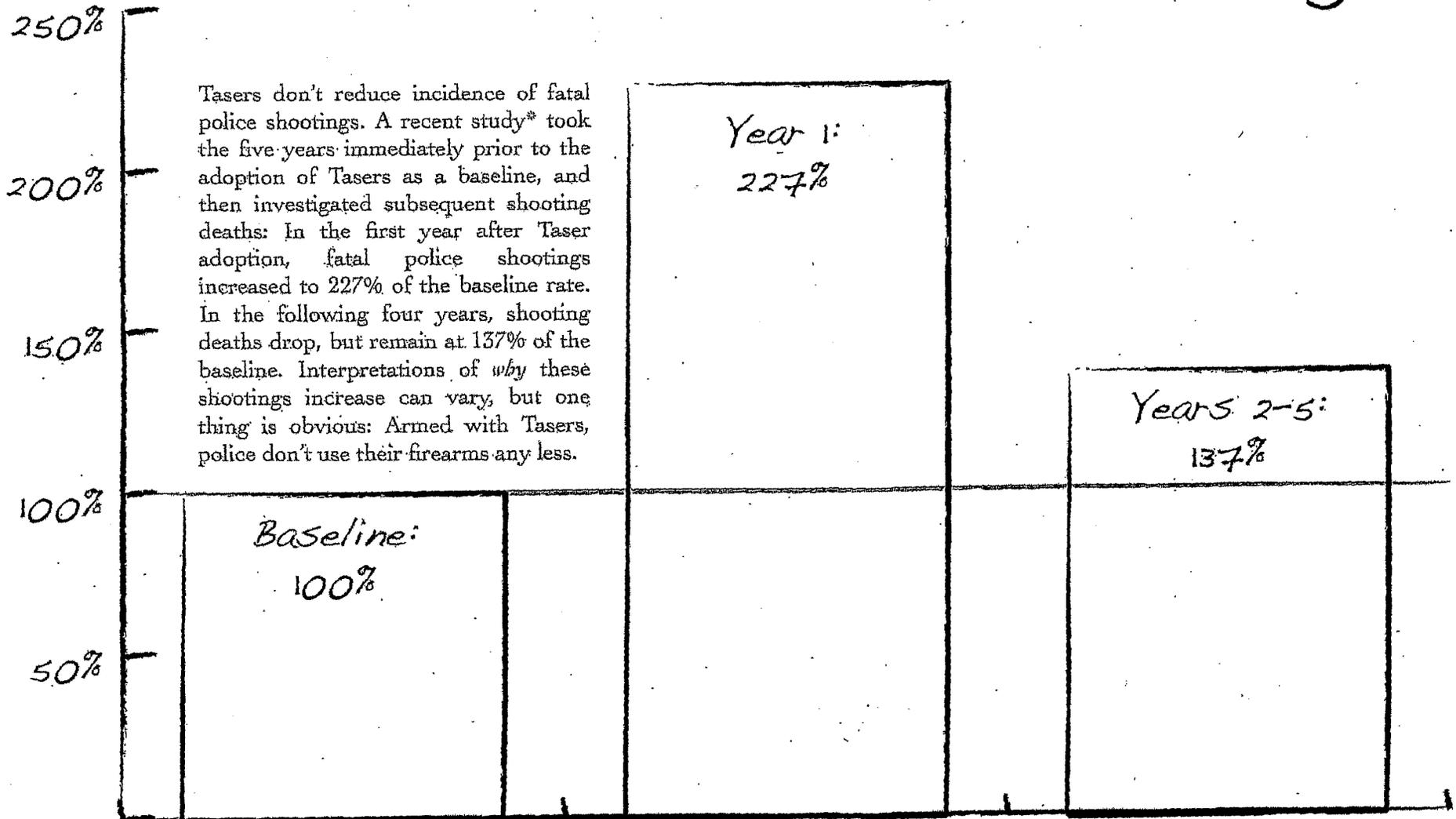
The San Francisco Mental Health Board Resolution against Tasers states: "WHEREAS, the risk of Taser injuries and/or death is heightened for the mentally and emotionally ill who, in a crisis may be potentially unable to connect actions to consequences and may resist police even in the face of stepped-up force; and; WHEREAS, research has found patients taking prescribed antipsychotic medications are already at increased risk of sudden cardiac death if tasered (Straus et al, 2004); and;

WHEREAS, people in states of acute agitation resulting from mental illness have been associated with unexplained deaths in custody. (Robison & Hunt, 2005)... THEREFORE, BE IT RESOLVED that the Mental Health Board of San Francisco urges the San Francisco Police Commission and the SFPD to oppose the adoption of Tasers to SFPD C.I.T. trained officers."

^v http://www.abcactionnews.com/dpp/news/local_news/investigations/american-heart-association-publishes-study-claiming-tasers-can-be-cause-of-death

^{vi} For example: <http://www.wcnc.com/news/local/NC-family-awarded-10M-in-lawsuit-against-Taser-125907818.html>

Tasers Don't Reduce Shootings



Tasers don't reduce incidence of fatal police shootings. A recent study* took the five years immediately prior to the adoption of Tasers as a baseline, and then investigated subsequent shooting deaths: In the first year after Taser adoption, fatal police shootings increased to 227% of the baseline rate. In the following four years, shooting deaths drop, but remain at 137% of the baseline. Interpretations of *why* these shootings increase can vary, but one thing is obvious: Armed with Tasers, police don't use their firearms any less.

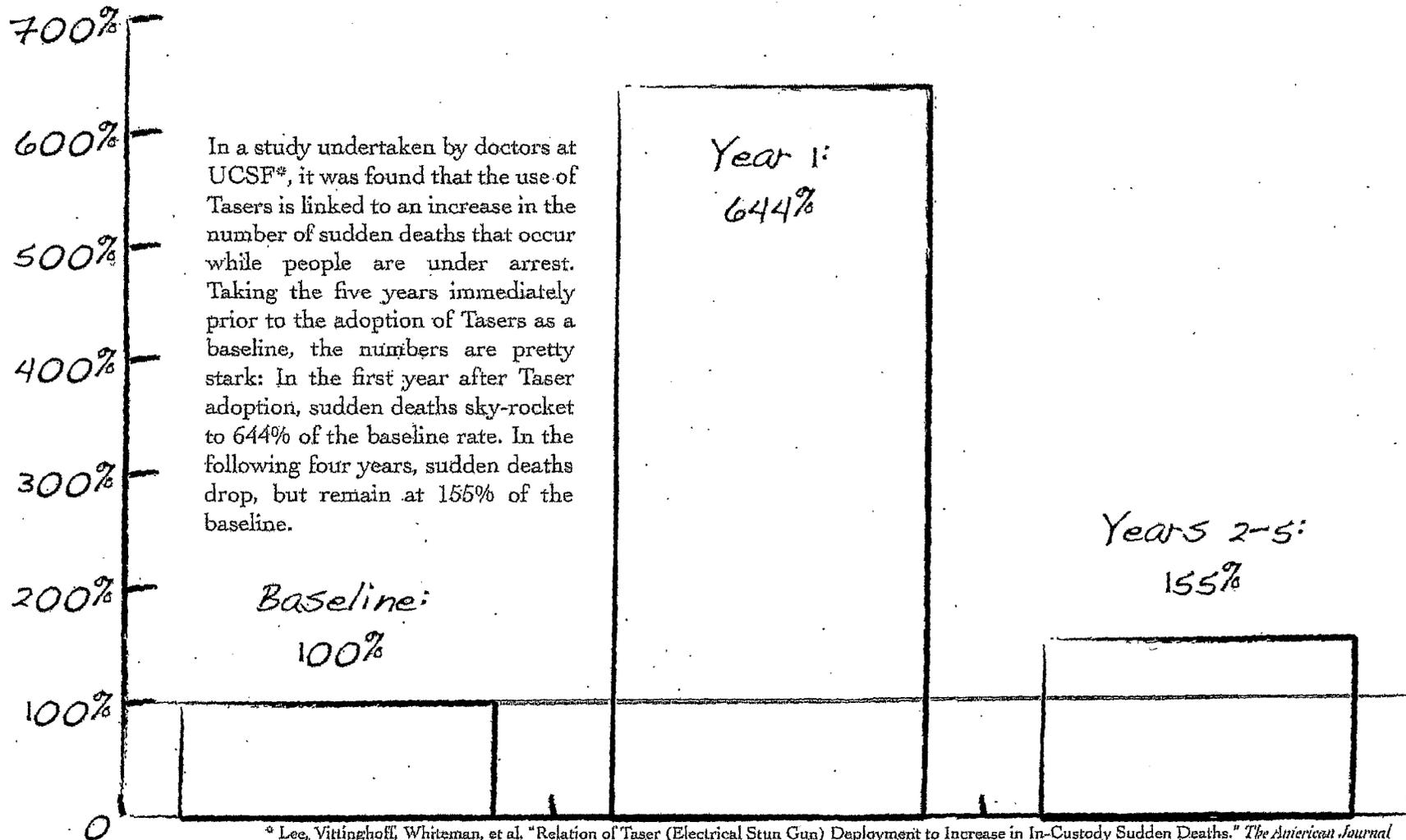
Baseline:
100%

Year 1:
227%

Years 2-5:
137%

* Lee, Vittinghoff, Whiteman, et al. "Relation of Taser (Electrical Stun Gun) Deployment to Increase in In-Custody Sudden Deaths." *The American Journal of Cardiology*. 103 (6): 877-880.

Tasers Kill



In a study undertaken by doctors at UCSF*, it was found that the use of Tasers is linked to an increase in the number of sudden deaths that occur while people are under arrest. Taking the five years immediately prior to the adoption of Tasers as a baseline, the numbers are pretty stark: In the first year after Taser adoption, sudden deaths sky-rocket to 644% of the baseline rate. In the following four years, sudden deaths drop, but remain at 155% of the baseline.

Baseline:
100%

Year 1:
644%

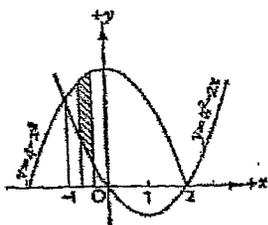
Years 2-5:
155%

* Lee, Vittinghoff, Whiteman, et al. "Relation of Taser (Electrical Stun Gun) Deployment to Increase in In-Custody Sudden Deaths." *The American Journal of Cardiology*. 103 (6): 877-880.

Pre-Tase Calculus Formula For Police officers

WARNING DO NOT USE ON:

- Mentally ill people
- People who have Asthma
- Children
- Old people
- People with heart conditions
- People on medication
- Pregnant women
- People exhibiting excited delirium
- Wet people
- People near roadways
- People in crisis
- Also
- Do Not Use On Front Torso
- Also



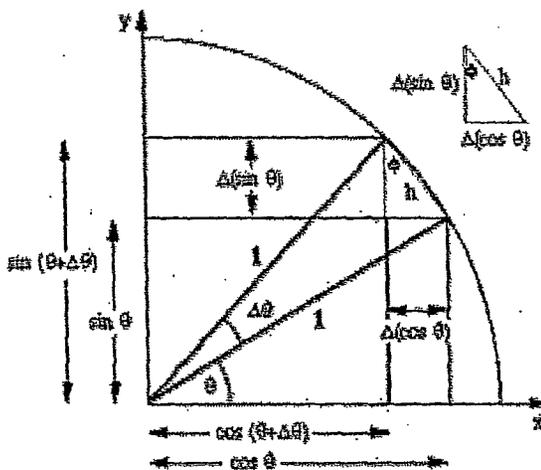
$$\frac{\partial}{\partial x} \left(\frac{\partial f}{\partial x} \right) = \frac{\partial^2 f}{\partial x^2} = f_{xx} = D^2_{xx} f$$

$$\frac{\partial}{\partial x} \left(\frac{\partial f}{\partial y} \right) = \frac{\partial^2 f}{\partial x \partial y} = f_{xy} = D^2_{xy} f$$

$$\frac{\partial}{\partial y} \left(\frac{\partial f}{\partial x} \right) = \frac{\partial^2 f}{\partial y \partial x} = f_{yx} = D^2_{yx} f$$

$$\frac{\partial}{\partial y} \left(\frac{\partial f}{\partial y} \right) = \frac{\partial^2 f}{\partial y^2} = f_{yy} = D^2_{yy} f$$

Do not use without a heart defibrillator and a individual trained in its use.



*Taser Free Berkeley agrees with SF Chief of Police Greg Suhr
that Tasers require "too much calculus"
on the part of a police officer to be of value.*

Crisis Intervention Team
Progress Analysis

THE FOUNDATION

The SFPD has made considerable progress implementing Crisis Intervention Team within the San Francisco Police Department. This has resulted in decreased use of force by officers responding to those in psychiatric distress. However, many of the recommendations in the original resolution passed by the Police Commission have yet to be implemented.

WHAT HAS BEEN ACCOMPLISHED

The training has been developed and put in place, with over 300 sworn officers trained in a 40 hour training.

The Chief has committed to training all new recruits, and has added this training onto their academy training. The plan is for all officers to receive basic CIT training and the number of trainings has been increased.

Emergency dispatch has developed and implemented protocol for dispatching CIT trained officers to those instances where individuals are in psychiatric crisis.

CIT DGO has been drafted by Office of Citizen Complaints with input from mental health advisory board.

Administration and brass level support has been supplied to CIT. This includes staffing to coordinate training, assigning of commander to attend meetings, and assignment of Lieutenant and Commander to oversee operations.

Chief has agreed to assign data analyst to project to track progress and analyze results in terms of decreased use of force—part of this data collection involves an electronic form CIT officers will fill out for CIT incidents per the CIT DGO

CIT has been promoted by introduction of awards ceremony, and awarding of trained officers with pin.

Chief implemented 20 hour advanced officer training every 2 years that includes verbal de-escalation scenario training.

WHAT IS STILL TO BE DONE

I Vertical Support for the Program

CIT is not simply training; it is a program that needs institutional support at each

district station and from the top down. The Captains at each station need to attend CIT training, actively advocate and support this program; each district station is supposed to have two CIT liaison officers, one of whom is a sergeant, who are to assist with trainings, scheduling etc. Field training officers and sergeants need to be CIT trained so that they are trained in these de-escalation skills and body of information etc. and are able to oversee their subordinates who are CIT trained.

II. Operationalize "TEAM" portion of the project.

SFPD has not operationalized CIT, and it needs to move beyond a training program. The Department needs to make sure that DEM dispatches for CIT officers when needed, and that SFPD responds with CIT officers and allow these officers to develop a plan to de-escalate at the scene. The Mario Woods tragedy is a prime example. It appears from news reports that there were multiple signs he was in behavioral crisis. However, it doesn't appear CIT officers were specifically dispatched to the scene. And certainly, it doesn't appear they were given any authority to develop a plan to use communication and de-escalation at the scene. Moreover, supervisors of CIT officers also need to be trained in CIT.

Assignment of CIT senior officers to be in charge at scene of crisis

Training new recruits on CIT is good, however, they should not be dispatched as primary responders to individuals in psychiatric crisis. New recruits do not have law enforcement experience and may not be particularly skilled at responding to behavior crisis calls. Just as all officers would not make good hostage negotiators, and are required to have five years experience and volunteer to be a negotiator, when CIT was first adopted through the Police Commission resolution, CIT officers had to apply to be a CIT officer and needed three years of law enforcement experience. The working group and the draft CIT DGO have proposed having advanced CIT officers who have volunteered for the program, have three years of law enforcement experience & taken the 40 hour class in contrast to CIT certified officers who have taken the 40 hour class.

Training must be specific to creating a tactical plan—that involves input and evaluation not only from CIT trainers but also from Police Academy's Use of Force trainers.

Advanced training for CIT senior officers

Proposed DGO and Police Commission resolution requires CIT officers to refresh their training every two years—a type of "advanced officer training" with the notion that all of these skills are perishable. There's been no refresher training since February 2011 Police Commission resolution. This refresher/advanced officer training is a core aspect of building the CIT program because this training would build upon the 40 hour training and address the ongoing challenges officers are seeing in CIT calls. Part of any specialized team—the tactical teams, the hostage and negotiator teams—involves advanced training and opportunities to

acquire more skill etc. This has never happened.

Creation and Review of Tactical Plan before Approaching Person in Crisis as Led by Senior CIT officer

There is no mechanism right now for CIT coordinator & CIT officers to review use of force incidents, and identify tactics in the same manner that a tactical team or hostage negotiators will review incidents, trouble shoot etc.—this is the type of infrastructure that is needed.

The proposed DGO and the Police Commission resolution stated that CIT officers were to receive supervisory training so that they could assume control of the scene. This is more imperative than ever because now there are CIT officers (new recruits) who have no experience but have received CIT training and CIT advanced officers (who are CIT certified & have 3 years of police service) though they still need training in how to assume control of a scene.

Imperative to this process is a review of use of force incidents in order to identify those tactics that resulted in decreased use of force and those that resulted in increased use of force, and fold into training modules.

Selection process for CIT officers - Currently, SFPD does not have an application process for officers to become advanced CIT officers. Key to success is for officers to volunteer to become advanced CIT officers. In addition, SFPD has yet to implement a selection process for officers to apply to become CIT officers. Not all officers can become CIT officers. It's for those who have the interest, experience, patience, and people skills to become great CIT officers. Currently, it appears SFPD sends whoever is available to the trainings.

Refresher training

A one time training is not enough. Refresher training is needed to maintain and further develop skills of CIT officers.

Data collection

It's been 5 years since the Police Commission adopted the resolution to implement CIT, however, SFPD has yet to provide any significant data to the CIT working group, or to do an analysis of the effectiveness of the program. This is in process, but there is a need to ensure it materializes.

Analysis of DEM dispatch

Conduct analysis of whether DEM is actually dispatching CIT officers as first responders. Although the capacity is there, there has been no analysis to see if DEM is identifying calls as a behavior health crisis call and a CIT officer is being dispatched.

Regular Debriefs on Crisis Incidents

When we traveled to Memphis to study their CIT program, Major Cochran and Dr. Dupont emphasized that debriefs of incidents with mental health providers and the police would help to improve both police response and mental health services delivery. The SF CIT working group has asked SFPD for debriefs countless times. This has yet to happen.

Concern About ECD/Tasers

Because CIT has yet to be fully implemented, now is not the time to give officers tasers. Training and operationalizing communication and de-escalation skills should be top priority and this can easily be derailed with the introduction of tasers, which often are used not to avoid use of a gun, but instead to obtain compliance from individuals.

II. Implementation of CIT DGO.

It is imperative that the CIT DGO be considered at the same time SFPD is rewriting its use of force policy because the CIT DGO involves a “re-engineering” of SFPD’s use of force policy and the CIT DGO and SFPD’s use of force DGOs (DGO 5.01 and 5.02) have to be consistent. The DGO must match the CIT program design to ensure correct implementation.

CIT DGO designates advanced CIT officers as individuals who have 3 years law enforcement experience, taken the 40 hour training and volunteered to be a CIT officer. These individuals are distinguished from recruits who are required to take the 40-hour CIT training though they lack the law enforcement experience and they may not be best suited to respond to CIT calls.

III. Improvement of Training Portion of CIT

Decrease Reliance on Volunteer Trainers

Training is reliant on community volunteers, which may prove difficult as number of training hours is increased with training of recruits and advanced training. Stipends are a cost efficient form of payment of trainers that will prove necessary going forward. The number of trainings is moving from 4 per year to 12.

Increase De-Escalation Portion

Training itself needs to be greatly modified to include at least 30% time spent practicing de-escalation techniques with paid actors and de-escalation experts in which the actors and trainers have training in providing feed-back. A recent study showed that key aspect of successful training is the feedback given to each officer after every scenario—a senior facilitating officer focused on officer performance and safety, a mental health professional who addressed mental health aspects, and professional actors who were trained to provide feedback regarding police behavior. (see How to Improve Interactions Between Police and Mentally Ill, Yasmeeen Krameddine and Peter Silverstone, January 14, 2015, *Frontiers in Psychiatry*, Vol.5, Article 186.)

Incorporate Real Life Lessons

Training needs to incorporate lessons from real time successful and failed police interventions. Data analysis and findings should continuously shape training materials.

IV. Promotion of CIT within the department

In order to change culture and create a program that is widely respected within the department, it has proved successful in other localities to expend efforts on promoting the program.

Website

Utilize SFPD's website to promote CIT, incorporate real life story telling of positive resolutions of CIT calls, highlight CIT resources, and training.

Advancement

Provide status/benefits/recognition to advanced CIT officers similar to Hostage negotiators and Tactical officers. Ensure advanced CIT trained officers receive credit for promotions. In addition, the department should introduce pay deferential or other means to promote verbal de-escalation as ideal police intervention

Internal Promotion

The department should regularly promote positive interventions when no force is used, and regularly reinforce officers engaged in verbal de-escalation.

Kilshaw, Rachael (POL)

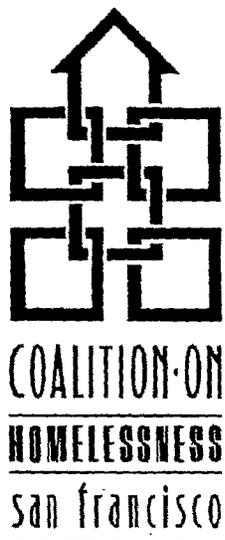
From: jennifer friedenbach <fbach4@yahoo.com>
Sent: Sunday, March 20, 2016 8:20 PM
To: rachel.kilshaw@sfgov.org; Kilshaw, Rachael (POL); rachel.kilshaw@sfgov.org
Subject: notes for DOJ/Commission

Hi Rachel,

I hope one of these e-mail addresses is right for you, as I don't have access to my work e-mail.

I would like the notes sent to the DOJ to include a comment from COH for the introductory sentence:

COH believes that using the word "reasonable" with regards to force indicates a huge step backwards to before even the standing use of force 5.01. It indicates the very lowest possible bar, and refers to current case law, where the standard centers around officer safety and what is "reasonable" for a police officer and does not embrace sanctity of life with regards to the public. We believe that the spirit of this effort is to move towards "community acceptable" standards which would suggest the use of the word "necessary" and "minimal force", in the introductory sentence .



April 6, 2016

Chief Greg Suhr
President Loftus
Vice President Turman
Commissioner DeJesus
Commissioner Mazzucco
Commissioner Hwang
Commissioner Melara
Commissioner Marshall

Police Commission Office
San Francisco Police Headquarters
1245 3rd Street
San Francisco, CA 94158

Dearest Chief and Commissioners,

Thank you for the opportunity for the Coalition on Homelessness to participate on the Use of Force working group. Often times, the voices of homeless people are left out of policy debates, and as a community that by virtue of living outdoors encounter law enforcement regularly, use of force policy is a great importance to the homeless community we work to represent. We see this conversation as a great opportunity for San Francisco to pave the way in reimagining use of force practices and build an even greater department, and commend the Departments efforts in this direction. We recognize how difficult this kind of systemic change is to take on, in SF and across the country, and we are hoping the Commission takes the courageous leadership necessary to forge this change.

As an organization that works in collaboration with many city departments, stakeholders and members of the homeless community, we were dismayed at the hard line the large number of representatives from various police officers associations took, and the lack of acknowledgement for the need for change in our embattled police department that has lost the trust of great parts of the community. Police depend on solid relationships with the community to do good work, as trust is a critical component of solving and addressing criminal activity. There was clearly a large chasm between what is acceptable in terms of use of force from the community perspective, and what police officers were advocating for.

We have four general points we would like the Police Commission to adopt throughout the Use of Force policies.

1) Retract references to “reasonable” force

As outdated as it is, the two-decade-old 1995 standing Use of Force DGO was a model in its own right in moving away from the use of “reasonable” force. The language states “with minimal reliance upon the use of physical force” and “to the degree minimally necessary to accomplish a lawful police task”.

The Police Executive Research Forum (PERF), in their report “Re-Engineering Training of Police Use of Force”, recommends “minimal use of force” and in another January, 2015 report, “Use of Force: Taking Policing to a Higher Standard” states that police departments should hold themselves to a higher standard than the legal requirements of Graham vs. Connor. Many cities have done just that, and used language of “minimal force” instead of the Graham vs. Connor reasonable force, including but not limited to New Orleans, Las Vegas, Washington DC, Chicago, Portland, Albuquerque, Seattle, Milwaukee, and Oakland, to name a few.

COH believes that using the word “reasonable” with regards to force indicates a huge step backwards over two decades. It indicates the very lowest possible bar, and centers on officer safety and what is “reasonable” for a police officer and does not embrace sanctity of life with regards to the public. We believe that the spirit of this effort is to move towards “community acceptable” standards, which would suggest the use of the word “minimal force”, in the introductory sentence and throughout.

2) Mandatory Language for De-Escalation

Throughout the document, the language around using de-escalation must be mandatory. The language in the proposed DGO allows for contingencies, “when feasible and safe” to use verbal de-escalation. We strongly recommend that language should state “shall” use verbal de-escalation when feasible and safe. In deconstructing the reason to have permissive language that recommends instead of dictates, it boils down to accountability. The only reason to have permissive language is to ensure officers are not held accountable to a higher standard that the community expects.

There are many cites that include “will”, “shall”, “must” instead of the permissive and suggestive language of “should”, or “may” including New Orleans, Albuquerque, Chicago, and Cleveland.

This is critical to avoid expensive lawsuits, to ensure the language of the DGO reflects the spirit of the vision of the new direction of the Police Department, to increase both officer and public safety, and to ensure clarity of instruction to officers.

3) Remove Electronic Control Weapons From Discussion

In the midst of trying to move forward as a department to address the very real issues associated with current Use of Force policies, a decision was made by the Department to introduce Electronic Control weapons as part of that discussion. This threw a proverbial wrench into what was already a very complicated discussion, enflamed distrust and

frustration among community members, and sent a contradictory message that included sanctity of life, time and distance, de-escalation and contradictory a new often lethal weapon.

As you know, we have looked very closely at this proposal in the past, and while at first glance, electronic control devices appear to be a good alternative to a gun, once we dug deep into the research and outcomes, we have come to the solid conclusion that they are a very unsafe option.

In my previous letter, I outlined many of the medical concerns (attached). Since then there have been several new studies coming out that further indicate the dangers and doubts of the use of these weapons. In addition to safety concerns, new information indicates to disproportionate use on African Americans. For example, a Maryland study found the 64% of the time; these weapons were discharged on African Americans. In addition, a C.O.P.S. report in Salinas, found that the police department there did not follow their own policies, and greatly over-used the weapons.

4) Consider and Implement Crisis Intervention Team DGO

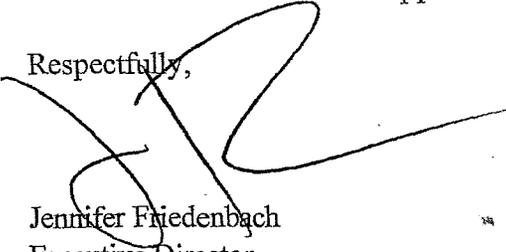
We need to fully operationalize the Crisis Intervention Team as our safeguard from officer-involved shootings. There are mainstream experts who agree and their expertise supports our lived experiences. This program has only been partially implemented, focusing mostly on training, but missing the operations component. Throughout this process, we have been regularly advised by the Department that the draft CIT DGO would be considered alongside the rest of the discussion. This has not happened to date, and there are many components that intersect with DGO 5.01. This must be prioritized within the broader discussion, and this DGO should be implemented alongside the Use of Force orders.

5) Ensure Data Collection on Use of Force

This is clearly needed – we must have transparent information on use of force that is accessible to the public. This should be outlined in the DGO.

We thank you for your service to our community and for holding open, community forums to gather the feedback and concerns from the citizens of San Francisco. We urge you to make a decision that best supports the entire city.

Respectfully,



Jennifer Friedenbach
Executive Director

Kilshaw, Rachael (POL)

From: Jennifer Friedenbach <jfriedenbach@cohsf.org>
Sent: Tuesday, May 03, 2016 10:10 AM
To: Kilshaw, Rachael (POL)
Subject: Re: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Changes in Red - last one 4 of 4

On May 2, 2016, at 1:49 PM, Jennifer Friedenbach wrote:

<5.01 Use of Force COH 032116.doc>

DGO 5.01, Use of Force, Corresponding Comments (03/21/16 version)

1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were “rapport-building,” “effective,” “non-violent, and “positive.” POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language that removed the adjective from the original.
2. SFPD will incorporate the term “crisis intervention” once the DGO on CIT is adopted and the term “crisis intervention” is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term “crisis intervention” now on its website, in its training and in a Police Commission resolution.
3. SFBAR, COH wants the opening paragraph to read: “The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary force. These are key factors in maintaining the legitimacy with the community and safeguarding the public’s trust.”

ACLU, SFBAR, OCC, Public Defender and COH want to use the term “minimal force necessary.” By using the term “reasonable force” throughout the policy and removing “minimal force” as stated in the current DGO 5.01, the Department is taking a step backwards from the current trend in policing nation-wide that goes beyond the standard set in the SCOTUS case *Graham v. Connor*. These members of the stakeholder group believe that the Department has a choice with this policy to let the community know it is committed to going beyond what is required by the law and have higher standards for its officers. They reminded the group that the Mayor, the Chief and the Commission all committed to changing the use of force policy by speaking about the principles in the PERF recommendations.

The POA, OFJ, Pride Alliance, APOA and LPOA concur with the term “reasonable force” being used throughout the policy and oppose the use of the term “minimal force.” Case law does not require officers to use minimal force; the courts require officers to use force that is objectively reasonable. These members of the stakeholder group state that PERF is not the authority on use of force, and is only one of many groups that have opinions on use of force policies, and point out that there is currently intense criticism regarding some of PERFs recent recommendations on use of force.

There is no consensus on this issue throughout the policy. Anytime the term “reasonable force” is written in the policy or the term “minimal” is proposed by a member of the stakeholder group, the positions described above should be considered.

4. ACLU, COH wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

5. ACLU and OCC do not believe this paragraph should be placed here. ACLU does not have a suggestion for placement.
6. SFDA/BRP, OCC, COH and Public Defender want a section prohibiting biased policing in this section and want the language to read: “FAIR AND UNBIASED POLICING. It is one of the Department’s guiding principles that policing occur without bias, including the use of force. Members of the Department shall carry out their duties, including with respect to use of force, in a manner free from any bias and to eliminate any perception of policing that appears to be motivated by bias. See DGO 5.17, Policy Prohibiting Biased Policing.” These members do not agree that it should be cross-referenced at the end of the policy because this is a key principle and there is a perception that the application of use of force is done in a biased manner.

POA, OFJ, LPOA, APOA and Pride Alliance recommend listing DGO 5.17, Policy Prohibiting Biased Policing, at the end of this DGO as a cross-reference.

7. The OCC, SFBAR and COH recommend changing this sentence to read, “When feasible and safe to do so, officers shall employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance. They state without this change, the language currently written means that officers would not have to attempt de-escalation techniques in three situations, when a subject is: 1) endangering the public or officers, 2) fleeing or 3) destroying evidence.

The POA, OFJ, LPOA, APOA and Pride Alliance concur with the language as written in the current draft and ask if members of the stakeholder group expect officers to attempt de-escalation techniques when the subject is endangering the public or the officer.

8. The stakeholder group cannot reach consensus on whether to use the term “shall, when feasible,” or the term “should, when feasible” throughout the entire document. When the terms “shall, when feasible” or “should, when feasible” are written in the document, the positions described below should be considered.

The OCC, SFBAR, Coalition on Homelessness (COH), San Francisco District Attorney/Blue Ribbon Panel (SFDA/BRP), Public Defender and ACLU want to use the term “shall, when feasible.” The POA, OJF, Pride Alliance, LPOA and APOA had concerns with this term because “shall” is a mandate, but if an officer cannot perform the action because of safety, someone might judge the situation, using 20/20 hindsight, and opine that the officer would have been able to, and therefore should have, performed the action and discipline the officer.

The POA, OFJ, LPOA, Pride Alliance and APOA want to use the term, “should, when feasible.” OCC, SFBAR, COH, SFDA/BRP, Public Defender and ACLU have concerns with that term and discussed the distinction between their understanding of the two terms: “shall, when practical” means an officer will take the action at a time when it is safe, and “should, when practical” means the officer can think about taking action, but does not have to take the action even if it is safe.

DGO 3.02, Terms and Definitions, defines both terms:

- 1) Shall/Will/Must: mandatory
 - 2) Should: permissive, but recommended
9. SFBAR, COH and OCC want a section on Crisis Intervention in the POLICY section. The language should include specific CIT procedures and training. SFPD will incorporate, at minimum, a cross-reference to the CIT DGO once DGO on CIT is adopted.
 10. POA has issues with the entire section of proportionality. They have submitted two written responses along with two Subject Matter Experts’ opinions that include: 1) the underlying offense may be minor, but an officer can use reasonable force to make the arrest, 2) the Department’s list of edged and improvised weapons are all situations where an officer could use deadly force if the suspect threatened the officer, 3) what are the principles of proportionality? and 4) it appears that the Department is stating there is only one acceptable response to a use of force incident. The COH recommends that the third guiding principle from PERF report be incorporated.
 11. OCC and COH recommends the language in this section to read: “Officers shall intervene when they reasonably believe another officer is about to use unnecessary or excessive force, or when they witness an officer using unnecessary or excessive, or engaging in other misconduct. Recommended language is underlined.
 12. OCC, ALCU, COH and SFBAR recommend adding additional language to item #5 to read: “to gain compliance with a lawful order, where the force is proportional to the timing and reasons for the order.” Recommended language is underlined.

POA, APOA, LPOA, Pride Alliance, and OFJ oppose the recommendation.

13. OCC, SFBAR, CIT working group, ACLU, and COH recommend adding the following language for this section under #6. To prevent a person from injuring himself/herself. “a) Officers shall avoid or minimize the use of force against individuals who are injuring themselves and do not pose a safety risk to officers. b) In situations where some force may be warranted to prevent suicide, officers shall determine whether other tactics are available to the officer that would cause less injury, and include the language of the prohibition from using lethal force on a person who is only a danger to himself as item c.

POA, OFJ, LPOA, APOA, and Pride Alliance oppose the recommendation. The law allows officers to use force to prevent a person from injuring himself, and the policy prohibits the use of lethal force. These members of the group question what officers are supposed to do to keep a person from hurting himself and get the person the help he needs. POA believes the list of lawful reasons to use force should be a comprehensive list of what is Constitutionally allowed, and training can cover the types of force that are reasonable when dealing with a person who is a danger to himself. POA provided case law that that may cover this area: Glenn vs. Washington City and Adams vs. City of Fremont.

14. OCC and SFBAR recommend adding language about the critical decision making model to this section and recommends the following language be added: “Officers shall use a Critical Decision Making framework in all circumstances in which the use of force might be needed. Officers shall collect information, assess the threats and risk, consider powers, policies, and other obligations, identify options and consider contingencies, and determine the best course of action.”

POA, OFJ, Pride Alliance, LPOA, and APOA oppose the recommendation as it requires officers to make decisions and solve problems by using only one method. Additionally, any methods for assisting officers in decision making strategies should be taught in the Academy.

15. ACLU, Public Defender, COH SFBAR, and OCC believe the language of 835a PC is against the principles of what the department is trying to accomplish in the revised policy. ACLU believes this language is archaic and more aggressive than what the Department is trying to achieve with the policy. ACLU believes that quoting the law sends an incorrect message to the community and the officers that is contrary to the principles of the policy. COH states this statement sends a confusing message to officers about whether to use the principles of de-escalation. SFBAR suggests moving the language but does not have a suggestion about where to place it.

POA, Pride Alliance, and OFJ, LPOA and APOA state this is the law and in the current policy. POA points out officers are currently trained on both the law and de-escalation techniques. POA suggests moving the language about 835a PC to the FORCE OPTIONS section.

16. OCC, COH, SFBAR, SFDA/BRP recommend adding four additional factors to the list of relevant factors, based on California Supreme Court and Ninth Circuit Court cases:

- What other tactics if any are available to the officer
- The ability of the officer to provide a meaningful warning before using force

- The officer's tactical conduct and decisions preceding the use of force
- Whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis or who is a person with a mental illness.

POA also mentioned the case Bryan vs. McPherson.

17. ACLU, SFBAR, COH and OCC want the policy to state "apply" instead of "consider. These members feel there is a distinction between the two terms: 1) apply means taking an action, and 2) consider means only having to think about the concept.
18. POA disagrees with making the requirements in this section for both officers and supervisors mandatory. There are too many proposed requirements that officers and supervisors must perform in situations that require attention to the incident.
19. SFBAR COH and ACLU want the policy to list the specific standards for the situations when officers can use a specific force option. SFBAR proposed using language similar to Oakland PD that reads that force is "...justified when reasonable alternatives have been exhausted, are unavailable or are impractical" in each section of the list of force options, or at least in the beginning of this section referring to all force options.

POA, LPOA, OFJ, APOA and Pride Alliance oppose the recommendation because it requires officers to use force based on a continuum, which is not the standard.

20. ACLU, OCC, COH and SFBAR want the language to read "serious injury."

POA, OFJ, APOA, LPOA and Pride alliance oppose the recommendation. Serious injury has a specific legal definition in PC section 243d, and training does not support the use of ERIWs only when the public is in danger of "serious bodily injury." The use of an ERIW is the same level of force as an impact weapon.

21. OCC, SFBAR, Public Defender and ACLU state CEDs should be taken out as a force option and discussed at a later time.

COH is opposed to CEDs as force option now and at a later time. COH has submitted written response that states the vertical support and operationalizing of CIT within the Department has not been implemented, and COH feels the team needs to be in place before CEDs are considered as necessary. COH also states the deaths and injuries that can result from CEDs as a reason for not implementing them. In addition, COH is concerned that these weapons will be used, as reports have noted in other places, without following department guidelines, as was the case in Salinas, CA as found by the DOJ. In addition, recent shootings of Gongora and Woods underline that SFPD is not using de-escalation and time and distance, and repositioning strategies, so it would be irresponsible to add another potentially lethal weapon.

CIT working group and SFDA/BRP take no position on CEDs as a force option. SFDA/BRP may submit a position on CEDs at some point, but the SFPD has not received as of the writing of this summary.

POA, OFJ, Pride Alliance, LPOA, and APOA are in favor of CEDs as a force option.

22. OCC, SFBAR and COH would like carotid restraint to be prohibited, as proposed in the previous drafts of revised DGO 5.01.

SFDA/BRP and CIT working group take no position on the carotid restraint.

POA, OFJ, LPOA, APOA and Pride Alliance concur with the carotid restraint being a force option.

23. POA, OFJ, LPOA, Pride Alliance and APOA do not agree that carotid restraint can only be used in cases of lethal force, especially with a requirement to give a warning. These groups questioned the logic behind using the carotid restraint only in situations where lethal force is justified – why would the Department want an officer to get that close to the subject? The POA mentioned that there has never been a lethal outcome in SFPD with a properly applied carotid restraint. Members of these groups mentioned that the DOJ commended Seattle PD for having the carotid restraint.
24. ACLU wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

On Apr 28, 2016, at 2:45 PM, Kilshaw, Rachael (POL) wrote:

Good Afternoon:

In preparation for the Commission meetings on May 4th and May 11th when the draft Use of Force policies and the draft Conducted Energy Devices Bureau Order will be discussed, I am putting together a summary for the Commissioner to review that explains the areas in the policies where the stakeholders cannot come to a consensus. I have attached the most recent document where I have listed those areas (03/21/16). Can you please review and confirm that I have accurately conveyed your group's position and that I have included all of your group's positions? If you need to make corrections, please track your changes and send back to me. Once I have all of the stakeholders' comments back, I will create the summary for the Commissioners that includes a cross-reference to the stakeholder's submitted documents, and send a copy to each of you. The comments will also be posted on the Commission's website and sent to the DOJ.

As the meeting is next week, I would like to start working on this over the weekend to have the documents to send to the Commissioners on Tuesday morning at 10 am. Please send your comments to me anytime between now and Monday, May 2nd at 3:00 pm.

Thank you

Sergeant Rachael Kilshaw
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Police Commission Office
1245 – 3rd Street, 6th Floor
San Francisco, California 94158

415.837.7071 phone
rachael.kilshaw@sfgov.org

<5.01 Use of Force corresponding comments 032116.docx><5.01.1 Use of Force Reporting corresponding comments 032116.docx><5.02 Use of Firearms and Lethal Force corresponding comments 032116.docx><Special Operations Bureau Order 032116 corresponding comments.docx>

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Kilshaw, Rachael (POL)

From: Jennifer Friedenbach <jfriedenbach@cohsf.org>
Sent: Tuesday, May 03, 2016 1:37 PM
To: Kilshaw, Rachael (POL)
Subject: Fwd: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Begin forwarded message:

From: Jennifer Friedenbach <jfriedenbach@cohsf.org>
Date: May 3, 2016 10:03:40 AM PDT
To: Jennifer Friedenbach <jfriedenbach@cohsf.org>
Subject: **Re: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order**

Changes in red

On May 2, 2016, at 1:48 PM, Jennifer Friedenbach wrote:

<5.01.1 Use of Force Reporting COH 032116.doc>

Corresponding Comments 5.01.1, Use of Force Reporting (03/21/16 version)

1. ACLU, COH wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

2. OCC COH and SFDA/BRP want a section that includes the requirement for data collection, analysis and distribution to the public. OCC, COH recommends that the section state the following:
 - The Department will collect and analyze its use of force data through the Use of Force Form that will enable electronic collection of data.
 - The Department will post on a monthly basis on its website comprehensive use of force statistics and analysis.

- The Department will provide a written Use of Force report to the Police Commission annually
- The Department's use of force statistics and analysis will include at a minimum:
 - The type of force
 - The type and degree of injury to the suspect and officer
 - Date and time
 - Location of the incident
 - Officer's unit
 - District station
 - Officer's assignment
 - Number of officers using force
 - Officer's activity when force was used
 - Officer demographic (age, gender, race/ethnicity, number of years with SFPD, number of years as a police officer)
 - Suspect demographics including race/ethnicity, age, gender, gender identity, primary language and other factors such as mental illness, cognitive impairment, developmental disabilities, drug and alcohol use/addiction and homelessness.

The SFPD has committed to collecting, analyzing and reporting data in a way that promotes transparency and accountability, but the Department believes that the specific data that will be collected is better articulated in a Department Unit Order. As technology and the laws on use of force data collection change, it will be easier for the Department to codify changes in requirements in a Unit Order versus a Department General Order. The Department is not opposed to listing the suggested items in a Unit Order.

On Apr 28, 2016, at 2:45 PM, Kilshaw, Rachael (POL) wrote:

Good Afternoon:

In preparation for the Commission meetings on May 4th and May 11th when the draft Use of Force policies and the draft Conducted Energy Devices Bureau Order will be discussed, I am putting together a summary for the Commissioner to review that explains the areas in the policies where the stakeholders cannot come to a consensus. I have attached the most recent document where I have listed those areas (03/21/16). Can you please review and confirm that I have accurately

conveyed your group's position and that I have included all of your group's positions? If you need to make corrections, please track your changes and send back to me. Once I have all of the stakeholders' comments back, I will create the summary for the Commissioners that includes a cross-reference to the stakeholder's submitted documents, and send a copy to each of you. The comments will also be posted on the Commission's website and sent to the DOJ.

As the meeting is next week, I would like to start working on this over the weekend to have the documents to send to the Commissioners on Tuesday morning at 10 am. Please send your comments to me anytime between now and Monday, May 2nd at 3:00 pm.

Thank you

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032116.docx><5.01.1 Use of Force Reporting corresponding
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14. ACLU wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

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Kilshaw, Rachael (POL)

From: Jennifer Friedenbach <jfriedenbach@cohsf.org>
Sent: Tuesday, May 03, 2016 9:59 AM
To: Kilshaw, Rachael (POL)
Subject: Re: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

changes in red

On May 2, 2016, at 1:47 PM, Jennifer Friedenbach wrote:

Rachel,

I am doing one at a time, because often times folks can't open my attachments, so I will paste as well. As always, big thanks for your work on this important civic issue.

<Special Operations Bureau Order COH 032116.doc>

Special Operations Bureau Order, Conducted Energy Devices, corresponding comments
(03/21/16 draft)

1. OCC, SFBAR, Public Defender and ACLU state CEDs should be taken out as a force option and discussed at a later time. As such, these agencies have not provided recommendations about the CED policy. However, each agency was clear that a lack of recommendations from it group was not to be taken as support or opposition to CEDs as a force option, at this time.

COH is opposed to CEDs as force option now and at a later time. COH has submitted written response that states the vertical support for CIT within the Department has not been implemented, has not been operationalized and the team has not been formed, and COH feels the program needs to be in place before CEDs considered. COH also states the deaths and injuries that can result from CEDs as a reason for not implementing them. However, COH did provide some recommendations for the CED policy.

CIT working group and SFDA/BRP take no position on CEDs as a force option. However, CIT did provide some recommendations for the CED policy. SFDA/BRP may submit a position on CEDs at some point, but the SFPD has not received as of the writing of this summary.

POA, OFJ, Pride Alliance, LPOA, and APOA are in favor of CEDs as a force option and would like the policy expanded to include all members of patrol.

2. SFPD will incorporate this language once the DGO on CIT is adopted and the term "crisis intervention" is defined. At this point the DGO is pending.
3. POA recommends the Department use its submitted CED draft policy. The POA is concerned that the Department's policy is too limited in its authorized uses.

4. COH recommends this sentence include stronger language as proposes either: 1) “CEDs are sometimes lethal weapons, and the risk of adverse effects can be higher for some subjects,” or 2) CEDs have caused some fatalities and the risk of adverse effects can be higher on some subjects.” COH believes the policy should be transparent to officers and the public that CEDS can be lethal.
5. POA, OFJ, LPOA, Pride Alliance, and APOA recommend CEDs for all members of patrol. COH is opposed to all members of patrol having CEDs.
6. CIT working group recommends having more information about AED training in this policy.
7. COH wants the policy to mention that homeless individuals and people on medication are some of the people who may have an adverse reaction to having the CED used on them. The weapons are not safe for use on elderly individuals, and recent UCSF study puts homeless people at 25 years advanced age then their actual birth age. Homeless people, due to living outdoors, frequently have compromised health which also puts them at risk.
8. POA questions why officers cannot use the CED in the drive-stun mode, which is considered a lesser use of force than deploying the probes.
9. POA, OFJ, APOA, LPOA and Pride Alliance recommend better defining when deployments and activations are determined to be a use of force.
10. POA, OFJ, APOA, LPOA and Pride Alliance want this language to remain and moved to the beginning of the policy.

On Apr 28, 2016, at 2:45 PM, Kilshaw, Rachael (POL) wrote:

Good Afternoon:

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Thank you

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Kilshaw, Rachael (POL)

From: Kilshaw, Rachael (POL)
Sent: Tuesday, May 03, 2016 10:36 AM
To: 'Jennifer Friedenbach'
Subject: RE: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Hi Jennifer:

This is a follow-up email to inform you that I only got three of the four emails; the one I did not receive is the comments regarding DGO 5.01.1, Use of Force Reporting. I have taken the liberty to add COH as joining OCC, SFBAR, ACLU, Public Defender and Public Defender to items #1 and #2, and made reference to your April 6th letter to the Commission recommending transparent data collection (comment #5).

I have to send this out to the Commission. If there is anything else that you wanted to add to DGO 5.01.1 perhaps you can mention it in your comments tomorrow night. Sorry about the tight deadline. If I don't get this out to the Commissioner now, they may not have enough time to review in preparation for tomorrow's meeting. Thanks for understanding.

Rachael

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rachael.kilshaw@sfgov.org

From: Jennifer Friedenbach [mailto:jfriedenbach@cohsf.org]
Sent: Tuesday, May 03, 2016 10:10 AM
To: Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org>
Subject: Re: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Changes in Red - last one 4 of 4

On May 2, 2016, at 1:49 PM, Jennifer Friedenbach wrote:

<5.01 Use of Force COH 032116.doc>

DGO 5.01, Use of Force, Corresponding Comments (03/21/16 version)

1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were “rapport-building,” “effective,” “non-violent, and “positive.” POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language that removed the adjective from the original.

Kilshaw, Rachael (POL)

From: Kilshaw, Rachael (POL)
Sent: Tuesday, May 03, 2016 10:14 AM
To: 'Jennifer Friedenbach'
Subject: RE: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Hi Jennifer:

I got three of the four. The one I am missing is your updated comments on DGO 5.01.1, Use of Force Reporting.

Thanks,
Rachael

Sergeant Rachael Kilshaw
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rachael.kilshaw@sfgov.org

From: Jennifer Friedenbach [mailto:jfriedenbach@cohsf.org]
Sent: Tuesday, May 03, 2016 10:10 AM
To: Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org>
Subject: Re: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Changes in Red - last one 4 of 4

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<5.01 Use of Force COH 032116.doc>

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1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were “rapport-building,” “effective,” “non-violent, and “positive.” POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language that removed the adjective from the original.
2. SFPD will incorporate the term “crisis intervention” once the DGO on CIT is adopted and the term “crisis intervention” is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term “crisis intervention” now on its website, in its training and in a Police Commission resolution.

OFFICE OF CITIZEN COMPLAINTS

CITY AND COUNTY OF SAN FRANCISCO



Joyce M. Hicks
Executive Director

February 29, 2016

Chief Gregory P. Suhr
San Francisco Police Department
1245 3rd Street
San Francisco, CA 94158

Re: OCC's Suggested Revisions to the Departments' Use of Force Policies

Dear Chief Suhr:

Thank you for providing our agency the opportunity to review the proposed revisions to the Department's Use of Force policies. The revisions are commendable in their emphasis on the sanctity of all human life, thoughtful communication, de-escalation and proportionality. By instructing officers to use time, distance, cover and tactical repositioning whenever practical, this approach increases officers' opportunities to obtain additional assistance and consider other options for a more favorable resolution. The restriction on the shooting at moving vehicles incorporates best practice rules adopted by law enforcement agencies in New York, Washington, D.C., Denver and Cleveland and is a standard that our agency has recommended for years.

Below I provide our suggested revisions to the Use of Firearms and Lethal Force (5.02), Use of Force (5.01), Use of Force Reporting (5.01.1) policies.

A. USE OF FORCE (DGO 5.01)

1. INCLUDE A COMMITMENT TO MINIMAL FORCE IN THE DEPARTMENT'S USE OF FORCE POLICY STATEMENT SIMILAR TO THE OAKLAND AND SEATTLE POLICE DEPARTMENTS

The OCC recommends that the Department include a commitment to relying on minimal force in its policy statement. By stating the Department's values accomplishing its police mission with a minimal reliance upon the use of physical force, the Department would be underscoring its commitment to using communication, de-escalation, and other tactics before resorting to the use of force, whenever practical. The Department already incorporates a commitment to minimal force when in its physical controls/personal body weapons section, the Department emphasizes that officers "should consider requesting additional resources to the scene to resolve the situation with a minimum amount of force." (See III (A)(1).).

Use of Force policies at other law enforcement agencies include a commitment to relying on minimal force. For example, Seattle Police Department's "Use of Force Core Principles" states that its policy is to "accomplish the police mission with the cooperation of the public and

as effectively as possible, and with minimal reliance upon the use of physical force.” (See Seattle Police Department’s Use of Force Core Principles, section 8.000 (effective date 09/01/2015). Oakland Police Department’s Use of Force policy statement explains that in addition to valuing the protection and sanctity of human life, the Department “is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force.” (Oakland Police Department’s Department General Order K-3 (Effective October 14, 2016). One of the Milwaukee Police Department’s Code of Conduct’s core values and guiding principles is “Restraint: We use the minimum force and authority necessary to accomplish a proper police purpose. We demonstrate self-discipline even when no one is listening or watching.” (Milwaukee Police Department Code of Conduct, section 6.00). Milwaukee’s Code of Conduct also states, “Police members shall exercise restraint in the use of force and act in proportion to the seriousness of the offense and the legitimate law enforcement objective to be achieved.” (Section 6.01). The OCC recommends that the following underlined sentence be added to the Department’s introduction to its Use of Force policies between the 2nd and 3rd line:

The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. It is the San Francisco Police Department’s policy to accomplish its police mission with respect and minimal reliance upon the use of physical force. The Department is committed to using thoughtful communication, and de-escalation principles before resorting to the use of force, whenever practical. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public’s trust.

2. INCLUDE A SPECIFIC PROVISION ENTITLED “SUBJECT WITH A WEAPON” THAT INFORMS OFFICERS TO REQUEST A SUPERVISOR IMMEDIATELY AND INCORPORATES THE SUPERVISOR’S DUTIES

Section II (F) entitled “Supervisor’s Responsibility” explains the supervisor’s responsibilities when officers are dispatched to or on-view a subject with a weapon. This section explains that supervisors are to monitor the radio communication, remind their subordinates about time, distance, cover and rapport tactics, and once on-scene to assume command. Implicit in this section is the officers’ duty upon being dispatched or on-viewing a subject with a weapon to call a supervisor immediately. The Use of Force DGO does not explicitly inform officers of their duty to call a supervisor when they encounter an individual with a weapon. For clarity, the OCC recommends that Section II (F) be revised to the following:

F. SUBJECT WITH A WEAPON

1. OFFICER’S RESPONSIBILITY: Upon being dispatched or on-viewing a subject with a weapon, officers shall call a supervisor immediately. When safe and practical

under the totality of the circumstances, officers should use the de-escalation tactics described in this policy. (See I(C))

2. SUPERVISOR'S RESPONSIBILITY. When notified that officers are dispatched to or on-view a subject with a weapon, a supervisor shall immediately:

- a. Notify DEM, monitor radio communications, respond to the incident (e.g., "3X100, I'm monitoring the incident and responding.");
- b. Remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources;
- c. Upon arrival, assume command, and ensure appropriate resources are on-scene or are responding. (Recommended language is underlined.)

3. CLARIFY OFFICERS' RESPONSIBILITIES WHEN AN INDIVIDUAL THREATENS TO INJURE HIM OR HERSELF AND POSES NO THREAT TO THE OFFICER OR OTHERS

Section (II)(A) states "officers may use reasonable force...to prevent a person from injuring himself/herself, unless the person also poses an imminent danger of death or serious bodily injury to another life or officer. See DGO 5.02, Use of Firearms and Lethal Force."

This section is confusing because it implies that officers are required to use something other than "reasonable force" when a person while attempting to injure him or herself poses an imminent danger of death or serious bodily injury to another life or officer. The OCC recommends that the Department clarify an officer's responsibilities when an individual threatens to injure himself/herself and poses no threat to the officers or others.

4. STATE THAT THE REASONABLENESS OF AN OFFICER'S USE OF FORCE INCLUDES CONSIDERATION OF THE OFFICER'S TACTICAL CONDUCT AND DECISIONS LEADING UP TO THE USE OF FORCE.

The OCC recommends that the Department's use of force policies, its analysis of all use of force incidents, and its training consider the officer's tactical conduct and decision-making that lead up to the use of force when determining the reasonableness of the officer's use of force. In Hayes v. San Diego (2013) 57 Cal.4th 622, the California Supreme Court ruled that under California negligence law, the tactical conduct and decisions preceding an officer's use of deadly force are relevant considerations in determining whether the use of deadly force is reasonable. In light of Hayes, the Los Angeles Police Department amended its use of force procedures to state, "the reasonableness of an officer's use of deadly force includes consideration of the officer's tactical conduct and decisions leading up to the use of deadly force." (See LAPD, Use of Force Policy, 556.10). While the Hayes court addressed the importance of evaluating the officer's tactical conduct and decision-making that preceded the use of deadly force, this evaluation is

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equally important when evaluating the reasonableness of an officer's use of force in circumstances that do not result in death.

The OCC recommends that the following provision be added to Section II (B)'s list of relevant factors in determining objective reasonableness:

10. The reasonableness of the officer's use of force includes consideration of the officer's tactical conduct and decisions leading up to the use of force.

5. MANDATORY MEDICAL ASSESSMENT SHOULD INCLUDE COMPLAINTS OF PAIN THAT PERSIST BEYOND THE USE OF THE PHYSICAL CONTROL HOLD

Currently use of physical control is a reportable use of force when the subject is injured, complains of injury in the presence of officers, or complains of pain that persists beyond the use of the physical control hold. (See Department Bulletin 15-051; also proposed DGO 5.01, Section III (A)(5)). The OCC recommends that section III (A)(4) be revised to state, "Any subject who has been injured, complains of injury in the presence of officers, or complains of pain that persists beyond the use of physical control hold shall be medically assessed by emergency medical personnel. (Recommended language is underlined.)

6. ADD "IMMEDIATELY" TO CLARIFY AN OFFICER'S RESPONSIBILITY TO SEEK EMERGENCY MEDICAL ATTENTION WHEN AN INDIVIDUAL LOSES CONSCIOUSNESS OR HAS DIFFICULTY BREATHING WHEN BEING TRANSPORTED FOLLOWING AN OFFICER'S USE OF CHEMICAL AGENTS

To clarify an officer's responsibilities to summon medical attention when an individual who has been sprayed with a chemical agent and loses consciousness or has difficulty breathing, the OCC suggests the following revision to Section III (B)(5): "If the subject loses consciousness or has difficulty breathing, officers shall immediately seek emergency medical attention. (Recommended language is underlined.).

B. USE OF FIREARMS AND LETHAL FORCE (DGO 5.02)

1. INCLUDE A COMMITMENT TO MINIMAL FORCE IN THE DEPARTMENT'S USE OF FORCE POLICY STATEMENT SIMILAR TO THE OAKLAND AND SEATTLE POLICE DEPARTMENTS

As previously discussed, the OCC recommends that the Department's commitment to using minimal force be added to the Department's "Sanctity of Life" introduction to both the Use of Force and Use of Firearms and Lethal Force policies. The OCC recommends the following sentence be added, "It is the San Francisco Police Department's policy to accomplish its police mission with respect and minimal reliance upon the use of physical force.

2. INCLUDE AN OFFICER'S DUTY TO CALL A SUPERVISOR WHEN A SUBJECT IS ARMED WITH WEAPONS OTHER THAN FIREARMS

Similar to DGO 5.01, DGO 5.02 explains the supervisor's responsibilities when officers are dispatched to or on-view a subject with a weapon. However, DGO 5.02 does not explicitly inform officers of their duty to call a supervisor when they encounter an individual with a weapon. For clarity, the OCC recommends that the following sentence be added to Section I (B)(3) **SUBJECTS ARMED WITH WEAPONS OTHER THAN FIREARMS**: "Upon being dispatched or on-viewing a subject with a weapon, officers shall call a supervisor immediately."

3. REQUIRE OFFICERS TO CALL A SUPERVISOR AND SUPERVISORS TO RESPOND TO THE SCENE WHEN A SUBJECT IS ARMED WITH A GUN

DGO 5.02 instructs supervisors to respond to incidents involving subjects armed with weapons other than firearms and to assume command upon arrival. DGO 5.02 does not instruct supervisors to respond to incidents involving subjects armed with a firearm and to assume command upon arrival. Nor is there any provision requiring officers dispatched or on-viewing a subject with a firearm to call a supervisor immediately. Given the safety risks implicit in an incident involving an individual with a firearm, the OCC recommends that DGO 5.02 state that officers on-viewing or dispatched to a call involving a subject armed with a firearm be required to call a supervisor. Additionally, the protocol should require supervisors to respond immediately to the scene.

4. PERMIT OFFICERS TO DRAW OR EXHIBIT A FIREARM ONLY WHEN THERE IS A SUBSTANTIAL RISK THAT THE SITUATION MAY ESCALATE TO JUSTIFY LETHAL FORCE

As emphasized in the Oakland Police Department's use of force policy, pointing a firearm at an individual is a threatening and intimidating act and when unwarranted, it foments a negative impression about law enforcement. The OCC recommends that the seriousness of the action be emphasized and the standard for exhibiting a firearm be clearly defined. The OCC also recommends that to ensure procedural justice and enhance community-policing relations, officers have a duty to explain to the individual why the officer pointed a firearm at the individual. Based on standards that the Oakland and Los Angeles Police Department's use, the OCC recommends that section I (C)(2) **AUHORIZED USES** include the following language:

The pointing of a firearm is a seizure and requires legal justification. No officer shall point a firearm at in the direction of an individual unless there is a reasonable perception of a substantial risk that the situation will escalate to justify lethal force. When an officer determines that the threat is over, the officer shall holster his or her firearm or shoulder the weapon in the ports arms position pointed or slung in a manner consistent with Department-approved firearms training. If an officer points a firearm at a person, the primary officer shall advise the subject the reason why the officer(s) pointed the firearm, unless it is not practical to do so. (Suggested language is underlined.)

5. STATE THAT THE REASONABLENESS OF AN OFFICER'S USE OF LETHAL FORCE INCLUDES CONSIDERATION OF THE OFFICER'S TACTICAL CONDUCT AND DECISIONS LEADING UP TO THE USE OF FORCE

As previously stated, the OCC recommends that the Department's use of force policies, its analysis of all use of force incidents, and its training consider the officer's tactical conduct and decision-making that lead up to the use of force when determining the reasonableness of the officer's use of force. (See Hayes v. San Diego (2013) 57 Cal.4th 622). In light of the California Supreme Court's ruling in Hayes, the OCC recommends that the Department include a provision in its use of firearm and lethal force policy that states "the reasonableness of an officer's use of deadly force includes consideration of the officer's tactical conduct and decisions leading up to the use of deadly force."

C. USE OF FORCE REPORTING (DGO 5.01.1)

1. INCLUDE COMPLAINTS OF PAIN BEYOND THE USE OF THE CONTROL HOLD AS A REPORTABLE USE OF FORCE IN DGO 5.01.1.

To provide consistency with SFPD's Use of Force policy, the OCC recommends revising DGO 5.01.1 § (I)(A) to state that officers "shall report any use of force involving physical controls where the subject is injured or claims to be injured or complains of pain that persists beyond the use of a physical control hold. This language is provided in the Use of Force policy, DGO 5.01 (III)(A)(5), "Use of physical controls is a reportable use of force when the subject is injured, complains of injury in the presence of officers, or complains of pain that persists beyond the use of a physical control hold."

2. SPECIFY THAT SFPD WILL COLLECT AND ANALYZE ITS USE OF FORCE DATA, DESCRIBE THE TYPE OF DATA THAT WILL BE COLLECTED, POST MONTHLY USE OF FORCE DATA ON SFPD'S WEBSITE AND PROVIDE A USE OF FORCE REPORT ANNUALLY TO THE POLICE COMMISSION

The OCC recommends that the Use of Force Reporting DGO state that SFPD will collect and analyze its use of force data—a practice it has done in prior years. (See for example, SFPD's 2002 Use of Force and Officer Assault Review; also see SFPD's study on Five Years of Officer-Involved Shootings (January 20, 2010).) The OCC recommends SFPD adopt a Use of Force form¹ so that such information is collected systematically and electronically in all cases.

¹ Currently, the supervisor of an officer who have used reportable force is required to fill out a "Use of Force log" where they provide the officer's name and star number, the name, age, race and sex of the individual against whom their subordinate used force, whether the officer and/or the individual complained of pain, was injured, and the type of force used (Carotid, ERIW,

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The OCC suggests on a monthly basis SFPD post on its website comprehensive use of force statistics and analysis and annually provide a Use of Force report to the Police Commission.

Use of force statistics and analysis should include:

1. The type of force
 2. The type and degree of injury to suspect and/or officer
 3. Date and time
 4. Location of the incident
 5. Officer's unit (i.e. Violence Reduction Task Force, plainclothes)
 6. District station
 7. Officer's assignment
 8. Number of officers using force in the incident
 9. Officer's activity when force was used (ex. handcuffing, search warrant, pursuit)
 10. Officer demographics (age, gender, race/ethnicity, rank, number of years with SFPD, number of years as a police officer)
 11. Suspect demographics including race/ethnicity, age, gender, gender identity, primary language and other factors such as mental illness, cognitive impairment; developmental disability, drug and alcohol use/addiction and homelessness.
- 3. AMEND THE USE OF FORCE REPORTING DGO TO REQUIRE SPECIALIZED UNITS SUCH AS THE VIOLENCE REDUCTION TASK FORCE AND PLAINCLOTHES TO IDENTIFY THEIR UNIT AND EXPLICITLY STATE THAT SPECIALIZED UNITS ARE TO RECORD THEIR USE OF FORCE AT THE DISTRICT STATION WHERE THE USE OF FORCE OCCURRED**

DGO 5.01.1 states that the District Stations, Airport Bureau and Department Operations Centers shall maintain a Use of Force log. (DGO 5.01.1 (III)(A)). DGO 5.01.1 also states that a reportable use of force shall be recorded in the Use of Force Log at the District Station where the use of force occurred except when the use of force occurs outside the city limits or the San Francisco International Airport. To avoid any confusion concerning the use of force reporting requirements for specialized units such as the Violence Reduction Task Force or Plainclothes, the OCC suggests that DGO 5.01.1 state that all members—including those in specialized units—are required to document a reportable use of force at the District Station where the use of force

Firearm, Impact Weapon, K-9, OC, Physical Control, Strike by Object/Fist, Vehicle Deflection, and Other).

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occurred and that officers in specialize units are to identify their unit on the Use of Force log. Specialized unit identification is necessary so that use of force data is available according to specialized units in addition to stations.

4. INCLUDE A SUPERVISOR'S DUTY TO NOTIFY THE OFFICE OF CITIZEN COMPLAINTS IF A CITIZEN COMPLAINT IS MADE

DGO 5.01 currently states that Superior Officers are required to "make the required notification to OCC if a citizen complaint is made." (DGO 5.01 (I) (N)(5)(d). This requirement has not been included in the Departments proposed use of force policies. The OCC recommends that this language be incorporated into DGO 5.01.1 (II)(C), so that included in the list of superior officer's responsibilities is to "make the required notification to OCC if a citizen complaint is made."

D. DRAFT BUREAU ORDER FOR CONDUCTED ENERGY DEVICES (CED)

The OCC recommends that the draft bureau order for conducted energy devices be tabled until a later date.

I look forward to discussing our agency's recommendations with you.

Sincerely,



Joyce M. Hicks
OCC Executive Director

Assigned Attorney: Samara Marion

OFFICE OF CITIZEN COMPLAINTS

CITY AND COUNTY OF SAN FRANCISCO



March 11, 2016

Joyce M. Hicks
Executive Director

Deputy Chief Hector Sainez
Police Headquarters
1245 3rd Street
San Francisco, CA 94158

Re: OCC's Use of Force Recommendations

Dear Chief Sainez:

Thank you for holding yesterday's meeting on the Department's Use of Force policies. I thought it was a very productive meeting and I appreciated the opportunity to participate in it. The Department's revised March 9, 2016 drafts incorporated several OCC recommendations from our February 29, 2016 letter to Chief Suhr. Thank you for adopting these recommendations.

Below I have highlighted three of our agency's recommendations and included practices from other law enforcement agencies and case law that I hope you will consider when deciding upon revisions to the Use of Force policies for next Friday's meeting.

1. Revise DGO 5.02 To Specifically Address When Officers Point a Firearm At a Person.

Currently, SFPD's revised DGO 5.20 states that "[a]n officer may draw or exhibit a firearm when the officer has reasonable cause to believe it may be necessary for the safety of others or for his or her own safety." While this standard may be appropriate when officers draw or exhibit their weapon, it does not address when an officer points a firearm at an individual. Los Angeles¹ and Oakland's² Police Departments use a standard that the OCC urges the Department to consider (see footnotes 1 and 2) and adopt.

¹Los Angeles Police Department's Drawing or Exhibiting Firearms Policy states

556.80 DRAWING OR EXHIBITING FIREARMS. Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm. Officers shall not draw or exhibit a firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with this policy on the use of firearms.

Note: During a special meeting on September 29, 1977, the Board of Police Commissioners adopted the following as a valid interpretation of this Section:

The OCC recommends that DGO 5.20 be revised to include a section under Authorized Uses (Handling and Drawing Firearms) entitled "Pointing a Firearm at A Person" and include the following language:

The pointing of a firearm at a person is a seizure and requires legal justification. No officer shall point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation will escalate to justify lethal force.

2. Incorporate the California Supreme Court's Standard In Hayes v. San Diego (2013) 57 Cal.4th 622 That The Reasonableness Of An Officer's Use Of Force Includes Consideration Of The Officer's Tactical Conduct And Decisions Leading Up To The Use Of Force.

In defining reasonable force, DGO 5.01 provides nine factors that are relevant to determining the reasonableness of force. The OCC suggests that included in this list of relevant factors should be the officer's tactical conduct and decisions leading up to the use of force.

The California Supreme Court in Hayes v. San Diego (2013) 57 Cal.4th 622 ruled that the officer's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. In light of Hayes, the Los Angeles Police Department amended its use of force procedures to state, "the reasonableness of an officer's use of deadly force includes consideration of the officer's tactical conduct and decisions leading up to the use of deadly force." (See LAPD, Use of Force Policy, 556.10). While the Hayes court addressed the importance of evaluating the officer's tactical conduct and decision-making that preceded the use of deadly force, this evaluation is equally important when evaluating the reasonableness of an officer's use of force in circumstances that do not result in death.

"Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm. An officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer's reasonable belief there is a substantial risk that the situation may escalate to the point where deadly force may be justified. When an officer has determined that the use of deadly force is not necessary, the officer shall, as soon as practicable, secure or holster the firearm."

² Oakland Police Department's Revised DGO K states, IV. USE OF FIREARMS AND OTHER LETHAL FORCE

A. Drawing, Exhibiting and Pointing Firearms

1. The intentional pointing of a firearm at another person is a use of force. (footnote to Robinson v. Solano County, 278 F.3d 1007 (9th Cir.2002).
2. The drawing, exhibiting and intentionally pointing of a firearm at another person is threatening and intimidating and when unwarranted may cast a negative impression on members. A member may intentionally point a firearm only when the member has reasonable cause to believe it may be reasonable for his/her safety or for the safety of others.
3. The pointing of a firearm at a person is a seizure and requires legal justification. No member shall draw and point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal force would be permitted. When it is determined that the use of lethal force is not necessary, as soon as practicable, firearms shall be secured or holstered.

OCC recommends that the following provision be added to DGO 5.01, Section II (B)'s list of relevant factors in determining objective reasonableness:

The reasonableness of the officer's use of force includes consideration of the officer's tactical conduct and decisions leading up to the use of force.

You may recall at yesterday's meeting that Lieutenant Mike Nevin spoke in favor of Hayes v. San Diego, and also added Bryan v. MacPherson (9th Circ. 2010) 630 F.3d 805 for the Department's consideration. In McPherson, the 9th Circuit reiterated its previous ruling that police are "required to consider [w]hat other tactics if any were available to effect an arrest." McPherson involved a §1983 lawsuit that alleged that the officer used excessive force for using a taser during a traffic stop for a seatbelt infraction. The Ninth Circuit noted that the arresting officer had not issued a warning before using the taser and had not considered the less intrusive means of effecting Bryan's arrest by waiting for additional officers he knew were enroute to the scene. I urge that that in light of these decisions, that the Department reconsider our agency's recommendation that DGO 5.01 and 5.02 include among relevant factors that determine reasonableness the officer's tactical conduct and decisions preceding the use of force.

3. Revise DGO 5.01.01 To Describe The Type Of Use of Force Data The Department Will Collect And Provide For Monthly Posting of Its Use Of Force Data On Its Website And A Use Of Force Report Annually To The Police Commission.

The OCC is aware that the Department is developing a comprehensive Use of Force form to enable the gathering and analysis of use of force data. The OCC applauds the Department for prioritizing this project and for dedicating a separate DGO to use of force reporting. For both transparency and accountability—goals that are underscored by reports by the President's Task Force on 21st Century Policing and PERF's Re-Engineering Use of Force—the OCC urges the Department to include provisions that describe the type of use of force data the Department will collect and provide for monthly posting of its use of force data on its website and a yearly Use of Force Report to the Police Commission. The current provision that states the Training Division Captain will review its Use of Force Logs, develop information to identify training needs, and report to the Chief quarterly on members' use of force does not sufficiently address the type of use of force data collection, analysis and reporting that the OCC recommends. The current Use of Force log, while it includes the officer's name and star number, the name, age, race and sex of the individual against whom their subordinate used force, whether the officer and/or the individual complained of pain, was injured, and the type of force used (Carotid, ERIW, Firearm, Impact Weapon, K-9, OC, Physical Control, Strike by Object/Fist, Vehicle Deflection, and Other), it does not include many other factors necessary for comprehensive use of force analysis.

The OCC recommends that DGO 5.01.01 be amended to include provisions that state:

- The Department will collect and analyze its use of force data through a Use of Force form that will enable electronic collection of data.
- The Department will post a monthly basis on its website comprehensive use of force statistics and analysis.

- The Department will provide a written Use of Force report to the Police Commission annually.
- The Department's Use of force statistics and analysis will include at a minimum:

1. The type of force
2. The type and degree of injury to suspect and/or officer
3. Date and time
4. Location of the incident
5. Officer's unit (i.e. Violence Reduction Task Force, plainclothes)
6. District station
7. Officer's assignment
8. Number of officers using force in the incident
9. Officer's activity when force was used (ex. handcuffing, search warrant, pursuit)
10. Officer demographics (age, gender, race/ethnicity, rank, number of years with SFPD, number of years as a police officer)
11. Suspect demographics including race/ethnicity, age, gender, gender identity, primary language and other factors such as mental illness, cognitive impairment, developmental disability, drug and alcohol use/addiction and homelessness.

Thank you for your consideration.

Sincerely,


Samara Marion
Policy Attorney

OFFICE OF CITIZEN COMPLAINTS

CITY AND COUNTY OF SAN FRANCISCO



Joyce M. Hicks
Executive Director

To: Deputy Chief Hector Sainez
From: Samara Marion
Date: March 17, 2016
Re: OCC Recommended Revisions to DGO 5.01

The OCC recommends the following revisions to DGO 5.01. These revisions address 1) the use of force when individuals pose a danger only to themselves; 2) additional factors relevant to the reasonableness of force; 3) an officer's duty to intervene; 4) compliance with a lawful order; and 5) the introduction to use of force being reasonable. Suggested revisions are in italics and blue font.

1. Clarify The Type of Force When Individuals Pose a Danger Only To Themselves

The OCC recommends that the following provisions be added to DGO 5.01 (II) A):

II. Considerations Governing All Uses Of Force

A. Use of Force Must Be For A Lawful Purpose

.....

6. To prevent a person from injuring himself/herself.

- a. *Officers shall avoid or minimize the use of force against individuals who are injuring themselves and do not pose a safety risk to officers or others.¹*
- b. *In situations where some force may be warranted to prevent suicide, officers shall determine whether other tactics are available to the officer that would cause less injury.*
- c. *An officer is prohibited from using lethal force against a person who presents only a danger to himself/herself and does not pose an imminent threat of death or serious bodily injury to another person or officer.*

¹ Settlement Agreement Pursuant to Fed. R. Civ. P.41(a)(2); United States v. City of Portland, Case No.3:12-cv-02265-SI, page 16.

2. Include Additional Factors Relevant To The Reasonableness Of Force

The OCC recommends adding the following four factors to DGO 5.01 (II)(B) to determining the reasonableness of an officer's use of force used. These factors are based on Ninth Circuit and California Supreme Court decisions.

1. *what other tactics if any are available to the officer*²
2. *the ability of the officer to provide a meaningful warning before using force*³
3. *the officer's tactical conduct and decisions preceding the use of force*⁴
4. *whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis or who is a person with a mental illness*⁵

3. Include PERF's Recommended Language About Duty to Intervene

PERF's January 2016 report entitled, "Use of Force: Taking Policing to a Higher Standard," provides 30 Guiding Principles. Principle 6 establishes that officers need to prevent other officers from using excessive and unnecessary force. The OCC suggests that PERF's Principle 6 be adopted:

Officer shall intervene when they reasonably believe another officer is about to use or is using unnecessary or excessive force. Officers are obligated to intervene

² In Bryan v. MacPherson (9th Cir.2010) 630 F.3d 805, 831 the Ninth Circuit stated that while police officers need not employ the least intrusive degree of force, "the presence of feasible alternatives is a factor to include in our analysis." See also Glenn v. Washington County (9th Cir.2011) 673 F.3d 864 where the Ninth Circuit stated that in addition to the Graham v. Connor factors, "[o]ther relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. See, e.g., Bryan, 630 F.3d at 831; Deorle, 272 F.3d at 1282-83." (Glenn at p.872).

³ See footnote 1; also Nelson v. City of Davis (9th Cir.2012) 685 F.3d 867 where the Ninth Circuit ruled that the law at the time of the incident should have placed the officers on notice that the shooting of pepper spray pellets without any warning to disperse a large party on a college campus that hit a non-threatening student and caused permanent eye damage to him was excessive force.

⁴ In Hayes v. San Diego (2013) 57 Cal.4th 622 the California Supreme Court ruled that the officer's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. In light of Hayes, the Los Angeles Police Department amended its use of force procedures to include consideration of the officer's tactical conduct and decisions preceding the use of deadly force. The OCC suggests that this evaluation is equally important when evaluating the reasonableness of an officer's use of force in circumstances that do not result in death.

⁵ See footnote 1's reference to Glenn v. Washington County. Also relevant is Deorle v. Rutherford (9th Cir. 2001) 272 F.3d 1272. In Deorle, the Ninth Circuit ruled that "[e]very police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." (Deorle at p.1285.)

Concerning the government interest in using force against a suicidal person, the Deorle court stated that, "[e]ven when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." (Deorle at p. 1283.

when they witness other officers using excessive or *unnecessary* force, or engaging in other misconduct.

4. Clarify When A Lawful Order Warrants the Use of Force

The OCC suggests adding the following clarifying language to DGO 5.01 (II) (A):

(II) A USE OF FORCE MUST BE FOR A LAWFUL PURPOSE

5. To gain compliance with lawful order, *where the force is proportional to the timing and reasons for the order.*⁶

5. Adopt PERF's Principle 5 by Incorporating the Critical Decision-Making Model into DGO 5.01

As previously discussed, PERF's January 2016 report entitled, "Use of Force: Taking Policing to a Higher Standard," provides 30 Guiding Principles. Principle 5 states that use of force policy should provide officers a decision-making framework during critical incidents and other tactical situations. PERF suggests that law enforcement agencies consider adopting the Critical Decision-Making Model (CDM) because of its easy-to-use process for quickly analyzing and responding to a range of incidents. The OCC suggests that the Critical Decision-Making Model be introduced under 5.01 (II)(B), USE OF FORCE MUST BE REASONABLE:

Officers shall use a Critical Decision-Making framework in all circumstances in which the use of force might be needed. Officer shall collect information, assess the threats and risk, consider powers, policies, and other obligations, identify options and consider contingencies, and determine the best course of action.

⁶ The Ninth Circuit has recognized that a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force. See for example Nelson v. City of Davis (9th Cir.2012) 685 F.3d 867 in which the Ninth Circuit pointed out the ineffectiveness of the officers' issuance of a dispersal order without any amplification in a large crowd. See also Bryan v. MacPherson (9th Cir.2010) 630 F.3d 805, 829-30 where the Ninth Circuit found that arrestee's cursing and muttering to himself and exiting his vehicle despite being told to stay in car was not active resistance.

LOS ANGELES POLICE COMMISSION

*Review of Categorical Use of
Force Policy*



OFFICE OF THE INSPECTOR GENERAL

ALEXANDER A. BUSTAMANTE
Inspector General

February 12, 2014

REVIEW OF CATEGORICAL USE OF FORCE POLICY

I. INTRODUCTION

The California Supreme Court opinion in *Hayes v. County of San Diego*, 2013 Cal. LEXIS 6652 has prompted the Office of the Inspector General (OIG) to reexamine current policies governing Categorical Use of Force (CUOF) incidents and their adjudication by the Los Angeles Board of Police Commissioners (“Commission” or “Board”).

In *Hayes*, the California Supreme Court found that, under California negligence law, an officer’s preshooting conduct leading up to a deadly use of force may affect whether a use of force is ultimately reasonable and therefore may be considered in the analysis of any use of deadly force. As part of its examination, the OIG reviewed the historical record behind the Department’s current use of force policies and procedures to determine the intent behind the Commission’s existing practices and to understand and potentially reconcile any dissonance between those practices and *Hayes*.

The OIG’s review determined that the Commission’s intent in creating the existing adjudication system, including their desire to examine the totality of circumstances surrounding a serious use of force, parallels the concerns and findings by the California Supreme Court in *Hayes*. Although the Commission has examined preshooting conduct in some cases for the purpose of deciding whether an officer’s use of force should be determined in- or out-of-policy, certain aspects of the existing process are not clearly codified in policy.

The OIG has concluded that a simple clarification of the Department’s use of force policy will both reinforce the original intent behind the enactment of current practices and align those practices with *Hayes*.

II. BACKGROUND: THE HAYES OPINION

In August of 2013, the California Supreme Court (“the Court”) issued its opinion in *Hayes v. County of San Diego*. Shane Hayes was shot and killed in 2006 by two San Diego County sheriff’s deputies who responded to a call reporting that screams had been heard. Upon arrival at the call, the deputies spoke with Hayes’ girlfriend, who advised them that Hayes had tried to kill himself earlier that day and that she was worried about his safety. The deputies entered the house where Hayes was located in order to determine whether he was a danger to himself. As they entered the living room, they saw Hayes and ordered him to show his hands. Hayes moved toward the deputies while holding a large knife, and was shot and killed. Hayes’ 12-year-old daughter subsequently filed a lawsuit asserting a state claim of negligence based, in part, on a contention that the officers’ preshooting conduct provoked the situation that led to the shooting of Hayes. The lawsuit also included an additional claim of negligence against the County of San Diego and alleged violations of Hayes’ rights under the Fourth and Fourteenth Amendments of the Constitution.

The California Supreme Court’s holding in this case was a response to a request by the U.S. Court of Appeals for the Ninth Circuit that the Court determine whether, under California law, “deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a

welfare check on him.”¹ This question was based on a finding by a district court that no such duty -- a required element of negligence -- existed with regard to the deputies’ preshooting conduct and decisions, and the court’s rejection of claims that the deputies negligently provoked the shooting of Hayes. In certifying the question, the Ninth Circuit Court noted that a recent decision by the California Supreme Court appeared to indicate that the Court would not adopt a broad rule that no such duty was owed.

In granting that request, the California Supreme Court reframed the issue as a question of “[w]hether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force.”² The Court concluded that “such liability can arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable.” Notably, the Court found that the “reasonableness of the deputies’ preshooting conduct should not be considered in isolation [...]; rather, it should be considered as *part of the totality of circumstances* surrounding the fatal shooting of [Hayes].”

In explaining its decision, the Court noted that “state negligence law, which considers the totality of circumstances surrounding any use of deadly force [...], is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used [...]” The Court furthermore found “no sound reason to divide plaintiff’s cause of action artificially into a series of decisional moments (the two deputies’ decision not to call for a psychiatric expert before entering [Hayes’] house, their decision to enter the house, their decision to speak to [Hayes], their decision to use deadly force in response to [Hayes’] apparently threatening behavior toward them with a large knife, etc.), and then to permit plaintiff to litigate each decision in isolation, when each is part of a continuum of circumstances surrounding a single use of deadly force by the deputies.”

Ultimately, the Court found that “[l]aw enforcement personnel’s tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.” Following this clarification, the Ninth Circuit panel reversed the district court’s summary judgment regarding the plaintiff’s claim of negligence under state law and remanded the case back to the district court for further proceedings.³ The panel also noted that, as a result of the California Supreme Court’s opinion in *Hayes*, the law is no longer unclear with regard to the deputies’ preshooting duty of reasonable care.

¹ *Hayes v. County of San Diego*, 658 F.3d 867 (9th Cir. 2011).

² *Hayes v. County of San Diego*, No. S193997 (Cal. Aug. 19, 2013).

³ *Hayes v. County of San Diego*, No. 09-55644 (9th Cir. Dec. 2, 2013).

In light of *Hayes*, the OIG performed an extensive review of the Department's policies and practices relating to the evaluation of preshooting conduct and the use of deadly force.⁴ In examining those practices, it found no policy or memorandum preventing the Commission's consideration of preshooting conduct as part of the totality of circumstances relevant to a use of deadly force. Indeed, the OIG has noted instances in which the Commission has engaged in such consideration during its adjudication of categorical uses of force. During this review, the OIG found indications that the Department's current adjudication system for shootings and other serious uses of force -- which requires the explicit evaluation of preshooting tactics -- was guided in substantial part by the Commission's desire to ensure that each incident was evaluated as a continuum of events rather than as an isolated decision to use force.

The OIG also found that the current system of developing separate findings for tactics, drawing, and the use of force could also lead to outcomes that are at odds with *Hayes*. In the OIG's experience, separate evaluations of each of those aspects is likely appropriate for the vast majority of incidents. There may be, however, rare incidents where officers' preshooting conduct precipitates a shooting that is negligent under California law. Likewise, there may be incidents where an officer's preshooting conduct supports the reasonableness of a subsequent decision to use deadly force. To ensure that such instances are properly evaluated, the OIG recommends that the use of force policy reference the adjudicators' ability to consider the officers' preshooting conduct when determining reasonableness.

The following sections of this report provide an overview of the Department's system for adjudicating officer-involved shootings and other serious uses of force. First, the report describes, through the lens of the Commission's hearings and report on the 1979 shooting of Eulia Love, the historical background and intent behind the current system, which was first developed as a result of that incident. The report then provides a description of present-day practices in the application of that system, including the Department's policies and processes with regard to the investigation and adjudication of those events, collectively known as Categorical Use of Force incidents. Finally, the report provides an assessment of current Department policies in light of *Hayes* and recommends a course of action to bring those policies in line with California law.

III. THE SHOOTING OF EULIA LOVE AND RELATED REVISIONS TO DEPARTMENT POLICY

The OIG examined the historical background behind the Commission's current deadly force adjudication practices through discussions with the Department and a review of historical documents surrounding the development of the current policy. This research revealed that the impetus behind the implementation of that policy was the high-profile, fatal shooting of Eulia Love, a 39-year-old black woman, by two LAPD officers in 1979.

⁴ For convenience, this report uses the term "preshooting conduct" to refer to "tactical conduct and decisions leading up to the use of deadly force." Both terms are used in the *Hayes* decision, which referred specifically to a fatal shooting. It should be noted that officer-involved shootings make up the majority of LAPD incidents involving the use of deadly force, but there may be other types of force that also fall into this category.

As a result of that controversial shooting and the subsequent public outcry, the Love-era Commission completed its own review of the incident and conducted a series of public hearings examining the Department's policies governing the investigation and adjudication of the use of force, as well as associated training, deployment, and hiring practices. The Commission then issued a report detailing its findings in the Love shooting, which it found to violate Department policy, and -- among other changes -- outlined a new policy framework for the adjudication of shootings and other serious uses of force.

The OIG reviewed the Commission's report on the topic, as well as transcripts of each of the public hearings and other associated documents, and found that much of the Commission's inquiry centered on the question of how best to ensure that the evaluation of an officer-involved shooting considers the entire series of events surrounding the use of deadly force, rather than just the moment that deadly force is used. The OIG also noted that the actual evaluation of the use of deadly force in the Love case rested not on the question of whether the use of force was authorized at the moment of the shooting, but on the use of "rapid fire" by the officers, a tactic that was found to violate the Department's then-policy on "minimizing the risk of death." The Commission also found that, to the extent that officers were in a situation where the use of deadly force was necessary to defend themselves, this was "in substantial part" because they had placed themselves in that situation by prematurely escalating the encounter. It is clear that the intent of the Commission in instituting the new adjudication policy -- and in its decision on Love -- was to emphasize the role of preshooting conduct in the evaluation of a use of deadly force, rather than to isolate it.

A. The Eulia Love Shooting

On the morning of January 3, 1979, a gas company employee went to the home of Eulia Love, and, after speaking with her, went to the side of the house to disconnect the gas due to non-payment.⁵ Love approached him, informed him that she would not let him turn off her gas, and hit him on the arm with a shovel. According to the employee, John Ramirez, she prepared to hit him again, and he left the area and went back to his office.

The LAPD was subsequently contacted about the incident and Ramirez signed a crime report for assault with a deadly weapon (ADW). Two additional gas company employees then went to Love's home, having requested that an LAPD patrol car join them at the location. During that same period, Love went to a market and attempted to pay her bill but was told that she could not do so at that location. She instead purchased a money order for \$22.09, the minimum payment required by the gas company to prevent her gas service from being disconnected. When the gas company employees arrived at her home, Love informed them that she would not pay the full amount due but would pay "\$20.00." She then went into her house, emerged with a knife, and began hacking at a tree in her front lawn.

⁵ All facts are summarized from the Commission's final report on the incident. For a full accounting of the events surrounding the shooting, please see "The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force," 1979.

Soon after, two LAPD officers stopped next to the gas company vehicles. They spoke with one of the gas company employees, who informed them of Love's earlier assault and asked them to stand by as he attempted to collect the bill or turn off the gas. At that time, the officers reportedly observed Love walking back and forth with a knife and yelling at the gas company employees. The officers subsequently drove to the front of the house and exited the patrol car, drawing their firearms as they did so.

Love appeared agitated, insisted that her gas would not be shut off, and reportedly "uttered a number of obscene remarks" at the officers.⁶ The officers commanded her to drop her knife and, upon seeing her teenage daughter come out of the house, instructed the daughter to go back inside. At that time, Love began to retreat toward her house while thrusting the knife at one of the officers, who was approximately six feet from Love, and who continued to advance toward her with his gun and baton drawn. During this period, witnesses saw the other officer motion the gas company employees to "come on."⁷ The officers also reported that they saw a second daughter come out of the house and heard the voices of children.

After a short period, Love stopped and faced the officers with the knife in her right hand. The officers were five and ten feet away from her. The officers held their guns pointed toward her, and one officer also had his baton in his left hand. As she began to lower the hand with the knife, the officer hit her hand with the baton and knocked the knife out of her hand, then backed away. She subsequently picked up the knife and drew her arm back as if to throw it. She was warned not to throw the knife, and at that time, the officer dropped his baton and held his firearm with both hands. Each officer then fired six rounds "in a rapid-fire sequence" as Love threw the knife. At the time shots were fired, the officers were twelve and eight feet from Love, respectively. The investigation yielded a number of differing accounts of Love's actions and the trajectory and final position of the knife, including some witnesses who reported that they did not see Love throw the knife.⁸ As a result, the Commission ultimately found that "the order of these events [the shooting and the throwing of the knife] is uncertain, as the events were almost simultaneous and witness reports are in conflict."⁹ Love was hit 8 times and subsequently pronounced dead. The knife was recovered 68 feet away from her body.

Following the shooting, three separate reviews of the incident were completed. The District Attorney's office evaluated the incident and determined that no criminal charges would be filed against the involved officers. Likewise, the United States Attorney for the Central District of California determined that there was no basis for prosecution of the officers for civil rights

⁶ "The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force ('Report')," Part I, 1979, pg. 6.

⁷ *Id.*, pg. 7.

⁸ District Attorney's Report, pgs. 19-23.

⁹ *Id.*, pg. 8.

violations. Finally, under existing procedures at that time, the Department's Shooting Review Board completed an administrative evaluation of the incident and found that the officer's actions were "in policy," in that they complied with the Department's policies related to the use of firearms and deadly force. A minority report was also issued and concluded that, although the officers' actions were in policy, they "failed to meet Department standards."

The shooting and subsequent reviews were met with widespread outrage and public protests. As a result, Mayor Tom Bradley requested that the Commission "initiate an immediate review of [the] case including meetings with the citizens in various parts of the City with the objective of making changes in the policies, procedures and tactics utilized by the Los Angeles Police Department in the training, performance, and supervision of its officers."¹⁰ Beginning in April 1979, the Commission embarked upon a series of hearings with the community and the Department as part of that process.

B. The Commission's Report

Following the hearings and the completion of its independent evaluation, the Commission completed a four-part public report titled, "The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force." The report touched on a number of issues related to the incident and the Department's practices, two of which were particularly relevant to the OIG's historical review. First, with regard to the shooting itself, the Commission found that the officers' actions were in violation of the Department's policies regarding the use of firearms and deadly force. Second, the Commission set forth a new procedure for the adjudication of all officer-involved shooting (OIS) incidents and incidents involving death or serious injury; namely, that the Commission would assume responsibility for their adjudication and that each case would be evaluated according to the Tactics, Drawing, and Use of Force classifications still in use today.

1. Evaluation of the Shooting of Eulia Love

In evaluating the shooting, the Commission first sought to establish the facts of the incident. By using evidence from the Department's original investigation, along with facts obtained in a supplemental investigation requested by the Commission, the Board settled on a set of facts that differed in some respects from the conclusions relied upon by the majority of the Shooting Review Board. Specifically, the Commission disagreed with the majority's factual findings regarding the officers' intent as they left the car, their concern for the safety of Love's children, and the length of time elapsed during the incident.

With respect to its assessment of the officers' actions, the Commission set forth two central questions. First, the Board considered whether "the decisions to draw weapons and to advance as Mrs. Love retreated [were] consistent with Department policy." Second, it considered whether "the use of deadly force and the extent of deadly force used [were] consistent with Department policy."¹¹

¹⁰ Transcript of "Eula Love Hearing," April 25, 1979, Los Angeles Board of Police Commissioners, pg. 2.

¹¹ Report, Part I, pg. 16.

a. The Decision to Draw and Advance

The report was very critical of the fact that the officers drew their weapons as they exited their vehicle. The Commission found that this decision was premature based on the information known to the officers and that it had the effect of escalating the situation while limiting the officers' other options. The Commission was also critical of the officers' decision to advance toward Love as she held the knife:

Once the stage for the use of force was set, the officers continued to escalate the situation by their actions. By advancing on Mrs. Love as she attempted to retreat, they put themselves in a situation of increased danger. The justification given for the continued pursuit (concern for the safety of children) was, as has been shown above, without basis in any of the reported facts. The decision to draw and point their weapons immediately, and to advance as Mrs. Love retreated, locked the officers, before all reasonable alternatives had been exhausted, into a situation which precipitated the use of deadly force.¹²

The Commission ultimately found, based on their factual findings, that the officers' drawing of their weapons in the Eulia Love case violated the relevant Department policy at the time, which was identical to the current policy on drawing a firearm.

b. The Use of Deadly Force

The Commission also found that the officers' use of deadly force violated Department policies in place at the time. The report noted that the use of deadly force was allowable for the purposes of "protection of self or others from an immediate threat of death or serious bodily injury" and that this was a "conceivable basis for its use in this case."¹³ In evaluating this question, however, the Commission found that Love "did not appear to be an immediate threat to anyone" at the time that the officers left their car. The report further noted that while "the inconsistencies in the witness statements about this series of events cannot be satisfactorily resolved," it would appear that the shooting and Love's throwing of the knife "occurred almost simultaneously." The Commission thus came to the following conclusion regarding the moment that the force was used:

If at that time the officers were justified in using deadly force in self-defense -- and the facts before the Commission do not enable us to make a final determination as to that question -- it was in substantial part because they had themselves prematurely escalated the confrontation and placed themselves in a situation where the use of deadly force became necessary. Moreover, since we conclude below that the officers violated

¹² *Id.*, pg. 22.

¹³ *Id.*; pg. 23.

Departmental policies by using rapid fire under the circumstances of this case, it is not necessary that we determine which shots violated those policies.¹⁴

The report went on to discuss the officers' use of rapid fire in the context of the Department's policy and training, which placed an emphasis on "limiting the number of shots" and on "observing the effect, if any, of the first shot before refiring." It also noted that the Department's firearms policy at that time required that "the risk of death to any person should be minimized."¹⁵ In light of this policy and its factual findings regarding the sequence of shots fired, the Commission found that "the firing of twelve shots in rapid-fire sequence was excessive and cannot be justified."¹⁶

2. *Modifications to the Adjudication Policy for CUOF Incidents*

Along with its review of the Eulia Love shooting, the Commission also evaluated the Department's procedures at the time ("pre-Love") for the investigation and adjudication of OIS incidents in order to determine what, if any, changes should be made. As a result of this process, it created a new policy that included a number of significant modifications to Department procedures in this area, two of which were particularly relevant to the OIG's review.¹⁷ First, the Commission assumed the role of final adjudicator in every OIS incident. Prior to this revision, that responsibility rested with the Assistant Chief, Office of Special Services, or -- in cases involving potential disciplinary action -- the Chief of Police. The Commission also determined that cases involving death or serious injury to a person in the custody of the Department, or resulting from police contact, would be adjudicated under the same procedure as OIS incidents. Second, as described below, the Commission set forth a new set of classifications under which each use of force incident was to be evaluated.

¹⁴ *Id.*, pg. 24.

¹⁵ *Id.*, pg. 25-26. This section has since been removed from the Manual.

¹⁶ *Id.*, pg. 26.

¹⁷ The Commission also set forth a number of additional changes to the LAPD's policy for investigating and evaluating OIS incidents and other serious uses of force. Those changes are detailed in Part II of the Commission's report.

a. Pre-Love Adjudication Categories

At the time of the Bulia Love incident, OIS incidents were adjudicated to be either a) in policy, b) in policy but fails to meet Department standards, or c) out of policy.¹⁸ Public testimony from Department officials regarding the application of this system revealed that it lacked definition and was ineffective in delineating those cases where officers' substandard tactics or decision-making were significant factors in an incident. Rather, the finding was primarily based upon an officer's decision to discharge a weapon, resulting in "in policy" findings even in cases where tactical or other decisions were problematic.

The Commission spent substantial time during its public hearings attempting to clearly define the difference between a shooting that was simply in policy and one in which the officers' actions failed to meet Department standards, and the extent to which poor tactics or other preshooting conduct played into these findings. In particular, much of the questioning focused on whether the evaluation was designed to encompass the entire incident or just the act of shooting. During an illustrative exchange between Commissioner Reva Tooley and Chief of Police Daryl Gates, the commissioner commented that the then-existing system of classifications was a "very critical" issue "because the public interprets the shooting -- a shooting as an incident from beginning to end. And I think either we need to change our terminology or they need to be apprised of the fact that when the Department classifies a shooting [as in policy or out of policy] it is really only classifying shots and not the total incident."¹⁹

Ultimately, the Commission determined that the system in place at the time did not clearly provide for separate assessments of the decision to draw a weapon and the decision to fire, and that the intermediate classification -- "in policy but fails to meet Department standards" -- was unclear and produced inconsistent results. Finally, the Commission found that those classifications did not "permit or require formal evaluation of the entire pattern of officer conduct in incidents of officer-involved shootings."²⁰

b. Revised Adjudication Policy

In order to remedy the problems identified with the adjudication system, the Commission adopted a new series of classifications. Under the new system, an officer-involved shooting or other serious use of force would be adjudicated using three classifications: Tactics, Drawing/Reholstering of Weapon, and Use of Force.²¹ Although refinements have been made to

¹⁸ If unintentional, a shooting could also be classified as "accidental."

¹⁹ Transcript of session "Re: Eula Love Reports," May 29, 1979, Los Angeles Board of Police Commissioners, pg. 81.

²⁰ Report, Part II, pg. 21.

²¹ Drawing/Reholstering of Weapon is now called Drawing/Exhibiting. The Commission also designated an "Additional Considerations" section for the discussion of any other issues not addressed in the first three categories.

the processes by which uses of force are adjudicated since 1979, the three adjudicative classifications remain unchanged.

According to the report, the new process was designed to “assist both the Department and the Police Commission in ensuring review of officer-involved shooting incidents in a manner which is uniform and consistent, which has direct application to departmental practice and which can earn widespread community acceptance.”²²

At the time the policy was implemented, the finding in each of the first three classifications could result in a recommendation of either no action or referral for divisional training or discipline. Those options were later clarified and refined as part of the Department’s 2008 Use of Force Directive, which created a finding of “Tactical Debrief” and set a standard for determining when deficiencies in tactics will result in administrative disapproval.

c. The Commission’s Intent

As set forth by the Commission, the revised classifications did not preclude the consideration of preshooting tactics or other conduct as part of the evaluation of the totality of circumstances relevant to the decision to use force. The OIG’s review of the Eulia Love materials found indications that the Commission’s intent in modifying the existing policy was to ensure, instead, that the use of force was evaluated as part of a continuum of officer actions and decisions.

The commissioners spent significant time discussing their preference in evaluating each use of force case as a whole, rather than a series of isolated components. The commissioners also paid special attention to the potentially causal relationship between preshooting conduct and the use of force. In setting forth the rationale for the new policy, the Commission’s report explicitly states that one drawback of the pre-Love system was, specifically, that “the present categories do not provide for those cases where the officer has placed himself in a position of an ‘in policy’ use of deadly force by reason of a deficient tactical approach to a police problem.”²³ This concern was highlighted in the Commission’s evaluation of the Love shooting, which found not only that “the officers made serious errors in judgement, and in their choice of tactics, which contributed to [the shooting],” but that those tactics “locked the officers [...] into a situation which precipitated the use of deadly force.”²⁴ As referenced earlier, the Commission further implied that while the officers in that case may have been justified in using deadly force as self-defense, this was only the case because they had placed themselves in such a situation by prematurely escalating the confrontation. As such, it appears unlikely that the Commission intended for tactics and the use of force to be evaluated in isolation from each other.

²² Report, Part II, pg. 25.

²³ *Id.*, pg. 22.

²⁴ Report, Part I, pgs. 30, 22.

Another indication of the Commission's intent is found in its analysis of the use of deadly force in the Love incident itself, which focused not on the circumstances present at the moment the force was used but on related tactical questions. In its evaluation of whether the force was authorized, the Commission's review emphasized the fact that Love did not pose an immediate threat of death or serious bodily injury at the time the officers exited their car, but did not come to a conclusion about whether such a threat was present at the moment of the shooting. Instead, the report focused on the officers' escalation of the incident and implied that at least some of the shots fired could have been out of policy on that basis. Furthermore, the Commission found that the use of rapid fire as Love fell violated the Department's firearms policy on the minimization of the risk of death, making the use of force out of policy.

Nowhere in its discussions or report did the Commission indicate that it intended the three adjudicative classifications to be considered in isolation from one another. Indeed, the Commission's finding that the prior system did not provide for an assessment of "the entire pattern of officer conduct" strongly suggests that the revised (and still-current) system of classifications was designed to facilitate a comprehensive review of an incident.

IV. THE LAPD'S PROCESS FOR INVESTIGATING AND ADJUDICATING CUOF INCIDENTS

The third component of the OIG's examination of this issue was a review of the Department's current practices with regard to the investigation and adjudication of the use of deadly force by LAPD officers. In completing this review, the OIG considered the extent to which current practice is aligned with the Love-era Commission's intent in creating the system, as well as with the Court's findings in *Hayes*.

As stated above, LAPD policy classifies shootings and other serious uses of force as Categorical Use of Force (CUOF) incidents, which include those incidents involving one or more of the following types of events:

- Officer-Involved Shooting (OIS): Any incident where one or more LAPD officers intentionally fires a weapon at a person, whether or not a person is hit. This category also includes warning shots.
- Head Strikes: Any strike to the head with an impact weapon. Inadvertent strikes without significant injury may be excluded from this category.
- Officer-Involved Animal Shooting: Any incident where one or more LAPD officers intentionally discharges a firearm at an animal.²⁵
- Carotid Restraint Control Hold (CRCH): Any use of the CRCH technique, which involves the application of pressure to the sides of a subject's neck and can render the subject unconscious.

²⁵ Although Non-Tactical Unintentional Discharges and Officer-Involved Animal Shootings are adjudicated by the Commission, the investigation and evaluation processes for these incidents are more limited than those of other CUOF incidents.

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²⁵ Although Non-Tactical Unintentional Discharges and Officer-Involved Animal Shootings are adjudicated by the Commission, the investigation and evaluation processes for these incidents are more limited than those of other CUOF incidents.

- Use of Deadly Force: Any other use of lethal force not captured by the previous categories, such as the deliberate striking of a person with a vehicle.
- Unintentional Discharge (UD): An event where a Department employee unintentionally discharges a firearm.
- In-Custody Death (ICD): Any incident where a person dies while in the custody of the LAPD and/or following the use of force by a Department employee.²⁶
- Law-Enforcement-Related Injury (LERI): Any incident where a person is admitted to a medical facility as the result of a use of force by a Department employee.
- Canine Contact: A canine contact that results in the hospitalization of the subject.

Because CUOF incidents represent some of the Department's most significant events, the protocols for their investigation and adjudication are detailed and rigorous. As described in the following sections, each CUOF incident is carefully documented and scrutinized by multiple entities across the Department, including the OIG and the Commission.²⁷ All other reportable uses of force are classified as Non-Categorical Use of Force (NCUOF) incidents. In contrast to CUOF incidents, NCUOF incidents are reviewed by the involved officers' chain of command, with final adjudication by the Commanding Officer of the Use of Force Review Division (UOFRD). More information about the investigation and adjudication of NCUOF incidents can be found in the OIG's June 2013 report on the topic.

A. Investigation of CUOF Incidents

1. Incident Response

Department employees are required to immediately report all CUOF incidents to a supervisor.²⁸ At that time, one or more supervisors will respond to the scene and take immediate action to secure the scene, protect any evidence, and to ascertain which officers used force or were substantially involved in tactical decision-making. As part of that process, the supervisor in charge of the scene will take a public safety statement from each of the involved officers and, if necessary, other officers present at the scene.²⁹ Each officer is asked a series of basic questions designed to provide information about potential safety concerns, such as the number and

²⁶ Under certain circumstances, such an incident may later be reclassified as a "Death Investigation" by the Commission, which is then removed from the CUOF adjudication process.

²⁷ Because the majority of CUOF incidents involve the use of firearms, and because those investigations are normally the most complex, the OIG's description of the CUOF process is based primarily on the investigation of OIS incidents. Investigations of other types of incidents -- such as unintentional discharges and animal shootings -- may be more limited.

²⁸ In most incidents, the notification will occur while the involved officers are at the scene, although there may be some instances, such as an ICD, where the incident is designated as a CUOF after the officers' initial involvement. In such cases, there may not be an on-scene investigation.

²⁹ Under certain circumstances, the obligation to provide a public safety statement supersedes an officer's right to remain silent.

direction of any shots fired and the location and existence of any outstanding suspects or evidence. These questions also provide preliminary information for the purposes of the on-scene investigation.

The supervisor in charge will then ensure that the involved and witnessing officers, called percipient witnesses, are individually separated according to Department protocols. Those protocols, which are designed to prevent officers at the scene from discussing the incident, require that the officers be individually monitored by a supervisor until they are interviewed by investigators. Officers are admonished that they may not talk about the incident with one another prior to their interview nor should supervisors discuss tactics or other decisions with the officers. In situations where resource constraints prevent the individual monitoring of every officer, groups of percipient witnesses may be monitored by one supervisor, but they are nonetheless prohibited from conferring about the incident.

Finally, the supervisor in charge or watch commander is responsible for ensuring that all appropriate preliminary notifications are made, including to the Real-Time Analysis and Critical Response Division (RACR), the Department's 24-hour command post, which is responsible for completing notifications to the investigative team; the Chief of Police; the OIG; the District Attorney's Office – if required; and others.

2. Investigation

Responsibility for the investigation of a CUOF incident falls to the Department's Force Investigation Division (FID), made up of several teams of detectives and technical staff specializing in the investigation of serious uses of force. A team of FID personnel responds to each CUOF incident and is responsible for managing and overseeing the on-scene investigation -- including the photographing and collection of physical evidence and documentation of the physical environment -- as well as conducting subsequent interviews of officers and any other investigation.³⁰

Along with the processing of evidence and canvassing of the area for witnesses, a major component of the on-scene investigation is the process of walking each involved officer and percipient witness through the scene of the incident. During that process, FID personnel ask officers to provide information about their movements and positioning throughout the incident, as well as those of the suspect. Officers are also photographed in the clothing and equipment they were wearing at the time of the incident and any firearms or other weapons used are collected and processed.

Following the walk-throughs, FID conducts in-depth, tape-recorded, individual interviews of all officers who were "substantially involved" in the incident -- Department employees who used force or "who had a significant tactical or decision making role in the incident" -- and percipient

³⁰ Evidence collection and analysis, including firearms analysis, is conducted by the Department's Scientific Investigation Division (SID).

witnesses.³¹ Barring concerns about an officer's condition due to injury, trauma, or fatigue, these interviews are conducted on the same day as the incident, until which time they are continuously monitored by a supervisor.³² Officers are, however, afforded representation throughout the walk-through and interview process.

The Department assigns responsibility for both the administrative investigation and, if necessary, the criminal investigation of a CUOF incident, to FID, which assigns two teams to develop both investigations concurrently. The criminal investigation is focused solely on the question of the officers' criminal culpability, while the administrative investigation focuses on the officers' actions, including the use of force, as they pertain to relevant Department policy. It is the general practice of LAPD officers -- including those who witness an incident -- not to provide a voluntary interview. As such, nearly all FID interviews of Department officers are "compelled," meaning the officers are ordered to submit to questioning as a condition of their employment with the City. Because officers maintain their Fifth Amendment right against self-incrimination, however, no information obtained as a result of their compelled interview may be used against them in a criminal case.

To ensure that a "wall" is maintained between such information and the criminal investigation, FID assigns separate teams to conduct the investigations.³³ The "administrative" team is responsible for conducting compelled interviews of involved officers, while the "criminal" team conducts interviews of percipient Department witnesses and other persons who witnessed the incident. The administrative investigation may use any information gathered during the criminal investigation, but information or evidence gleaned from compelled interviews with the involved officers may not be shared with the criminal team.

During the interview, FID asks involved officers about their planning, decision-making, actions, and observations throughout the incident in an attempt to determine what information was available to the officers, what tactics were used, and officers' reasoning for their actions. All interviews are subsequently transcribed to facilitate the review process.

In general, officers are not shown video footage of the incident, such a surveillance video that captures a use of force, prior to their initial interview. The only exception to this practice is footage taken from the Department's Digital In-Car Video System (DICVS), which, when activated, records audio and video from a patrol car's front-facing and back-seat cameras. Department policy requires that officers be shown any footage of the incident captured by their own DICVS prior to their initial interview. In instances where officers need to be questioned

³¹ "Adjudication of Categorical Use of Force Incidents," Use of Force Directive, Office of the Chief of Police, July 2008.

³² There are some instances in which the CUOF classification is made some time after the event -- for example, when a person is admitted to a medical facility several hours after the initial use of force. In such cases, it may not be possible to conduct all of the interviews immediately. In such cases, they will be scheduled as soon as possible.

³³ The criminal investigation of the suspect, if necessary, is, in most cases, conducted by a separate FID team, the Criminal Apprehension Team.

about additional video, or where supplementary information is required, FID will schedule subsequent interviews, which are conducted in the same manner as the initial interviews.

Along with conducting interviews, FID is also responsible for completing the rest of the investigation, including collecting and reviewing autopsy or medical reports, ballistic and other evidentiary analysis, and any other information that is relevant to the case. All of these data are ultimately compiled into the investigative record and incorporated into a final investigative report to be submitted to the OIG and the Use of Force Review Board (UOFRB).

The OIG's Role

The OIG is promptly notified of any CUOF that occurs. A representative of the OIG responds to the scene of the incident and monitors the on-scene investigation on behalf of the Inspector General and the Commission. The OIG's oversight role relative to the investigation is continual, and, following the on-scene response, the OIG regularly interacts with FID to monitor the conduct of ongoing investigations through to their completion.

3. 72-Hour Briefing

Approximately 72 hours following an OIS, a preliminary briefing to the Chief of Police will be scheduled.³⁴ During this meeting, FID will make a presentation of the preliminary findings of its investigation, to be followed by a review of the officers' backgrounds and an update from each officer's commanding officer. Whenever an officer is involved in an OIS incident, they are sent to Behavioral Science Services for a psychological assessment and also undergo generalized refresher training in a number of standard areas. The commanding officer is responsible for providing an initial assessment of the officer's status, including any need for additional training or intervention. Based on this assessment and any additional discussion, the Chief then determines whether each officer should be returned to the field or whether other steps should be taken.

The OIG attends each 72-hour briefing and provides input on these issues as required.

A. Adjudication of CUOF Incidents

1. Adjudication Process

Following the completion of the CUOF investigation and the compiling of the investigative report, each incident undergoes a rigorous review process, culminating in the final adjudication by the Commission.

The first step is a review of the incident by the UOFRB. The board, chaired by the Director of the Office of Administrative Services, reviews the performance of each substantially involved

³⁴ A briefing may also be held in other types of incidents as necessary.

officer for tactics, drawing and exhibition of a firearm, and the use of force.³⁵ As part of this process, the UOFRB receives a presentation on the incident from an FID investigator, followed by an assessment and recommendations from the involved officer's commanding officer. Although they do not participate in the process, the involved officers may observe this portion of the proceedings, as well as a brief review of their employment histories, including any previous CUOF incidents and/or sustained personnel complaints. The UOFRB then develops recommended findings to be presented to the Chief of Police in each of the relevant areas including, when necessary, the minority opinion for any board members whose analysis or recommendation differs from that of the majority. Representatives from the OIG attend each UOFRB meeting to exercise an oversight role and provide input to the discussion as appropriate.

The recommendations of the UOFRB, including any minority opinions, are presented to the Chief of Police for his review. The Chief of Police determines whether to accept those recommendations or to make different findings. A correspondence to the Commission, detailing the Chief's analysis and conclusions, is prepared by UOFRB and signed by the Chief. This report, along with the FID investigation of the incident, is ultimately submitted to the Commission for its review. The OIG also receives those documents and, following a review of all investigative materials, prepares its own analysis of the incident and its investigation. The OIG's report provides an annotated summary of the incident, an assessment of the quality of the investigation and of the Chief's analysis, and any supplemental analysis it deems appropriate. Finally, the report sets forth an independent set of recommended findings for the Commission's consideration. While the OIG concurs with the Chief's findings in many cases, the OIG's recommendations may differ from the Department's.

The final step of an incident's review is the adjudication by the Commission of the case, which occurs in closed session. Prior to the meeting, Commission members will have received and had the opportunity to review the investigative file and the reports provided by the Chief and the OIG. They then receive a presentation from FID on the incident itself, which includes a summary of the events, relevant video or audio footage, and a description of any relevant evidence. The Commissioners also receive a brief overview of each involved officer's work history. Following deliberations, during which they may ask questions of the Department and the OIG, the Commission ultimately votes either to adopt the Chief's analysis and recommendations or, in some cases, to amend one or more aspects of those findings. In those cases where the decision is made to amend the Chief's findings, the OIG will, on the Commission's behalf, prepare a report that memorializes the basis for the Commission's amendment.

³⁵ Along with the Chairperson, the UOFRB is composed of an Office Representative, the Deputy Chief over Personnel and Training Bureau, the Deputy Chief of the involved Bureau(s), and a Peer Member for each rank of involved officer.

2. Adjudication Categories

Based on procedures put into place following the 1979 shooting of Eulia Love, described in the previous section, each Department employee involved in a CUOF is adjudicated in each of the following categories, as applicable: tactics, drawing and exhibition of a firearm, and use of force. Those procedures were further codified and clarified in a Use of Force Directive approved by the Commission in 2008.³⁶

The Department uses “preponderance of the evidence” as its administrative standard of proof, meaning that the adjudicator must determine whether it is “more likely than not” that an officer’s conduct complied with the applicable standard. As described in the following sections, the general practice of the Department is to evaluate each of the three classifications in isolation from the others, which may lead to outcomes that are inconsistent with *Hayes*. While there is no explicit prohibition against the consideration of deficiencies in preshooting conduct -- whether in the form of tactics, the decision to draw and exhibit a firearm, or other relevant decisions -- during the ultimate evaluation of the use of force, there is likewise no explicit mechanism for doing so.

a. Tactics

The evaluation of the tactics used by an officer or a group of officers encompasses any of the strategies or methods used prior to, during, and following a use of force. As such, issues evaluated under this heading may include diverse topics such as planning and supervision, communication among officers, approach and positioning, availability and deployment of equipment and weapons, interactions with suspects, and post-incident procedures. The analysis may also identify issues relating to officers’ performance during the actual use of force, such as concerns about fire control, shooting backdrop, or the potential for crossfire. All aspects of involved officers’ tactical performance are assessed for compliance with relevant Department tactical training.

The purpose of the tactical analysis in a CUOF is twofold. First, it identifies those officers who were substantially involved in tactical decision-making. Under Department policy, each such officer will be sent to a tactical debrief, defined as a “collective review of an incident to identify those areas where actions and decisions were effective and those areas where actions and decisions could have been improved.”³⁷ The analysis identifies areas in which the officers’ tactical decision-making warrants review -- called debriefing points -- that will be included along with the general debrief. Second, it analyzes whether there are areas in which any tactical deficiencies rose to the level where they “unjustifiably and substantially deviated from approved Department tactical training.” Such a determination will result in administrative disapproval of the officers’ tactics.

³⁶ “Adjudication of Categorical Use of Force Incidents,” Use of Force Directive, Office of the Chief of Police, July 2008.

³⁷ *Id.*, pg. 2.

Ultimately, each substantially involved officer will receive a finding of either "Tactical Debrief" or "Administrative Disapproval." For those officers who receive the latter finding, the Chief will determine whether that finding should result in a Notice to Correct Deficiencies, extensive retraining, or the initiation of a personnel complaint for possible disciplinary action.

This category encompasses many of the decisions that make up an officer's "preshooting conduct" as referenced in *Hayes*, but these are, in most cases, evaluated separately from the use of force itself. Although the tactical decisions in the majority of cases are ultimately unrelated to the circumstances surrounding a use of force, there may be rare instances in which identified tactical deficiencies are found to lead to an "in policy" shooting that would otherwise not have occurred.

The OIG also notes that this classification does not encompass evaluation of preshooting decisions that do not fall into the category of tactics, including, for instance, decisions regarding the legality of detentions or searches. This type of conduct is evaluated as part of the process but is discussed as an "Additional" consideration and does not receive an adjudication by the Commission. Instead, any legal or other policy/administrative issues are handled outside of the CUOF adjudication process.

b. Drawing and Exhibition of a Firearm

Any substantially involved officer who unholsters his or her firearm during a CUOF incident will receive a finding in this classification, regardless of whether or not they discharged the weapon. According to Department policy, "[a]n officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer's reasonable belief there is a substantial risk that the situation may escalate to the point where deadly force may be justified."³⁸ As such, the evaluation of this decision seeks to determine whether, based on the preponderance of the evidence and the tactical situation, the officer may hold a reasonable belief that the threshold for the drawing and exhibition of the firearm has been met.

Each officer's decision to draw his or her weapon will result in a finding of "In Policy" or "Out of Policy." As with tactics, the finding in this category is generally developed in isolation from any subsequent use of the firearm. As a result, it could be possible to have a situation where the officer's decision to draw his or her weapon is found to be out of policy, but the ultimate use of deadly force -- even if precipitated by the drawing of the officer's firearm -- would be found in policy.

c. The Use of Force

The question of whether a use of force -- particularly the use of deadly force -- was compliant with the Department's policy is a key question in the evaluation of a CUOF incident. Depending

³⁸ LAPD Manual 1/556.80, "Drawing or Exhibiting Firearms."

on the type of force used, each person using or directing the use of force will receive one or more Use of Force findings, which are divided into the following groups:

- Lethal: the use of deadly force, including the discharge of a firearm, strikes to the head with an impact weapon, or other force that “creates a substantial risk of causing death or serious bodily injury.”³⁹
- Less-Lethal: the use of a less-lethal weapon, such as a TASER or beanbag shotgun.
- Non-Lethal: the use of other force, such as bodyweight, takedowns, or strikes.⁴⁰

All uses of force, regardless of level, are evaluated according to the Department’s use of force policy, which states that Department employees “may use only that force which is ‘objectively reasonable’ to: defend themselves; defend others; effect an arrest or detention; prevent escape; or overcome resistance.”⁴¹

Along with listing the general circumstances under which force may be used, the policy also provides the specific parameters for the use of firearms or other deadly force. According to the policy, “officers are authorized to use deadly force to:

- Protect themselves or others from what is reasonably believed to be an imminent threat of death or serious bodily injury; or,
- Prevent a crime where the subject’s actions place person(s) in imminent jeopardy of death or serious bodily injury; or
- Prevent the escape of a violent fleeing felon when there is probable cause to believe that the escape will pose a significant threat of death or serious bodily injury to the officer or others if apprehension is delayed. [...]”⁴²

The Department further constrains the use of deadly force by restricting the circumstances under which officers may fire at or from a moving vehicle. Under that policy, officers “shall not” discharge a firearm at a “moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle.”⁴³ In general, officers are instructed to move out of the path of an oncoming vehicle rather than fire at it, and are directed likewise not to fire from a moving vehicle except in certain circumstances. The policy does allow, however, for exceptions to this prohibition, such as instances in which there was “no reasonable or apparent means of escape.”

³⁹ “Use of Force Policy – Revised.” Directive No. 1, Use of Force – Tactics Directive, July 2009, pg. 2.

⁴⁰ Although the use of less-lethal weapons or non-lethal force does not generally rise to the level of a CUOF incident, these categories may be included in instances where such force is used in an incident where the subject dies or is hospitalized. Additionally, any force used during an OIS or other deadly force incident will be evaluated through the CUOF process, even if it did not lead to death or hospitalization.

⁴¹ *Id.*

⁴² “Use of Force Policy – Revised.” Directive No. 1, Use of Force – Tactics Directive, July 2009, pg. 3.

⁴³ *Ibid.*

Objective Reasonableness

In determining whether a use of force was in policy, adjudicators will determine whether, based on a preponderance of the available evidence, each officer's use of force was "objectively reasonable" in light of the Department's use of force policies. Derived from the Fourth Amendment legal standard, as established by *Graham v. Connor*, 490 U.S. 386 (1989), this reflects the concept that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."⁴⁴ The Department further defines the reasonable officer as a "Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances."⁴⁵

In keeping with *Graham*, the current policy includes a non-exhaustive list of factors that may be used to determine reasonableness, such as the seriousness of the crime or suspected offense; the level of threat or resistance presented by the subject; whether the subject was posing an imminent threat to officers or a danger to the community; and officer versus subject factors such as age, size, relative strength, and other characteristics.⁴⁶ According to *Graham*, the test of reasonableness "is not capable of precise definition or mechanical application;" instead, "the question is 'whether the totality of the circumstances justify[es]' " the use of force.

As currently written, none of the factors listed in the Department's use of force policy explicitly address the relevance of tactical conduct and other decisions preceding the use of force. Although the policy does not limit the factors to be calculated in the totality of the circumstances, and the policy on shooting at moving vehicles does take into account tactical decision-making, the *Graham* test has generally been interpreted to focus primarily on the circumstances present at the moment that force is used.

The Commission is not restricted from considering preshooting conduct in its evaluation of the reasonableness of a use of force, and the OIG has noted instances in the past where the Commission has considered incidents in their totality. Nonetheless, without clarification, the language of the current policy -- combined with the adjudicative separation of findings for tactics and the use of force -- creates the impression that an adjudicator should focus simply on the circumstances present in the exact moment that deadly force was used. Without clarification, the existing policy would appear to suggest that adjudicators should ignore all preshooting decision-making when deciding when a use of lethal force is in policy, no matter how otherwise relevant those actions were. Such an approach is inconsistent with the Love-era Commission's apparent

⁴⁴ "Use of Force Policy -- Revised." Directive No. 1, Use of Force -- Tactics Directive, July 2001, pg. 1.

⁴⁵ *Id.*, pg. 2.

⁴⁶ For a full list of factors, please see the current use of force policy, included as an appendix to this report.

intent in developing the new adjudication policy and is likely at odds with *Hayes*, which found “no sound reason to divide plaintiff’s cause of action into a series of decisional moments [...] when each is part of a continuum of circumstances surrounding a single use of force by [officers].”⁴⁷

V. OIG RECOMMENDATION

Based on its review of the decision in *Hayes*, the OIG has concluded that, under California negligence law, an officer’s decisions leading up to a use of deadly force are “relevant considerations” in determining whether the force was negligent, and that such conduct may show, as part of the totality of the circumstances, that the use of force was reasonable or unreasonable. As such, State law is more expansive than the Fourth Amendment “objective reasonableness” standard set forth in *Graham*, which, in most cases, looks more narrowly at the circumstances facing an officer at the moment that force was used.

The OIG has determined that the current CUOF adjudication process, which typically functions to produce separate evaluations for tactics, drawing, and the use of force, is well-designed and leads to a comprehensive evaluation of each incident that properly compares each decision made by officers against its applicable standard. The design of the process does not, however, limit the Commission’s authority to consider tactics and other preshooting conduct in their assessment of the reasonableness of a use of force, when appropriate. The OIG has noted instances when the Commission has exercised that authority, although the cases in which an out-of policy finding has been made due to preshooting conduct have been extremely rare. In the OIG’s experience, such a finding has only occurred in cases where the conduct was so substantially deficient that it unreasonably created the need to use deadly force.

While the Department’s current use of force policy includes a non-exhaustive list of factors that may be used to determine reasonableness, the section does not explicitly address the relevance of tactical conduct and decisions preceding the use of deadly force. Accordingly, in light of the *Hayes* opinion, the use of force policy currently employed by the Department can be interpreted as being less restrictive than the minimum standard set by current State law. The OIG recommends that this matter be corrected by clarifying the policy to include that adjudicators may consider “the tactical conduct and decisions leading up to the use of deadly force.”⁴⁸ This language precisely mirrors the language of the Court’s opinion and its addition to the Department’s use of force policy would serve to unambiguously align that policy with State law.

⁴⁷ *Hayes v. County of San Diego*, No. S193997 (Cal. Aug. 19, 2013).

⁴⁸ Please see LAPD Manual, Volume 1, Section 556.10, a copy of which is attached in the Appendix of this report. As stated above, the policy lists the non-exclusive factors to be considered when evaluating a use of force. In addition to these, the OIG recommends that a reference to preshooting conduct be added to the section on the use of deadly force. Specifically, the OIG recommends that the following sentence be inserted after the list of bulleted conditions under which the use of deadly force is authorized, found on page 25, paragraph 1 of this document: “The reasonableness of an officer’s use of deadly force includes consideration of the officer’s tactical conduct and decisions leading up to the use of deadly force.” This language has been developed in consultation with the Department and the City Attorney’s Office, and has been agreed to by all of the parties.

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This approach would also serve to align adjudicative practice with the original intent of the Commission in adopting the current three-classification system, enabling officer conduct during an incident to be considered in its totality. Such a change in practice would not require any amendment to existing adjudication policy, and could be immediately implemented.

Appendix
Los Angeles Police Department Manual, Volume 1
Current Use of Force Policy

556.10 POLICY ON THE USE OF FORCE.

PREAMBLE TO USE OF FORCE. The use of force by members of law enforcement is a matter of critical concern both to the public and the law enforcement community. It is recognized that some individuals will not comply with the law or submit to control unless compelled to do so by the use of force; therefore, law enforcement officers are sometimes called upon to use force in the performance of their duties. It is also recognized that members of law enforcement derive their authority from the public and therefore must be ever mindful that they are not only the guardians, but also the servants of the public.

The Department's guiding value when using force shall be reverence for human life. When warranted, Department personnel may objectively use reasonable force to carry out their duties. Officers who use unreasonable force degrade the confidence of the community we serve, expose the Department and fellow officers to legal and physical hazards, and violate the rights of individuals upon whom unreasonable force is used. Conversely, officers who fail to use force when warranted may endanger themselves, the community and fellow officers.

DEFINITIONS.

Objectively Reasonable. The legal standard used to determine the lawfulness of a use of force is the Fourth Amendment to the United States Constitution. See *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* states in part, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and rapidly evolving - about the amount of force that is necessary in a particular situation. The test of reasonableness is not capable of precise definition or mechanical application." The force must be reasonable under the circumstances known to the officer at the time the force was used. Therefore, the Department examines all uses of force from an objective standard rather than a subjective standard.

Factors Used To Determine Reasonableness. The Department examines reasonableness using *Graham* and from the articulated facts from the perspective of a Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances. In determining the appropriate level of force, officers shall evaluate each situation in light of facts and circumstances of each particular case. Those factors may include but are not limited to:

- The seriousness of the crime or suspected offense;
- The level of threat or resistance presented by the subject;
- Whether the subject was posing an immediate threat to officers or a danger to the community;

- The potential for injury to citizens, officers, or subjects;
- The risk or apparent attempt by the subject to escape;
- The conduct of the subject being confronted (as reasonably perceived by the officer at the time);
- The time available to an officer to make a decision;
- The availability of other resources;
- The training and experience of the officer;
- The proximity or access of weapons to the subject;
- Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion, and number of officers versus subjects; and,
- The environmental factors and/or other exigent circumstances.

Deadly Force. Deadly Force is defined as that force which creates a substantial risk of causing death or serious bodily injury.

Imminent. Black's Law Dictionary defines imminent as, "Near at hand; impending; on the point of happening."

Serious Bodily Injury. California Penal Code Section 243(f)(4) defines Serious Bodily Injury as including but not limited to:

- Loss of consciousness;
- Concussion;
- Bone fracture;
- Protracted loss or impairment of function of any bodily member or organ;
- A wound requiring extensive suturing; and,
- Serious disfigurement.

Warning Shots. The intentional discharge of a firearm off target not intended to hit a person, to warn others that deadly force is imminent.

POLICY.

Use of Force -- General. It is the policy of this Department that personnel may use only that force which is "objectively reasonable" to:

- Defend themselves;
- Defend others;
- Effect an arrest or detention;
- Prevent escape; or,
- Overcome resistance.

Deadly Force. Law enforcement officers are authorized to use deadly force to:

- Protect themselves or others from what is reasonably believed to be an **imminent** threat of death or serious bodily injury; or,
- Prevent a crime where the suspect's actions place person(s) in **imminent** jeopardy of death or serious bodily injury; or,
- Prevent the escape of a violent fleeing felon when there is probable cause to believe the escape will pose a significant threat of death or serious bodily injury to the officer or others if apprehension is delayed. In this circumstance, officers shall, to the extent practical, avoid using deadly force that might subject innocent bystanders or hostages to possible death or injury.

Warning Shots. Warning shots shall only be used in exceptional circumstances where it might reasonably be expected to avoid the need to use deadly force. Generally, warning shots shall be directed in a manner that minimizes the risk of injury to innocent persons, ricochet dangers, and property damage.

Shooting At or From Moving Vehicles. Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle. The moving vehicle itself shall not presumptively constitute a threat that justifies an officer's use of deadly force. An officer threatened by an oncoming vehicle shall move out of its path instead of discharging a firearm at it or any of its occupants. Firearms shall not be discharged from a moving vehicle, except in exigent circumstances and in the immediate defense of life.

Note: It is understood that the policy in regards to discharging a firearm at or from a moving vehicle may not cover every situation that may arise. In all situations, Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy. Any deviations from the provisions of this policy shall be examined rigorously on a case by case basis. The involved officer must be able to articulate clearly the reasons for the use of deadly force. Factors that may be considered include whether the officer's life or the lives of others were in immediate peril and there was no reasonable or apparent means of escape.

THE POLICE COMMISSION

OFFICE OF CITIZEN COMPLAINTS

CITY AND COUNTY OF SAN FRANCISCO



Joyce M. Hicks
Executive Director

April 6, 2016

Hon. Suzy Loftus, President
Members, San Francisco Police Commission

Re: OCC Recommendations and Research Concerning Three Use Of Force Principles

Dear President Loftus and Commissioners:

Below I have provide our agency's recommendations and research concerning three Use of Force provisions in the San Francisco Police Department's proposed Use of Force policies. These recommendations and research supplement the written materials that my designee, Policy Attorney Samara Marion, provided to the Department throughout her participation in the Use of Force stakeholder meetings in February and March 2016.

I. Introduction

Several law enforcement agencies across the nation have Use of Force policies that include a commitment to rely upon minimal force whenever practical, require (rather than simply recommend) officers to use whenever feasible de-escalation and other tactics before resorting to force, and prohibit officers from pointing a gun at an individual unless the officer or another is in danger of serious bodily injury or death. During the meetings with the San Francisco Police Department on its proposed revisions to its Use of Force policies, the Office of Citizen Complaints, the San Francisco Bar Association, the Coalition on Homelessness, the Northern California American Civil Liberties Union, and other stakeholders recommended incorporating similar provisions to SFPD's Use of Force policies. This memo summarizes Use of Force policies from several law enforcement agencies that address these three Use of Force principles.

A. LAW ENFORCEMENT AGENCIES AND OTHER SOURCES THAT EMPHASIZE A MINIMAL RELIANCE ON FORCE IN THEIR USE OF FORCE POLICIES.

SFPD's current Use of Force Department General Order instructs officers to accomplish its mission with minimal reliance on force (see #10 below). SFPD's proposed Use of Force policy does not include any reference to a minimal reliance on force.

1. New Orleans Police Department

The New Orleans Police Department's Use of Force policy includes a commitment to use the minimum amount of force and states that the Department restricts its officers' use of force beyond the limitations set forth under the Constitution and state law. The New Orleans Police Department's Use of Force policy provides:

The policy of the New Orleans Police Department is to value and preserve human life when using lawful authority to use force. Therefore, officers of the New Orleans Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the members or others. Members are advised that the Department places restrictions on officer use of force that go beyond the restrictions set forth under the Constitution or state law. (New Orleans Police Department Operations Manual, Use of Force, Chapter: 1.3, December 6, 2015, emphasis added.).¹

2. Las Vegas Metropolitan Police Department

The Las Vegas Metropolitan Police Department's Use of Force policy states in its introduction, "[i]t is the policy of the department that officers hold the highest regard for the dignity and liberty of all persons, and place minimal reliance upon the use of force."

¹ The New Orleans Police Department Regulation's Manual (3/15/16) that includes its Use of Force policy is available at <http://www.nola.gov/nopd/publications/>. The New Orleans Police Department's Use of Force policy resulted from the United States Department of Justice (DOJ)'s investigation into an alleged pattern of civil rights violations and other misconduct pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §14141 (Section 14141). Section 14141 makes it unlawful for law enforcement officers to engage in a pattern or practice of conduct that deprives individuals of rights protected by the Constitution or laws of the United States. Conduct covered by Section 14141 includes excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests. For more information about DOJ's work with the New Orleans Police Department, see <http://www.nola.gov/nopd/nopd-consent-decree>. For information about the DOJ's pattern and practice investigations involving law enforcement agencies throughout the United States, see <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#police>.

(Use of Force, Directive GO-008-15, June 18, 2015, emphasis added).²

3. Washington, D.C., Metropolitan Police Department

The Use of Force policy for the District of Columbia's law enforcement agency, the Metropolitan Police Department, states in pertinent part:

The policy of the Metropolitan Police Department is to value and preserve human life when using lawful authority to use force. Therefore, officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others. (Washington, D.C. Metropolitan Police Department, Use of Force, GO-RAR-901.07, October 7, 2002³).

4. Chicago Police Department

The Chicago Police Department's Use of Force policy instruct officers to use the least amount of appropriate force. Chicago Police Department's Use of Force policy statement provides:

A. The goal of a Department member's response to all incidents is to resolve the incident with the foremost regard for the preservation of human life and the safety of all persons involved.

B. The Department expects members to develop and display the skills and abilities that allow them to regularly resolve confrontations without resorting to force (i.e. anything other than an officer's physical presence or use of verbal commands) or by using the least amount of appropriate force.

²The Las Vegas Metropolitan Police Department partnered with the Community Oriented Policing Services (COPS) Office and requested COPS to provide an independent investigation of its Use of Force policies and procedures. In July 2012, the Las Vegas Police Metropolitan Police Department announced an updated Use of Force policy. (See <http://www.lvmpd.com/Portals/0/OIO/GO-008-15 UseofForce.pdf>.) For more information about the ten police departments, include SFPD, that are engaged in COPS' Collaborative Reform program, see <http://cops.usdoj.gov/Default.asp?Item=2807>.

³The Metropolitan Police Department's Use of Force policy is available at <http://mpdc.dc.gov/page/written-directives-general-orders>. In 2001, the Department of Justice initiated a pattern and practice investigation into the Washington, D.C. Metropolitan Police Department; the memorandum of agreement (or consent decree) concluded in 2008. See, "Civil Rights Investigations of Local Police: Lessons Learned," Critical Issues in Policing Series, Police Executive Research Forum, July 2013, page 2.

C. Officers will de-escalate and use Force Mitigation principles whenever possible and appropriate, before resorting to force and to reduce the need for force. (Chicago Police Department, Force Options, General Order GO3-02-02, January 1, 2016.)⁴

5. Portland Police Department

The Portland Police Department's Use of Force policy includes a minimal reliance on force. Its policy statements provides, "It is the intention of the Bureau to accomplish its mission as effectively as possible with as little reliance on force as practical." (See Portland Police Department's Use of Force, Policy 1010.00, emphasis added.) It also states, [m]embers should be aware the Bureau's force policy is more restrictive than the constitutional standard and state law." (Ibid.)⁵

6. Albuquerque Police Department

Albuquerque Police Department's Use of Force policy incorporates de-escalation and the minimum amount of force necessary to effect lawful objectives. Albuquerque Police Department's Use of Force policy provides:

The Albuquerque Police Department (APD) is committed to protecting people, their property and their rights. It is the policy of the APD to de-escalate situations without using force when possible. Force will not be used against any person except as necessary to protect the sanctity of human life, and to effect lawful objectives. With the use of force is necessary, force will be used in a way that preserves and protects individual liberties. Under current legal standards, APD officers may only use force that is objectively reasonable, based on a totality of the circumstances the officer is on confronted with, to effect an arrest or protect the safety of the officer or another person. APD's policy and training requires that officers not only follow the legal standard, but also, where feasible, identify a range of objectively reasonable alternatives, and whenever feasible, to use the minimum amount of force necessary within that range to effect lawful objectives. This policy is not intended to limit the lawful authority of APD officers to use objectively reasonable force or otherwise to fulfill their law enforcement obligations under the Constitution and laws of the United States and the state of New Mexico. Officer must remain mindful that they

⁴ In December 2015, the Department of Justice initiated a pattern and practice investigation into the Chicago Police Department. For more information about DOJ's work with the Chicago Police Department, see <https://www.justice.gov/opa/pr/justice-department-opens-pattern-or-practice-investigation-chicago-police-department>.

⁵For Portland Police Bureau's Use of Force policy, see <https://www.portlandoregon.gov/police/29867>

Portland Police Bureau's Use of Force policy was revised as a result of the DOJ's pattern and practice investigation. For more information about DOJ's work with the Portland Police Bureau, see <https://www.portlandoregon.gov/police/62044>.

derive their authority from the United States Constitution, Federal and State laws, and the community. Unreasonable force degrades the legitimacy of that authority. (Albuquerque Police Department, Procedural Orders, Use of Force, SOP 2-52, Page 1, January 21, 2016, emphasis added.)

Included among the factors to determine objectively reasonable force is “[i]f feasible, opportunities to deescalate or limit the amount of force used. (See Albuquerque Police Department, Procedural Orders, Use of Force, SOP 2-52-3, January 21, 2016, Page 5, emphasis added)”⁶

7. Seattle Police Department

The Seattle Police Department’s “Use of Force Core Principles” states that its policy is to “accomplish the police mission with the cooperation of the public and as effectively as possible, and with minimal reliance upon the use of physical force.” (See Seattle Police Department’s Use of Force Core Principles, section 8.000, September 1, 2015, emphasis added.)⁷

8. Oakland Police Department

Oakland Police Department’s Use of Force policy statement states that in addition to valuing the protection and sanctity of human life, the Department “is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force.” (Oakland Police Department’s Department General Order K-3, October 14, 2016, emphasis added.)⁸

⁶ For Albuquerque Police Department’s Use of Force policy, see <http://www.cabq.gov/police/our-department/standard-operating-procedures>. Albuquerque Police Department’s Use of Force policy was revised as a result of the DOJ’s pattern and practice investigation. For more information about DOJ’s work with Albuquerque Police Department, see <http://www.cabq.gov/police/departments-of-justice-doj-reports>.

⁷ For Seattle Police Department’s Use of Force policy, see <http://www.seattle.gov/police-manual>. Seattle’s Police Department’s Use of Force policy was revised as a result of the DOJ’s pattern and practice investigation. For more information about DOJ’s work with Seattle Police Department, see <http://www.seattle.gov/police-manual>.

⁸ For Oakland’s Use of Force policy see <http://www2.oaklandnet.com/Government/o/OPD/s/DepartmentalPublications/OAK034257>. Oakland Police Department’s Use of Force policy was revised as a result of the DOJ’s pattern and practice investigation initiated in 2003. For more information about DOJ’s work with Oakland Police Department, see <http://www2.oaklandnet.com/Government/o/OPD/a/PublicReports/DOWD004998>.

9. Milwaukee Police Department

One of the Milwaukee Police Department's Code of Conduct's core values and guiding principles is "Restraint: We use the minimum force and authority necessary to accomplish a proper police purpose. We demonstrate self-discipline even when no one is listening or watching." (Milwaukee Police Department Code of Conduct, section 6.00, emphasis added.). The Code of Conduct also states, "Police members shall exercise restraint in the use of force and act in proportion to the seriousness of the offense and the legitimate law enforcement objective to be achieved." (Section 6.01).⁹

10. San Francisco Police Department

For over two decades, SFPD has instructed officers to accomplish its mission with minimal reliance on the use of physical force. DGO 5.01 provides:

It is the policy of the San Francisco Police Department to accomplish the police mission as effectively as possible with the highest regard for the dignity of all persons and with minimal reliance upon the use of physical force. The use of physical force shall be restricted to circumstances authorized by law and to the degree minimally necessary to accomplish a lawful police task. (San Francisco Police Department, Department General Order 5.01, October 4, 1995, emphasis added.)¹⁰

SFPD's proposed revisions to DGO 5.01 do not include a minimal reliance on force.

⁹ For the Milwaukee Police Department's Code of Conduct, see <http://city.milwaukee.gov/Directory/police/About-MPD/Code-of-Conduct.htm#.Vv1suFKP8vU>.

The Milwaukee Police Department has recently partnered with the Community Oriented Policing Services (COPS) Office and COPS is in the midst of the assessment phase. For more information about the ten police departments, including the Milwaukee Police Department, that are engaged in COPS' Collaborative Reform program, see <http://cops.usdoj.gov/Default.asp?Item=2807>.

¹⁰San Francisco Police Department General Orders are available on its website. To see the current version of DGO 5.01, see <http://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/14790-DGO5.01.pdf>.

11. Police Executive Research Forum (PERF)

Minimizing the use of force is at the center of Police Executive Research Forum's (PERF) report on "Re-Engineering Training on Police Use of Force." The PERF report explains, "We need to rethink how we are training officers to handle use of force, and we must recognize that current training is not providing officers with state-of-the-art techniques to minimize use of force." (PERF's "Re-Engineering Training on Police Use of Force," August 2015, page 4). In January 2016, PERF issued another report entitled, "Use of Force: Taking Policing to a Higher Standard" in which it identified 30 guiding principles. Following its number one guiding principle that the sanctity of human life be central to everything a law enforcement does, PERF's second guiding principle is that "Departments should adopt policies that hold themselves to a higher standard than the legal requirements of Graham v. Connor." (See "Use of Force: Taking Policing to a Higher Standard, 30 Guiding Principles, Police Executive Research Forum, January 29, 2016, page 2.)

B. LAW ENFORCEMENT AGENCIES THAT USE MANDATORY LANGUAGE CONCERNING OFFICERS' DUTY TO USE DE-ESCALATION AND OTHER TACTICS BEFORE USING FORCE.

As defined by San Francisco Police Department General Order 3.02, mandatory police procedures use the terms "shall" or "will" or "must" to signify that officers are required to follow the procedure. DGO 3.02 defines "should" as "permissive, but recommended" and "may" as "permissive."¹¹

As summarized below, several law enforcement agencies require officers to use de-escalation and other tactics before using force and also recognize that rapidly developing circumstances may preclude or not warrant de-escalation and other tactics before using force. Thus, these agencies qualify the mandatory duty to de-escalate by phrases such as "when feasible" or "when practical" or "when possible."

SFPD's proposed use of force policy predominantly uses the term "should" rather than "shall" in describing officers' duties, especially pertaining to de-escalation and other tactics before using force. Similar to the law enforcement agencies below, the OCC, the Office of Citizen Complaints, the San Francisco Bar Association, the Coalition on Homelessness, the Northern California American Civil Liberties Union, and other stakeholders recommend that the duty to use de-escalation and other tactics before using force be a mandatory duty that permits exceptions by including a qualifying phrase such as "when feasible" or "when practical" or "when possible."

¹¹See San Francisco Police Department Order 3.02
<http://sanfranciscopolice.org/sites/default/files/FileCenter/Documents/14810-DGO3.02.pdf>

1. New Orleans Police Department

The New Orleans Police Department's (NOPD) Use of Force policy uses mandatory language when describing officers' responsibilities to use de-escalation and other techniques before resorting to force. NOPD's policy recognizes that there will be times when an officer cannot use de-escalation and other techniques and thus, qualifies the duty by stating "when feasible" and "when possible."

For example, NOPD's Use of Force policy statement explains,

When feasible based on the circumstances, officer will use de-escalation techniques, disengagement; area containment; surveillance, waiting out a subject; summoning reinforcements; and/or calling in specialized units such as mental health and crisis resources, in order to reduce the need for force, and increase officer and civilian safety. Moreover, the officers shall de-escalate the amount of force used as the resistance decreases. (New Orleans Police Department Operations Manual, Use of Force, Chapter: 1.3, December 6, 2015, emphasis added.)

Concerning the duty to communicate, NOPD's Use of Force policy states,

NOPD officers, regardless of the type of force or weapon used, shall abide by the following requirements:

- Officers shall use verbal advisements, warnings, and persuasion, when possible, before resorting to force. (New Orleans Police Department Operations Manual, Use of Force, Chapter: 1.3, December 6, 2015, emphasis added.)

2. Albuquerque Police Department

The Albuquerque Police Department (APD) uses mandatory language concerning an officer's duty to use de-escalation techniques. APD's Use of Force policy states, "t]he officer shall consider and use, where appropriate, de-escalation techniques." (See Albuquerque Police Department, Procedural Orders, Use of Force, SOP 2-52-3, January 21, 2016, Page 5.)

APD's policy also states that "officers shall use advisements, warnings, verbal persuasion, and other tactics and alternatives to higher levels of force, if feasible." (Id. at p.7.) Additionally, APD's policy instructs officers that "[w]hen use of force is needed, and if feasible, officers will assess each incident to determine, based on policy, training and experience, which use of force option will de-escalate the situation and bring it under control in a safe and prudent manner." (Id. at p. 7.)

3. Chicago Police Department

The Chicago Police Department requires officers to de-escalate use "Force Mitigation" principles whenever possible. Chicago Police Department's Use of Force policy statement provides:

Officers will de-escalate and use Force Mitigation principles whenever possible and appropriate, before resorting to force and to reduce the need for force.
(Chicago Police Department, Force Options, General Order GO3-02-02, January 1, 2016.)

Officers have a mandatory duty to adhere to the Chicago Police Department's "force mitigation" principles. Officers are required to de-escalate, use verbal control techniques, request for a CIT officer, and employ other principles of Force Mitigation whenever it is possible and appropriate. The Chicago Police Department's Use of Force policy provides:

During all use of force incidents, Department members will strive to use the principles of Force Mitigation to ensure effective police-public encounters based on the totality of the circumstances. The concepts of Force Mitigation include:

A. When involved in a potential use of force incident or taking police action requiring the use of force, Department members will determine if the seriousness of the situation requires an immediate response or whether the member can employ other force options, including creating more time and distance between the subject and others.

B. Department members shall de-escalate and use Force Mitigation principles at the earliest possible moment.

C. If the Department member is responding to an incident involving persons in need of mental health treatment, the member will act in accordance with the Department directive entitled "Responding to Incidents Involving Persons In Need Of Mental Health Treatment," including using every possible means to verbally de-escalate the situation before resorting to the use of equipment, physical restraints, or other use of force options.

D. Continual Communication

1. Members will use de-escalation and verbal control techniques in an attempt to reduce confrontations prior to, during, and after the use of physical force.

2. Whenever reasonable, members will exercise persuasion, advice, and warning prior to the use of physical force.

3. The goal of continual communication is to establish and maintain verbal communication in all police-public encounters where the member continually evaluates the effectiveness of that communication. Members will

a. when practical, establish and maintain one-on-one communication where only one member speaks at a time.

b. vary the level of assertiveness of their communication depending on the type of police-public encounter. This may range from:

(1) respectful queries in a preliminary investigation where there is not yet determination a crime has occurred; through

(2) forceful commands where a serious crime has been committed or life or property is at risk.

4. When encountering non-compliance to lawful verbal direction, members

are not compelled to take immediate police action through the use of force. Except in the case of preservation of life or property, members will consider:

- a. changing their verbal communication techniques to discover a more effective method.
- b. requesting additional personnel to respond or making use of the specialized units and equipment available through a notification to OEMC.

NOTE: Members will, when practical, request assistance from specialized units, including a Crisis Intervention Team (CIT) trained officer in accordance with the Department directive entitled " Responding to Incidents Involving Persons In Need Of Mental Health Treatment."

- c. if available, allowing a different member to initiate verbal communications. (Chicago Police Department, Force Options, General Order G03-02-02, January 1, 2016, emphasis added.)

4. Cleveland Police Department

The Cleveland Police Department (CPD) also uses mandatory language concerning an officer's responsibility to use de-escalation and other tactics before using force.

CPD's Use of Force policy states,

Members shall first attempt verbal persuasion tactics and warnings to gain *the person's* cooperation.Members shall consider alternative tactics to the use of force, which include, but are not limited to:

1. Concealment and/or cover.
2. Voice commands and other verbal attempts to deescalate the situation.
3. *Use of Crisis Intervention Team (CIT) officer, if available.*
4. Show of force (i.e. multiple officers, display of weapons).
5. *Judiciously allow time and/or opportunity for a person to regain self-control or cease struggling/resisting; when their actions do not immediately threaten the safety of themselves or others.* (Cleveland Division of Police, Use of Force, General Police Order 2.1.01, August 8, 2014, italics in original.¹²)

¹²For Cleveland Police Department's Use of Force policy, http://city.cleveland.oh.us/sites/default/files/forms_publications/GPO_Book11-24-15.pdf?id=6778

Cleveland Police Bureau's Use of Force policy was revised as a result of the DOJ's pattern and practice investigation initiated in 2013. For more information about DOJ's work with the Cleveland Police Department, see http://city.cleveland.oh.us/sites/default/files/forms_publications/ClevelandDOJFindings.pdf?id=3451.

C. LAW ENFORCEMENT AGENCIES THAT PERMIT AN OFFICER TO POINT A FIREARM AT AN INDIVIDUAL ONLY WHEN THE OFFICER OR ANOTHER IS IN DANGER OF DEATH OR GREAT BODILY INJURY.

SFPD'S Use of Force policy permits officers to point a gun at an individual when the officer believes it may be necessary for the safety of the officer or others. Several law enforcement agencies require a reasonable belief that the situation may escalate to a point where deadly force may be justified.

1. New Orleans Police Department

The New Orleans Police Department's Use of Force policy restricts officers from drawing or exhibiting a firearm unless circumstances create an objectively reasonable belief that the situation may escalate to the point that would authorize lethal force. NOPD's Use of Force policy states,

Officers shall not draw or exhibit a firearm unless the circumstances surrounding the incident create an objectively reasonable belief that a situation may escalate to the point at which lethal force would be authorized. Once an officer determines that the use of deadly force is no longer likely, the officer shall re-holster the weapon. (New Orleans Police Department Operations Manual, Use of Force, Chapter: 1.3, December 6, 2015, emphasis added.)

2. Washington, D.C. Metropolitan Police Force

The Washington, D.C. Metropolitan Police Force also restricts when officers can point a firearm at an individual. The D.C. Metropolitan Police Department's Use of Force policy states,

No member shall draw and point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal force would be permitted. When it is determined that the use of lethal force is not necessary, as soon as practical, firearms shall be secured or holstered. (Washington, D.C. Metropolitan Police Department, Use of Force, GO-RAR-901.07, October 7, 2002).

3. Los Angeles Police Department

Los Angeles Police Department's policy on drawing and pointing a firearm states:

Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm. Officers shall not draw or exhibit a firearm unless the circumstances surrounding the incident create a reasonable belief that it may be necessary to use the firearm in conformance with this policy on the use of firearms (Los Angeles Police

Department's Drawing or Exhibiting Firearms Policy, section 556.80 (2007).)

The Los Angeles Board of Police Commissioners on September 29, 1977 adopted the following interpretation of LAPD's policy:

Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm. An officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer's reasonable belief there is a substantial risk that the situation may escalate to the point where deadly force may be justified. When an officer has determined that the use of deadly force is not necessary, the officer shall, as soon as practical, secure or holster the firearm. (Emphasis added.)

4. Denver Police Department

The Denver Police Department uses the same standard as the LAPD's for drawing and exhibiting a firearm. DPD's Use of Force policy provides:

Unnecessarily or prematurely drawing or exhibiting a firearm limits an officer's alternatives in controlling a situation, creates unnecessary anxiety on the part of citizens, and may result in an unwarranted or accidental discharge of the firearm. An officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer's reasonable belief there is a substantial risk that the situation may escalate to the point where deadly force may be justified. When an officer has determined that the use of deadly force is not necessary, the officer should, as soon as practicable, secure or holster the firearm. (Denver Police Department, Operations Manual, Use of Force Policy 105.01, emphasis added.)

5. Oakland Police Department

Oakland Police Department's Use of Force policy specifically addresses the pointing of a firearm at an individual. Its policy provides:

The pointing of a firearm at a person is a seizure and requires legal justification. No member shall draw and point a firearm at or in the direction of a person unless there is a substantial risk that the situation may escalate to the point that lethal force would be permitted. When it is determined that the use of lethal force is not necessary, as soon as practical, firearms shall be secured or holstered. (Oakland Police Department, Use of Force, October 14, 2015, emphasis added.)

6. San Francisco Police Department's Field Training Manual

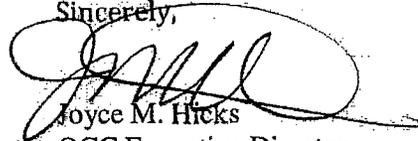
San Francisco Police Department's Field Training Manual includes the standard that the aforementioned law enforcement agencies have adopted. SFPD's Field Training

Manual states:

Officers may draw and be ready to use their firearms anytime they have reasonable cause to believe that they or another person is in danger of death or great bodily injury. (SFPD's Peace Officer Field Training Manual, June 2013 Edition, Firearms Use, Week 1, Page 65, emphasis added.)

Thank you for considering our recommendations.

Sincerely,



Handwritten signature of Joyce M. Hicks in black ink, featuring a large, stylized initial 'J' and 'H'.

Joyce M. Hicks
OCC Executive Director

Attorney assigned: Samara Marion
Policy Analyst

Kilshaw, Rachael (POL)

From: Marion, Samara (OCC)
Sent: Monday, May 02, 2016 5:52 AM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); O'Brien, Alexa (POL); Cabrera, Alicia (CAT); Suzy Loftus; Koski, J Trevor (CAT)
Subject: OCC Suggested Edits to comments on DGO 5.01, 5.02 and 5.01.1
Attachments: 5.01 Use of Force_OCCEdits.docx; 5.02 Use of Firearms and Lethal Force_OCCSuggestedEdits_032116.docx; 5.01.1 Use of Force_OCCEdits_032116.docx

Thank you for the opportunity to provide suggested edits to comments concerning our agency's position on the Use of Force policies. I look forward to Wednesday night's discussion.

Best regards,
Samara

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From: Kilshaw, Rachael (POL)
Sent: Thursday, April 28, 2016 2:45 PM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); O'Brien, Alexa (POL); Cabrera, Alicia (CAT); Suzy Loftus; Koski, J Trevor (CAT)
Subject: comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Good Afternoon:

In preparation for the Commission meetings on May 4th and May 11th when the draft Use of Force policies and the draft Conducted Energy Devices Bureau Order will be discussed, I am putting together a summary for the Commissioner to review that explains the areas in the policies where the stakeholders cannot come to a consensus. I have attached the most recent document where I have listed those areas (03/21/16). Can you please review and confirm that I have accurately conveyed your group's position and that I have included all of your group's positions? If you need to make corrections, please track your changes and send back to me. Once I have all of the stakeholders' comments back, I will

create the summary for the Commissioners that includes a cross-reference to the stakeholder's submitted documents, and send a copy to each of you. The comments will also be posted on the Commission's website and sent to the DOJ.

As the meeting is next week, I would like to start working on this over the weekend to have the documents to send to the Commissioners on Tuesday morning at 10 am. Please send your comments to me anytime between now and Monday, May 2nd at 3:00 pm.

Thank you

Sergeant Rachael Kilshaw
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OCC 05/02/16

DGO 5.01, Use of Force, Corresponding Comments (03/21/16 version)

1. SFBAR, OCC, ACLU and COH want an adjective to describe the type of communication. Some possibilities were "rapport-building," "effective," "non-violent, and "positive." POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language.
2. SFPD will incorporate the term "crisis intervention" once the DGO on CIT is adopted and the term "crisis intervention" is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term "crisis intervention" now on its website, in its training and in a Police Commission resolution.
3. SFBAR and OCC recommend ~~wants~~ the opening paragraph ~~state to read:~~ "The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary force. These are key factors in maintaining the legitimacy with the community and safeguarding the public's trust."

ACLU, SFBAR, OCC, Public Defender and COH recommend that the want to use the term "minimal force necessary;" be incorporated throughout the use of force policies. Police Executive Research Forum (PERF)'s recently released "Guiding Principles On Use of Force (March 2016) recommends that police departments adopt policies that hold themselves to a higher standard than the legal requirements of Graham v. Connor (1989) 490 U.S. 386. Several law enforcement agencies across the nation have Use of Force policies that instruct officers to use "minimal force." Departments relying on a standard of minimal force include the New Orleans Police Department, Las Vegas Metropolitan Police Department, Washington, D.C. Metropolitan Police Department, Chicago Police Department, Portland Police Department, Albuquerque Police Department, Seattle Police Department, Oakland Police Department, Milwaukee Police Department, and Police Scotland. By using the term "reasonable force" throughout the policy and removing "minimal force" as stated in the current DGO 5.01, stakeholders are concerned that the Department is taking a step backwards from the current trend in policing nation-wide to rise to a higher standard than t goes beyond the standard set in the SCOTUS case the minimum set forth in Graham v. Connor. These members of the stakeholders group believe that believe the Department has a can and should choose Use of Force policies, training and tactics that are considered best practices in the policing profession and go beyond the minimum requirements of Graham v. Connor. choice with this policy to let the community know it is committed to going beyond what is required by the law and have higher standards for its officers. They reminded the group that the Mayor, the Chief and the Commission all committed to changing the Uuse of Fforce policy by speaking about the principles in the PERF recommendations.

The POA, OFJ, Pride Alliance, APOA and LPOA concur with the term “reasonable force” being used throughout the policy and oppose the use of the term “minimal force.” Case law does not require officers to use minimal force; the courts require officers to use force that is objectively reasonable. These members of the stakeholder group state that PERF is not the authority on use of force, and is only one of many groups that have opinions on use of force policies, and point out that there is currently intense criticism regarding some of PERF’s recent recommendations on use of force.

There is no consensus on this issue throughout the policy. Anytime the term “reasonable force” is written in the policy or the term “minimal” is proposed by a member of the stakeholder group, the positions described above should be considered.

4. ACLU and the OCC recommend ~~wants to use~~ the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

5. ACLU and OCC do not believe this paragraph should be placed here. ACLU does not have a suggestion for placement.

6. SFDA/BRP, OCC, and Public Defender recommend ~~want~~ a section prohibiting biased policing ~~in this section~~ and suggest ~~want~~ the language to read: “FAIR AND UNBIASED POLICING. It is one of the Department’s guiding principles that policing occur without bias, including the use of force. Members of the Department shall carry out their duties, including with respect to use of force, in a manner free from any bias and to eliminate any perception of policing that appears to be motivated by bias. See DGO 5.17, Policy Prohibiting Biased Policing.” These members do not agree that DGO 5.017 ~~it~~ should be simply cross-referenced at the end of the policy instead of including the actual language. Stakeholders recommend that a statement about fair and unbiased policing be included in the use of force policy because fair and unbiased policing is ~~because this is~~ a key principle that can address and there is a the perception in segments of the community that the application of use of force is ~~applied~~ done in a biased manner.

POA, OFJ, LPOA, APOA and Pride Alliance recommend listing DGO 5.17, Policy Prohibiting Biased Policing, at the end of this DGO as a cross-reference.

7. The OCC, SFBAR and COH recommend changing this sentence to read, “When feasible and safe to do so, officers shall employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary

compliance. They state without this change, the language currently written means that officers would not have to attempt de-escalation techniques in three situations, when a subject is: 1) endangering the public or officers, 2) fleeing or 3) destroying evidence.

The POA, OFJ, LPOA, APOA and Pride Alliance concur with the language as written in the current draft and ask if members of the stakeholder group expect officers to attempt de-escalation techniques when the subject is endangering the public or the officer.

8. The stakeholder group cannot reach consensus on whether to use the term “shall, when feasible,” or the term “should, when feasible” throughout the entire document. When the terms “shall, when feasible” or “should, when feasible” are written in the document, the positions described below should be considered.

The OCC, SFBAR, Coalition on Homelessness (COH), San Francisco District Attorney/Blue Ribbon Panel (SFDA/BRP), Public Defender and ACLU ~~recommend~~ want to use the term “shall, when feasible.” The POA, OJF, Pride Alliance, LPOA and APOA had concerns with this term because “shall” is a mandate, but if an officer cannot perform the action because of safety, someone might judge the situation, using 20/20 hindsight, and opine that the officer would have been able to, and therefore should have, performed the action and discipline the officer.

The POA, OFJ, LPOA, Pride Alliance and APOA want to use the term, “should, when feasible.” OCC, SFBAR, COH, SFDA/BRP, Public Defender and ACLU have concerns with that term and discussed the distinction between their understanding of the two terms: “shall, when ~~feasible~~practical” means an officer is required to will take the action at a time when it is feasible, i.e. safesafe, and “should, when ~~feasible~~practical” means the action is “recommended” and thus, the officer can think about the recommendation to takeing action, but does not have to take the action even if it is feasible/safe.

DGO 3.02, Terms and Definitions, defines both terms:

- 1) Shall/Will/Must: mandatory
- 2) Should: permissive, but recommended

9. SFBAR and OCC ~~recommend~~ want a section on Crisis Intervention be included in the POLICY section. The language should include specific CIT procedures and training because -SFPD currently offers CIT training, has a website on CIT, and the 2011 Police Commission Resolution establishes a CIT program. Thus, incorporating CIT procedures and training should not be contingent on formal adoption of a CIT DGO. SFPD will incorporate, at minimum, a cross-reference to the CIT DGO once DGO on CIT is adopted.
10. POA has issues with the entire section of proportionality. They have submitted two written responses along with two Subject Matter Experts’ opinions that include: 1) the underlying offense may be minor, but an officer can use reasonable force to make the arrest, 2) the Department’s list of edged and improvised weapons are all situations where an officer could use deadly force if the suspect threatened the officer, 3) what are the principles of proportionality? and 4) it appears that the Department is stating there is only

one acceptable response to a use of force incident. The OCC recommends that PERF's Guiding Principle No.3 on proportionality be incorporated into the Use of Force policy.

11. OCC recommends the language in this section to read: "Officers shall intervene when they reasonably believe another officer is about to use unnecessary or excessive force, or when they witness an officer using unnecessary or excessive, or engaging in other misconduct. Recommended language is underlined.
12. OCC, ALCU, and SFBAR recommend adding additional language to item #5 to read: "to gain compliance with a lawful order, where the force is proportional to the timing and reasons for the order." Recommended language is underlined.

POA, APOA, LPOA, Pride Alliance, and OFJ oppose the recommendation.

13. OCC, SFBAR, CIT working group, ACLU, and COH recommend adding the following language for this section under #6. To prevent a person from injuring himself/herself. "a) Officers shall avoid or minimize the use of force against individuals who are injuring themselves and do not pose a safety risk to officers. b) In situations where some force may be warranted to prevent suicide, officers shall determine whether other tactics are available to the officer that would cause less injury, and include the language of the prohibition from using lethal force on a person who is only a danger to himself as item c. In Deorle v. Rutherford (9th Cir. 2001) 272 F.3d 1272, the Ninth Circuit ruled that "[e]very police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." (Deorle at p.1285.) Concerning the government interest in using force against a suicidal person, the Deorle court stated that, "[e]ven when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual." (Deorle at p. 1283.)

POA, OFJ, LPOA, APOA, and Pride Alliance oppose the recommendation. The law allows officers to use force to prevent a person from injuring himself, and the policy prohibits the use of lethal force. These members of the group question what officers are supposed to do to keep a person from hurting himself and get the person the help he needs. POA believes the list of lawful reasons to use force should be a comprehensive list of what is Constitutionally allowed, and training can cover the types of force that are reasonable when dealing with a person who is a danger to himself. POA provided case law that may cover this area: Glenn vs. Washington City and Adams vs. City of Fremont.

14. OCC and SFBAR recommend adding language about the critical decision making model to this section and recommends the following language be added: "Officers shall use a Critical Decision Making framework in all circumstances in which the use of force might

be needed. Officers shall collect information, assess the threats and risk, consider powers, policies, and other obligations, identify options and consider contingencies, and determine the best course of action.”

POA, OFJ, Pride Alliance, LPOA, and APOA oppose the recommendation as it requires officers to make decisions and solve problems by using only one method. Additionally, any methods for assisting officers in decision making strategies should be taught in the Academy.

15. ACLU, Public Defender, SFBAR, and OCC believe the language of 835a PC is against the principles of what the department is trying to accomplish in the revised policy. ACLU believes this language is archaic and more aggressive than what the Department is trying to achieve with the policy. ACLU believes that quoting the law sends an incorrect message to the community and the officers that is contrary to the principles of the policy. COH states this statement sends a confusing message to officers about whether to use the principles of de-escalation. SFBAR suggests moving the language but does not have a suggestion about where to place it.

POA, Pride Alliance, and OFJ, LPOA and APOA state this is the law and in the current policy. POA points out officers are currently trained on both the law and de-escalation techniques. POA suggests moving the language about 835a PC to the FORCE OPTIONS section.

16. OCC, SFBAR, SFDA/BRP recommend adding four additional factors to the list of relevant factors, based on California Supreme Court and Ninth Circuit Court cases:
- What other tactics if any are available to the officer. In Bryan v. MacPherson (9th Cir.2010) 630 F.3d 805, 831 the Ninth Circuit stated that while police officers need not employ the least intrusive degree of force, “the presence of feasible alternatives is a factor to include in our analysis.” See also Glenn v. Washington County (9th Cir.2011) 673 F.3d 864 where the Ninth Circuit stated that in addition to the Graham v. Connor factors, “[o]ther relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. See, e.g., Bryan, 630 F.3d at 831; Deorle, 272 F.3d at 1282–83.” (Glenn at p.872).
 - The ability of the officer to provide a meaningful warning before using force In Nelson v. City of Davis (9th Cir.2012) 685 F.3d 867 the Ninth Circuit ruled that the law at the time of the incident should have placed the officers on notice that the shooting of pepper spray pellets without any warning to disperse a large party on a college campus that hit a non-threatening student and caused permanent eye damage to him was excessive force.
 - The officer’s tactical conduct and decisions preceding the use of force In Hayes v. San Diego (2013) 57 Cal.4th 622 the California Supreme Court ruled that the officer’s tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability. In light of Hayes, the Los Angeles

Police Department amended its use of force procedures to include consideration of the officer's tactical conduct and decisions preceding the use of deadly force. The OCC suggests that this evaluation is equally important when evaluating the reasonableness of an officer's use of force in circumstances that do not result in death.

- Whether the officer is using force against an individual who appears to be having a behavioral or mental health crisis or who is a person with a mental illness. See Glenn v. Washington County (9th Cir.2011) 673 F.3d 864 where the Ninth Circuit stated that in addition to the Graham v. Connor factors, “[o]ther relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. See, e.g., Bryan, 630 F.3d at 831; Deorle, 272 F.3d at 1282–83.” (Glenn at p.872). In Deorle v. Rutherford (9th Cir. 2001) the Ninth Circuit ruled that “[e]very police officer should know that it is objectively unreasonable to shoot—even with lead shot wrapped in a cloth case—an unarmed man who has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.” (Deorle at p.1285.) Concerning the government interest in using force against a suicidal person, the Deorle court stated that, “[e]ven when an emotionally disturbed individual is “acting out” and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.” (Deorle at p. 1283.)

POA also mentioned the case Bryan vs. McPherson.

17. ACLU, SFBAR, COH and OCC suggest want the policy use the term to state “apply” instead of “consider.” These members feel there is a distinction between the two terms: 1) apply means taking an action, and 2) consider means only having to think about the concept.
18. POA disagrees with making the requirements in this section for both officers and supervisors mandatory. There are too many proposed requirements that officers and supervisors must perform in situations that require attention to the incident.
19. SFBAR and ACLU want the policy to list the specific standards for the situations when officers can use a specific force option. SFBAR proposed using language similar to Oakland PD that reads that force is “...justified when reasonable alternatives have been exhausted, are unavailable or are impractical” in each section of the list of force options, or at least in the beginning of this section referring to all force options.

POA, LPOA, OFJ, APOA and Pride Alliance oppose the recommendation because it requires officers to use force based on a continuum, which is not the standard.

20. ACLU, OCC and SFBAR want the language to read “serious injury.”

POA, OFJ, APOA, LPOA and Pride alliance oppose the recommendation. Serious injury has a specific legal definition in PC section 243d, and training does not support the use of ERIWs only when the public is in danger of “serious bodily injury.” The use of an ERIW is the same level of force as an impact weapon.

21. OCC, SFBAR, Public Defender and ACLU state CEDs should be taken out as a force option and discussed at a later time.

COH is opposed to CEDs as force option now and at a later time. COH has submitted written response that states the vertical support for CIT within the Department has not been implemented, and COH feels the support needs to be in place before CEDs are issued. COH also states the deaths and injuries that can result from CEDs as a reason for not implementing them.

CIT working group and SFDA/BRP take no position on CEDs as a force option. SFDA/BRP may submit a position on CEDs at some point, but the SFPD has not received as of the writing of this summary.

POA, OFJ, Pride Alliance, LPOA, and APOA are in favor of CEDs as a force option.

22. OCC, SFBAR and COH recommend that the ~~would like~~ carotid restraint to be prohibited, as proposed in the previous drafts of revised DGO 5.01.

SFDA/BRP and CIT working group take no position on the carotid restraint.

POA, OFJ, LPOA, APOA and Pride Alliance concur with the carotid restraint being a force option.

23. POA, OFJ, LPOA, Pride Alliance and APOA do not agree that carotid restraint can only be used in cases of lethal force, especially with a requirement to give a warning. These groups questioned the logic behind using the carotid restraint only in situations where lethal force is justified – why would the Department want an officer to get that close to the subject? The POA mentioned that there has never been a lethal outcome in SFPD with a properly applied carotid restraint. Members of these groups mentioned that the DOJ commended Seattle PD for having the carotid restraint.

24. ACLU wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

OCC 05/02/16

Corresponding Comments 5.01.1, Use of Force Reporting (03/21/16 version)

1. ACLU and OCC wants to use the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

2. OCC and SFDA/BRP recommend want a section that includes the requirement for data collection, analysis and distribution to the public. Police Executive Research Forum’s March 2016 Report on “Guiding Principles on Use of Force,” Principle #11 states, “to build understanding and trust, agencies should issue regular reports to the public on use of force.” PERF’s recommendation includes police agencies providing regular public reports on their officers’ use of force, demographic information about the incident and the involved officers and subjects and any efforts to prevent bias and discrimination. OCC recommends that the section state the following:

- The Department will collect and analyze its use of force data through the Use of Force Form that will enable electronic collection of data.
- The Department will post on a monthly basis on its website comprehensive use of force statistics and analysis.
- The Department will provide a written Use of Force report to the Police Commission annually
- The Department’s use of force statistics and analysis will include at a minimum:
 - The type of force
 - The type and degree of injury to the suspect and officer
 - Date and time
 - Location of the incident
 - Officer’s unit
 - District station
 - Officer’s assignment
 - Number of officers using force
 - Officer’s activity when force was used
 - Officer demographic (age, gender, race/ethnicity, number of years with SFPD, number of years as a police officer)
 - Suspect demographics including race/ethnicity, age, gender, gender identity, veteran status, primary language and other factors such as mental illness, cognitive impairment, developmental disabilities, drug and alcohol use/addiction and homelessness.

The SFPD has committed to collecting, analyzing and reporting data in a way that promotes transparency and accountability, but the Department believes that the specific data that will be collected is better articulated in a Department Unit Order. As technology and the laws on use of force data collection change, it will be easier for the Department to codify changes in requirements in a Unit Order versus a Department General Order. The Department is not opposed to listing the suggested items in a Unit Order.

OCC 05/02/16

DGO 5.02, Use of Firearms and Lethal Force, corresponding notes (03/21/16 version)

1. SFBAR, OCC, ACLU and COH ~~suggest want~~ an adjective to describe the type of communication. Some possibilities were “rapport-building,” “effective,” “non-violent, and “positive.” POA, OFJ, LPOA, APOA, and Pride Alliance concur with the current language.
2. SFPD will incorporate the term “crisis intervention” once the DGO on CIT is adopted and the term “crisis intervention” is defined. At this point the CIT DGO is pending. COH and OCC question why the term cannot be included at this time – the Department uses the term “crisis intervention” now on its website, in its training and in a Police Commission resolution.
3. SFBAR and the OCC recommend ~~wants~~ the opening paragraph state to read: “The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force by using rapport-building communication, crisis intervention and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism and to never employ unnecessary force. These are key factors in maintaining the legitimacy with the community and safeguarding the public’s trust.”

ACLU, SFBAR, OCC, Public Defender and COH recommend want to use the term “minimal force necessary.” be incorporated throughout the use of force policies. Police Executive Research Forum (PERF)’s recently released “Guiding Principles On Use of Force (March 2016) recommends that police departments adopt policies that hold themselves to a higher standard than the legal requirements of Graham v. Connor (1989) 490 U.S. 386. Several law enforcement agencies across the nation have Use of Force policies that instruct officers to use “minimal force.” Departments relying on a standard of minimal force include the New Orleans Police Department, Las Vegas Metropolitan Police Department, Washington, D.C. Metropolitan Police Department, Chicago Police Department, Portland Police Department, Albuquerque Police Department, Seattle Police Department, Oakland Police Department, Milwaukee Police Department, and Police Scotland. By using the term “reasonable force” throughout the policy and removing “minimal force” as stated in the current DGO 5.01, stakeholders are concerned that the Department is taking a step backwards from the current trend in policing nation-wide that seeks a higher that goes beyond the standard than the minimum requirement of set in the SCOTUS case Graham v. Connor. These members of the stakeholder group believe that the Department can and should choose Use of Force policies, training and tactics that are considered best practices in the policing profession and go beyond the minimum requirements of Graham v. Connor, has a choice with this policy to let the community know it is committed to going beyond what is required by the law and have higher standards for its officers. They reminded the group that the Mayor, the Chief and the

Commission all committed to changing the use of force policy by speaking about the principles in the PERF recommendations.

The POA, OFJ, Pride Alliance, APOA and LPOA concur with the term “reasonable force” being used throughout the policy and oppose the use of the term “minimal force.” Case law does not require officers to use minimal force; the courts require officers to use force that is objectively reasonable. These members of the stakeholder group state that PERF is not the authority on use of force, and is only one of many groups that have opinions on use of force policies, and point out that there is currently intense criticism regarding some of PERFs recent recommendations on use of force.

There is no consensus on this issue throughout the policy. Anytime the term “reasonable force” is written in the policy or the term “minimal” is proposed by a member of the stakeholder group, the positions described above should be considered.

4. ACLU and the OCC recommend ~~wants to use~~ the word “unnecessary” instead of “unreasonable” and “necessary” instead of “reasonable.” ACLU states that un/necessary and un/reasonable mean two different things.

The POA, OFJ, APOA, LPOA and Pride Alliance all want the use the terms “reasonable” and “unreasonable.”

There is no consensus on this issue throughout the policy. Anytime the terms “reasonable” or “unreasonable” are written, the positions described above should be considered.

5. ACLU and OCC do not believe this paragraph should be placed here. ACLU does not have a suggestion for placement.
6. OCC, SFBAR and ACLU recommend adding language based on California Supreme Court case Hayes vs. San Diego in DGO 5.02 if the SFPD does not include the language in DGO 5.01: “The reasonableness of the officer’s use of force includes consideration of the officer’s tactical conduct and decisions leading up to the use of force.”
7. ACLU, SFBAR, COH and OCC recommend want the policy ~~to~~ state “apply” instead of “consider. These members feel there is a distinction between the two terms: 1) apply means taking an action, and 2) consider means only having to think about the concept.
8. The POA questions whether the Department believes firearms are the only deadly weapons and has concerns that the Department has created a two-tiered system of response for deadly weapons: 1) firearms and 2) edged and other weapons.
9. The stakeholder group cannot reach consensus on whether to use the term “shall, when feasible,” or the term “should, when feasible” throughout the entire document. When the terms “shall, when feasible” or “should, when feasible” are written in the document, the positions described below should be considered.

The OCC, SFBAR, Coalition on Homelessness (COH), San Francisco District Attorney/Blue Ribbon Panel (SFDA/BRP), Public Defender and ACLU ~~recommend~~want to ~~use~~the term “shall, when feasible.” The POA, OFJ, Pride Alliance, LPOA and APOA had concerns with this term because “shall” is a mandate, but if an officer cannot perform the action because of safety, someone might judge the situation, using 20/20 hindsight, and opine that the officer would have been able to, and therefore should have, performed the action and discipline the officer.

The POA, OFJ, LPOA, Pride Alliance and APOA want to use the term, “should, when feasible.” OCC, SFBAR, COH, SFDA/BRP, Public Defender and ACLU have concerns with that term and discussed the distinction between their understanding of the two terms: “shall, when ~~feasible/practical~~” means an officer shall take the required action when feasible/safe. ~~will take the action at a time when it is safe,~~ and “~~S~~should, when ~~feasible/practical~~” means the officer the action is “recommended” and thus, the officer can think about the recommendation to take action, but the officer does not have to take the action even if it is feasible/safe. ~~can think about taking action, but does not have to take the action even if it is safe.~~

DGO 3.02, Terms and Definitions, defines both terms:

- 1) Shall/Will/Must: mandatory
- 2) Should: permissive, but recommended

10. The POA asks the Department if it expects officers, when faced with imminent threat of death or serious bodily injury to themselves or an innocent member of the public, to attempt de-escalation techniques.
11. The OCC, Public Defender and SFBAR recommend revising this section and including a section titled “Pointing a Firearm at a Person” and include the following language: “The pointing of a firearm at a person is a seizure and requires legal justification. No officer shall point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation will escalate to justify lethal force.”

POA, OFJ, LPOA, APOA and Pride Alliance are opposed to the recommended language and state the law does not support the statement that the situation will escalate to lethal force in order for an officer to point a firearm. The POA also state that while they know the pointing of a firearm is a use of force, they question why the Department has made it a reportable use of force.

12. POA, OFJ, APOA, LPOA, and Pride Alliance would like the policy to be consistent with current 5.02 policy drafted in 2011. The POA lists examples where an officer would have to use his/her firearm to safe his/her life or the life of another, but would be out of policy:
 - A vehicle is driving toward the officer and the officer has no reasonable means or apparent way to retreat or move out to a place of safety.
 - There is a driver on the sidewalk “actively plowing through a crowd of people.”

New York Police Department, Boston Police Department, Chicago Police Department, Cincinnati Police Department, Denver Police Department, Philadelphia Police Department, and Washington, DC Metropolitan Police Department restrict the shooting at or from a moving vehicle. For more than 40 years the NYPD has restricted officers from shooting at or from a moving vehicle. After adopting its restrictive policy in 1972, NYPD's shootings at cars dramatically reduced from nearly 1,000 to 665 the following year to fewer than a 100 per year today with no indication that officer safety was in any way jeopardized by the change in policy. PERF's Guiding Principle #8 provides that law enforcement agencies should adopt a strict prohibition against shooting at or from a moving vehicle unless someone in the vehicle is using or threatening deadly force by means other than the moving vehicle itself.

13. SFBAR suggests adding more specific language: 1) members are prohibited from intentionally positioning themselves in a location vulnerable to vehicle attack, 2) whenever possible, members shall move out of the way of the vehicle, instead of discharging his or her firearm at the operator, and 3) members shall not discharge a firearm at the operator of the vehicle when the vehicle has passed and is attempting to escape.
14. ACLU wants this language taken out. POA wants this language to remain and moved to the beginning of the policy. OCC and SFBAR want a requirement that the exceptional circumstances and the force used by the officer be articulated in writing.

Kilshaw, Rachael (POL)

From: Williams, Yulanda (POL)
Sent: Sunday, February 28, 2016 10:46 AM
To: Kilshaw, Rachael (POL)
Subject: Re: minutes from the February 23, 2016 use of force stakeholder group

Ok great thank you Rachel appreciate all of the updates.

Yulanda

Sent from my iPhone

On Feb 28, 2016, at 09:59, Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org> wrote:

Yulanda:

The minutes that I sent you are only a recap of the discussion. I did provide copies of your email to the stake holders at the meeting.

No submitted stake holders written responses were included in the minutes as there was no discussion of submitted comments, although they were provided to other stake holders that day. As stated in previous emails, I am working on incorporating all of the submitted responses into the draft copies of the policies, similar to the notes on the draft of the body worn camera policy. Your comments from your email along with any other stake holder's written response will be included and sent to the DOJ on Wednesday, 03/02/16. If the OFJ would like to submit any additional comments, DC Sainez asks that you provide them no later than Monday, 2/29/16 at 1000 hrs. to give me time to include them for submission to the DOJ. I will also send a copy of what the Commission sends to the DOJ to all of the members of the stakeholders group.

Regarding the time frame, as you can see from the minutes, other stake holders feel as you do. However, the time line was set by Commissioner Loftus. I included the proposed schedule of events in yesterday's email, and the Commission invites the stake holders to attend the Commission meetings.

Sgt Rachael Kilshaw

Sent from my BlackBerry 10 smartphone.

From: Williams, Yulanda (POL)
Sent: Sunday, February 28, 2016 8:33 AM
To: Kilshaw, Rachael (POL)
Cc: OFJ Manager; Monty Singleton
Subject: Re: minutes from the February 23, 2016 use of force stakeholder group

Rachel,

I am concerned as I do not see any mention of OFJ concerns with the proposed policy changes in accordance with the draft we received. I emailed our response to you in our absence.

The timeline is unreasonable as this is such an important policy one meeting with the stakeholders in my opinion was insufficient. Awaiting your response as our input should have been included.

Which included removal of the 1. carotid restraint, 2. the new training at the range as opposed to FATS during AO/CPT, 4. Language in reference to use if Baton and in addition to these 4. the scripted language for Supervisors to state during a response to an incident possibly while Code 33 has been requested.

This is a copy of our original email response (See Below). It was sent to you from me on 2/22/2016 in response to your email requesting our input (from OFJ Active Members).

Sgt. Yulanda Williams

Begin forwarded message:

From: "Williams, Yulanda (POL)" <yulanda.williams@sfgov.org>
Date: February 22, 2016 at 23:14:21 PST
To: "Kilshaw, Rachael (POL)" <Rachael.Kilshaw@sfgov.org>
Subject: Re: stakeholder's meeting (Comments from Sworn Members on DGO 5.01)

Good Evening,

I have spoken with several officers who indicate concerns about the elimination of the Carotid Restraint. They are stating when used under the right circumstances it has proven to be successful. There have been no deaths by usage of the Carotid Restraint by SFPD. One officer advised that this technique is utilized all the time in UFC Martial Arts. If the Carotid Restraint is discontinued the circumstances could lead to the highest option of force ---- lethal force.

Next there are issue concerning Batonusage. "Reasonable" can be argued as to how much time is reasonable; officers indicate this is an ambiguous statement. Their suggestion and preference is to revert to the previous definition established by the Supreme Court. Their question is why is this being redefined?

In DGO 5.01 C #3c Impact Weapon: Using the word "shall" does not allow for mitigating circumstances and generally prohibited the belief is there should be exceptions based on circumstances that could occur that allow no other alternatives.

Thank you,

Sgt. Yulanda D.A. Williams
Patrol Sergeant
Richmond Police Station
461 6th Avenue
San Francisco, CA 94118
Phone: (415) 666-8000
Fax: (415) 666-8060
Cell: (415) 254-9846

From: Kilshaw, Rachael (POL)
Sent: Wednesday, February 17, 2016 2:37 PM
To: Kilshaw, Rachael (POL)
Cc: SFPD, Commission (POL); Sainez, Hector (POL); Chaplin, Toney (POL); Fabbri, Carl (POL); Suzy Loftus; Cabrera, Alicia (CAT)
Subject: stakeholder's meeting

Good Afternoon All:

Thank you for your interest in attending the stakeholder's meeting to discuss and make recommendations on the Department's use of force draft policies. The meeting is scheduled for **Tuesday, February 23, 2016 from 10:00 am until 2:00 pm at the Public Safety Building, 1245 3rd Street, Room 1025 – first floor.** If you cannot attend, please feel free to designate someone from your agency to attend as a representative.

I have attached the current DGO 5.01, Use of Force, and DGO 5.02, Use of Firearms, along with the PDF versions of the revised drafts of DGO 5.01, Use of Force, DGO 5.01.1, Use of Force Reporting, DGO 5.02, Use of Firearms and Lethal Force, and the Special Operations Bureau Order on Conducted Energy Devices. These are the documents the group will be discussing at the meeting next Tuesday. The Department asks that you provide written feedback about what you see as positive changes to the policies and what you think may need improving, prior to the meeting. If possible, please send your comments to me, and I will make them available to all of the stakeholders at the meeting. Each agency/organization will have an opportunity to discuss and make recommendations on each of the four policies on February 23, 2016.

Finally, can you please advise me either by telephone or return email whether you (or a designee from your agency) will be attending?

Please contact me should you have any questions.

Sergeant Rachael Kilshaw
San Francisco Police Department
Police Commission Office
1245 – 3rd Street, 6th Floor
San Francisco, California 94158
415.837.7071 phone
rachael.kilshaw@sfgov.org

Sent from my iPhone

On Feb 27, 2016, at 15:20, Kilshaw, Rachael (POL) <Rachael.Kilshaw@sfgov.org> wrote:

Kilshaw, Rachael (POL)

From: Gracie, Teresa (POL)
Sent: Sunday, February 28, 2016 9:07 PM
To: Kilshaw, Rachael (POL)
Subject: Re: minutes from the February 23, 2016 use of force stakeholder group
Attachments: Pride Alliance response to UOF Drafted Policy.docx

Here you go. Need more time for this but here is what I have.

Teresa

From: Kilshaw, Rachael (POL)
Sent: Saturday, February 27, 2016 3:20 PM
To: Kilshaw, Rachael (POL)
Cc: Sainez, Hector (POL); Chaplin, Toney (POL); Fabbri, Carl (POL); Suzy Loftus; Cabrera, Alicia (CAT)
Subject: minutes from the February 23, 2016 use of force stakeholder group

Hello Everyone:

Sorry for the delay in getting these minutes to you. Please review and if I have misunderstood your comments, please let me know and I will correct them.

I have included members from the stakeholder group who were not able to attend, so they may see what was discussed. These minutes may help in crafting your recommendations and comments on the four policies which are due to the Commission on Monday, February 29, 2016 at 10:00 am.

On behalf of the Commission and the SFPD, thank you in advance for providing valuable feedback on the use of force policies. Your recommendations will help the Commission and the Department as we move forward on these important policy revisions.

Please contact me should you have any questions.

Sergeant Rachael Kilshaw
San Francisco Police Department
Professional Standards Division
850 Bryant Street, #577-13
San Francisco, CA 94103
415-553-1522
rachael.kilshaw@sfgov.org

Pride Alliance response to UOF Drafted Policy

We agree with other stakeholders that we need time to draft this policy. It does not help the Department nor the community to rush into any policy without a thorough examination of its content and application. When the stakeholders as they stated at our meeting, do not understand the language distinctions of "shall" verses "if practical" there cannot be an agreement of a policy.

5.01 B

Prefer: build rapport to defuse the situation to gain compliance, if practical, prior to force options.

Remove: ask questions and provide advice to diffuse conflict and achieve voluntary compliance before resorting to force options.

5.01 C

Addition: Officers should consider the possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation, when possible, may enable officers to use de-escalation techniques while maintaining public safety and officer safety.

5.01 C 4

Addition: Designate an officer to engage in thoughtful communication and/or rapport with the subject without time constraint...

5.01 E ~~F~~

Remove: DUTY TO INTERVENE. Officers shall intervene when they reasonably believe another officer is about to use, or is using, excessive force. Officers shall promptly report any use of excessive force ~~and the efforts made to intervene to a~~ ~~supervisor.~~ (the investigation of the excessive use of force by the supervisor will cover this as far as efforts to intervene).

5.01 II A

Addition: Graham vs Connor should be stated as a "objective reasonableness" standard for law enforcement in this order.

5.01 II C

Remove: UNLAWFUL PURPOSES. Penal Code Section 149 provides criminal penalties for every public officer who "under color of authority, without lawful necessity, assaults or beats any person." ~~When any degree of force is utilized as summary punishment or for vengeance, it is clearly improper and unlawful.~~

Any malicious assaults and batteries committed by officers constitute gross and unlawful misconduct and will be criminally investigated. Unnecessary and clearly stated in the last sentence)

5.01 II F

Remove: . **SUPERVISOR'S RESPONSIBILITY.** When officers are dispatched to or on-view a subject with a weapon, a supervisor ~~shall~~ immediately: (replace with, "when practical")

5.01.1 h

Remove: The supervisor's name, rank, star number and the time notified. ~~If applicable, the supervisor's reason for not responding to the scene shall also be included.~~ (This should be done by the supervisor in their mandatory review of the UOF, not the responsibility of the officer)

5.02 I B

Addition: When safe and practical under the totality of circumstances, officers shall consider other force options before discharging a firearm or using other

lethal force, if practical: (Due to the events unfolding quickly an officer may not have time to go to other uses of force to stop the threat)

5.02 | B 1

~~Remove: Officers should consider the possible reasons why a subject may not be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to use de-escalation techniques while maintaining public safety and officer safety.~~

Re-wording: **DE-ESCALATION.** As stated and more fully described in DGO 5.01, Use of Force, de-escalation techniques are actions used by officers, when safe to do so, that seek to decrease the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance. Attempt when practical, to understand the situation (medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis) while maintaining public safety and officer safety. While attempting to stop the escalation of a situation but to de-escalate the best

you can with the circumstances as you know it.

5.02 B 2

Why isn't *Tennessee v Garner* cited in this as a guide to proportionality?

5.02 B 4

Remove: SUPERVISOR'S RESPONSIBILITY TO ASSUME COMMAND. When officers are dispatched to or on-view a subject with a weapon, a supervisor shall

Addition: (Replaced with "when reasonable")

My members of the Pride Alliance have numerous questions regarding the language of the new policies as well as the training that will be put into place. But much more than that there is a large concern on the rush instead of a thoughtful examination and implementation of this new policy.

I ask again to have time to work through this policy with all stakeholders so not only we agree but there be an understanding of this policy.

It was obvious at the meeting that the majority did not understand the language in which we are held too as an absolute, example the "shalls" of our policies.

Kilshaw, Rachael (POL)

From: jeff.adachi@sfgov.org
Sent: Monday, March 21, 2016 9:16 AM
To: Kilshaw, Rachael (POL)
Subject: Point of clarification

Dear Rachael,

Hi. It was very nice to meet you at the Use of Force policy meeting last week.

I wanted to clarify our department's position on the one of the issues discussed at Friday's meeting. My office's position is that we do not support the inclusion of Tasers in the Use of Force Policy. While we do not generally support the use of Tasers on public safety grounds, we believe that any policy allowing use of Tasers should be taken up independently from the use of force policy that is before the Police Commission.

Please let me know if you have any questions or require any further clarification.

Thank you!

Best, Jeff Adachi

Kilshaw, Rachael (POL)

From: Marion, Samara (OCC)
Sent: Monday, May 02, 2016 12:05 PM
To: Kilshaw, Rachael (POL)
Cc: Adachi, Jeff (PDR)
Subject: Public Defender joining OCC comments 1/3/4/6/7 5.02 recommendations; 5.01.1 recommendations 1/2.

Hi Sergeant Kilshaw: I hope you are well. If you did not hear separately from Public Defender Jeff Adachi, he would like to join OCC's comments 1/3/4/6/7 to DGO 5.02 and recommendations 1/2 to 5.01.1. (see e-mail below).

Thanks,
Samara

Samara Marion
Policy Attorney
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San Francisco, CA 94102
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Date: Mon, 2 May 2016 08:53:23 -0700
From: jeff.adachi@sfgov.org
Subject: Re: my comments/recommendation regarding the use of force policies and the Conducted Energy Device Bureau Order

Thank you Samara. Please add the Public Defender to 1/3/4/6/7 5.02 recommendations consistent with your agencies; please add Public Defender to 5.01.1 recommendations 1/2.

Best, Jeff

Sent from my iPad



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February 22, 2016

MARTIN HALLORAN
President

TONY MONTOYA
Vice President

MICHAEL NEVIN
Secretary

JOE VALDEZ
Treasurer

VAL KIRWAN
Sergeant At Arms

President Suzy Loftus
San Francisco Police Commission
1245 3rd St. 6th floor
San Francisco, CA 94158

Dear President Loftus:

POA Response to Department Draft Use of Force

This is the POA's initial response to the proposed changes to the SFPD Use of Force Policy.¹ The changes in the new policy are sweeping and the POA's concerns are manifold. Additional responses will be forthcoming through subsequent correspondence, the Working Group meetings (which the POA will attend in an observer-only capacity) and the meet-and-confer process over these changes.²

Draft Department General Order (DGO) Section 5.01

1. Section II. A. 5 [Use of Force Must Be For A Lawful Purpose]

describes instances when an officer may use reasonable force including:
"To prevent a person from injuring himself/herself, unless the person also poses an imminent danger of death or serious bodily injury to another life or officer."

- a. This is confusing: Can an officer use non-deadly force on a subject who is injuring themselves?
- b. Careless use of terms. The Department uses "imminent" and "immediate" in different sections, without distinguishing their meaning. Officers have been trained and understand the

¹ On very short notice, the Department asked for initial responses before the February 23, 2016 Working Group meeting.

² The POA demanded to meet and confer about these policy changes on Friday, February 19, 2016.

c. difference. But the Department must be more careful in intermixing terminology with different legal definitions. [See section II. B. 1.,.]

2. **Section II. B [Use of Force Must Be Reasonable]** states: *"Under the Fourth Amendment of the United States Constitution and California Penal Code section 835(a), an officer's decision to use force, and to use a particular type and degree of force, must be objectively reasonable under the totality of the circumstances."*

a. Current DGO 5.01 cites the exact language of California Penal Code section 835a. This gives California peace officers the authority to use reasonable force. We encourage the draft DGO to include this important language as well:

"Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, or to prevent escape, or to overcome resistance."

3. **Section II. E [Duty to Provide Medical Assessment]** states, *"If the emergency medical response is excessively delayed under the circumstances, officers should contact a supervisor to coordinate and expedite the medical assessment or evaluation of the subject."*

a. We need data. How can officers and supervisors be responsible for *outside agency* medical response to their requests? We are unfamiliar with any data suggesting that subjects are not getting prompt medical treatment. Can you provide data suggesting otherwise?

b. Unnecessary liability. We encourage the Department to work with outside agencies (S.F.F.D. and AMR) to develop response protocols to critical incidents involving injured parties. However, we have concerns that this language in the proposed DGO will expose our members to unnecessary liability.

4. **Section II. F. 2 [Supervisor's Responsibility]** states: *"When officers are dispatched to or on-view a subject with a weapon, a supervisor shall immediately remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources."*

- a. Does the Department expect supervisors to repeat this reminder every time officers "are dispatched to or on-view a subject with a weapon?" Will they carry the reminder (or admonition) in their pockets like a *Miranda* card to recite verbatim as the DGO suggests?
- b. Has the Department considered the significant officer safety concerns when officers or dispatchers are trying to give critical information and supervisors are trampling on the radio to recite this reminder to responding units? Historically, when an officer calls "Code 33," it means the radio traffic is cleared for emergency communications only. Does this reminder serve as an emergency?
- c. Is the Department changing the active shooter response methods by its personnel? Current training involves members "moving to contact" violent homicidal suspects without delay. It seems contrary to every recent study to have officers "finding cover" and "engaging in thoughtful communication" when, for instance, children are actively being slaughtered in a school?

5. **Section III. A. 3. [Prohibited Use Of Control Holds]** *Officers are prohibited from using the following control holds: a. Carotid restraint; and b. Choke hold.*

- a. Banning the carotid restraint makes no sense. There are approximately 35 carotid restraints per year by SFPD. It is a force option used with significantly greater frequency than deadly force. The POA knows of no instance where a suspect suffered serious injury as a result of carotid restraint. Not only were suspects not seriously injured, but others (officer, suspect, civilian) avoided serious injury BECAUSE the carotid restraint was used? The Department has access to these reports. Have they been reviewed, or considered, and will this data be shared?
- b. The choke hold myth. The SFPD has never trained in "choke holds." Why is the Department banning something never taught to its officers? Can the Department provide any examples of this hold being used?

6. **Section III. C. 3. [Impact Weapons-Prohibited Uses]** *"Officers shall not (B.) Strike a handcuffed prisoner with an impact weapon. (C.) Raise an impact weapon above the head to strike a subject."*

- a. The Working Group must watch the scenario from the Department's Force Options training which involves a handcuffed (hands behind back) subject walking through a mall with a security guard. The suspect, who clearly has expert martial arts skills, jumps through the handcuffs, moving them from behind his body to the front, then proceeds to beat people to death using his handcuffs and feet. Officers are EXPECTED to immediately engage the suspect. Most use a baton to do so, and it is a reasonable response. (*A member of the media who took this training could not stop shooting her firearm into the crowd of the people to get the subject to stop.)

b. Current training teaches officers where to strike (or where not to strike) a suspect. Why does it matter if an officer raises his or her arms above his or her head to accomplish a lawful tactic? This prohibition seems arbitrary and should be fully explained.

7. **The last two sentences of this DGO draft state the following:** *"If exceptional circumstances occur, not contemplated by this order, an officer's use of force shall be reasonably necessary to protect others or himself or herself. The officer shall articulate the reasons for employing such use of force."*

- a. We recommend giving this paragraph a heading and moving these sentences to the first page of this order—just like the current DGO 5.01. Exceptional circumstances happen and can never be fully anticipated by any order. Officers need to know we expect them to survive under any circumstance they might face.
- b. We understand that we are providing multiple examples of "exceptional" circumstances in this response. We do NOT believe you can ban or prohibit an action in one section of the order only to rely on this language when you find the officers' actions reasonable. We expect the City Attorney's Office should be able to weigh in on this argument, as it has in the past.

Draft DGO 5.01.1 (Use of Force Reporting)

8. **Section I.A. [Reportable Uses of Force]** *"Officers shall report any use of force involving physical controls where the subject is injured or claims to be injured, personal body weapons, chemical agents, impact weapons, extended range impact weapons, vehicle interventions, conducted energy devices, and firearms. Additionally, officers shall report the intentional pointing of conducted energy devices and firearms at a subject."*

- a. Since the Department wants to expansively increase its use of force reporting requirements, has consideration been given to how it will explain the inevitable resulting increase in use of force to the public and Police Commissioners? While the POA appreciates and accepts most of these options listed above are in fact "uses of

force," no court requires they all be "reportable" uses of force. We expect that if this is adopted that both the Department and Police Commission spend the time to educate the public as to the reason for an increase in reportable force incidents.

- b. Unlike current use of force reporting, there will be many cases where a subject is unaware reportable force was even used against him. That is because a person may submit to the arrest and not even see force options pointing in his direction.
- c. The current use of force log is antiquated. It tracks force by each member and each subject separately. In a case where 4 armed robbery suspects are stopped on a high-risk felony traffic stop, there *should be* numerous police officers with firearms drawn. These reportable force incidents should be tracked by incident number. That will list all the involved parties and accomplish your goals.

Draft DGO 5.02 (Use of Firearms)

9. **Section I. D. 5. [Moving Vehicles]** *"An officer shall not discharge at the operator or occupant of a moving vehicle unless the operator or occupant poses an **immediate** threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle."*

- a. The current DGO 5.02 was last revised in 2011. This proposed new version erases a page's worth of language about engaging threats in moving vehicles. Unfortunately, the language removed described exceptions to the current *restrictive* policy. This is clearly now a policy of *prohibition*. The exceptions in the current policy allowed for the use of a firearm for the following reasons:
 - i. When the officer had no reasonable and apparent way to retreat or otherwise move to a place of safety. Now it would seem an officer must choose between his or her life or violating policy.

- ii. In defense of another person when the officer has reasonable cause to believe that the [innocent] person is in imminent danger of death or serious bodily injury. If a person is armed with *only* a vehicle and actively plowing through a crowd of people during a parade the officer would, under this policy, only be able to stand and watch.
- iii. To apprehend a person who has committed a violent felony involving lethal force AND a substantial risk exists that the person will cause death or serious bodily injury if apprehension is delayed. Unlike a suspect on foot who is a violent, fleeing felon—a suspect who enters a vehicle will now be free to leave. This proposal turns a vehicle into a safety zone for violent felons to escape.

Note:

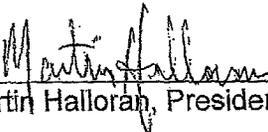
- *The latest quarterly summary provided to the Police Commission of officer-involved shootings lists a brief synopsis of cases since 2000. This is a public document that we encourage you to review again.
- Since DGO 5.02 was adopted in March of 2011, there have been 11 cases involving a threat in a moving vehicle. None of those cases would now be "In Policy" if the language in this draft is adopted. However, any reasonable person reviewing the facts of these cases would find it impossible to believe that the officers acted improperly.
- One may wish that threats caused by moving vehicles will cease. But in the real world, where police officers patrol, there will be cases involving violent suspects seeking to harm innocents by way of their vehicles. The only question remaining is if the Department and Police Commission will trust them to make reasonable choices in dangerous, rapidly-evolving situations. This proposed policy change precludes that.

Draft Bureau Order for Conducted Energy Devices (CED)

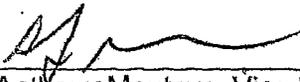
- The POA has authored a draft CED policy. It should be considered. Numerous concerns undermine this Department draft policy. Why would

the Department limit permissible use to only "armed" suspects? If an officer or citizen is being beaten to death by the hands or feet of a suspect, an officer could articulate a reasonable need to use a firearm. *Why would an ECD be limited in these instances if it might prevent the use of a firearm by an officer?*

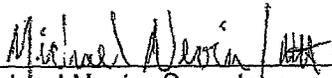
- Other concerns/questions involve the very limited authorized users, when it can (or cannot) be used, how it is reported and investigated. We believe it would be better served to start from scratch with regard to considering this Department draft.



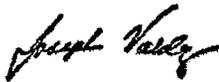
Martin Halloran, President



Anthony Montoya, Vice President



Michael Nevin, Secretary



Joseph Valdez, Treasurer



Stephen Val Kirwan, Sgt. At Arms

cc: Greg Suhr, Chief of Police, San Francisco Police Department
Micki Callahan, Director of Human Resources, City and County of San Francisco



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February 29, 2016

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MICHAEL NEVIN
Secretary

JOE VALDEZ
Treasurer

VAL KIRWAN
Sergeant At Arms

President Suzy Loftus
San Francisco Police Commission
1245 3rd St. 6th floor
San Francisco, CA 94158

Dear President Loftus:

**SAN FRANCISCO POLICE OFFICERS' ASSOCIATION INITIAL RESPONSE TO THE SAN FRANCISCO
POLICE DEPARTMENT'S PROPOSED REVISIONS TO ITS USE OF FORCE POLICIES**

This is the POA's response to the proposed changes to the SFPD Use of Force Policy.¹ The POA has asked to meet and confer with the Department over these proposed changes.

The proposed revisions to the use of force policy represent a clear break in intent from the current Use of Force and Use of Firearms policy. As written, they appear to be at odds with federal and state law and longstanding precedents and best practices.

The Department *should* want to update DGO 5.01 (last revised 10/4/95); however, the proposed order upends the spirit and intent of the current order.

The current Department General Order specifies under section I. C:

Officers are permitted to use whatever force is reasonable and necessary to protect others or themselves, but no more. The purpose of this policy is not to restrict officers from using sufficient force to protect themselves or others, but to provide general guidelines under which force may be used. If exceptional circumstances occur which are not contemplated by this order, officers should use any force reasonably necessary to protect themselves or others; however, they must be able to articulate the reasons for employing such force.

The current Department General Order specifies under section I. E. 1:

¹ The initial POA response letter was dated February 22, 2016.

Officers must frequently employ the use of force to effect arrests and ensure the public safety. It is not intended that any suspect should ever be allowed to be the first to exercise force, thus gaining an advantage in a physical confrontation. Nothing in this order should be interpreted to mean that an officer is required to engage in prolonged hand-to-hand combat with all its risks before resorting to the use of force that will more quickly, humanely and safely bring arrestee under physical control.

Deviating from the legal standard of "reasonableness" is dangerous. The Department is attempting to substitute in its place a smorgasbord of options limited to specified scenarios. The revisions appear to have been written in a bubble—they ignore that use of force incidents are dynamic, fast-paced, and constantly evolving. There is no acceptable reason for the Department to force officers to ignore and forgo their legal rights, protections, and obligations in the necessary performance of their duty.

Draft Department General Order (DGO) Section 5.01

1. The opening statement of this draft policy contains an excerpt from the Law Enforcement Code of Ethics; however, the code and its intent are misstated. First, the full excerpt from the line referenced should be: "With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence, and never accepting gratuities."

Furthermore, the Code of Ethics represents ideals to be strived towards, not inflexible requirements. *Is it the Department's contention that an officer can be charged for Neglect of Duty for failing to follow the Code?* If that is not the intent, why have language that the Code is "required"? We believe the word "practical" needs to be replaced with "feasible" and that "unnecessary" should be replaced with "unreasonable."

2. **Section I. A. [Sanctity of Human Life]** describes the laudable goal of being "committed to the sanctity and preservation of all human life, human rights, and human dignity." However, the revisions to the policy set up a conflict between this ideal and the realities of police work. For instance, *if the Department intends officers to preserve "all human life," then how could it ever justify the use of deadly force within policy grounds?* Exception to the laudable goal need to be created.

- a. *Is it now the Department's policy that officers treat all person's lives, rights, and dignity equally, without regard to the person's actions? Consider this scenario: a suspect is threatening an innocent bystander, and the officer's only recourse to end the threat is to seize the suspect (a permissible deprivation of the right of liberty) using force as reasonable (and necessarily endangering the suspect's life and livelihood), and restraining the suspect (thereby compromising that suspect's dignity). How should the officer value the life, rights, and dignity of the innocent bystander over that suspect and effect this arrest? Or is it the Department's contention that the officer should take no action, thus valuing the innocent bystander and the suspect equally?*
 - b. It seems that this section and subsequent sections better fit a mission statement than a Use of Force policy authorizing and outline peace officer authority, responsibility, and duty to use reasonable force in accordance with the law.
 - c. The term "sanctity" has religious connotations and is murkier than "preservation." "Human rights" and "human dignity" mean different things to different people. According to many "human rights" groups, the use of liquid chemical agent and CEDs is an affront to "human rights" and "human dignity." Exposing officers to unnecessary censure by utilizing these terms in the Department's own policy creates additional concerns and increases the likelihood of liability for the Department.
3. **Section I. B. [Thoughtful Communication]** states that officers should attempt to "diffuse conflict and achieve voluntary compliance before resorting to force options." We presume that the Department intended that officers **defuse** conflict, not geographically spread it over a wider area or among a large group of people, as the term diffuse connotes.
- a. *Does the Department believe that the ability to achieve "thoughtful communication" is entirely dependent on the officer's willingness and capability? If not, why are barriers to successful communication created by the suspect not being acknowledged in this section? For example, a suspect incapable of communicating because of a medical, mental or physical impairment, language barrier, drug interaction or emotional crisis.*

- b. *What is "proper voice intonation" and who determines this?*
 - c. *Why has the Department stopped using the long-established and successful POST approved and taught concept of Tactical Communication? Why substitute in its place the vague and untested concept of "Thoughtful Communication"?*
 - d. *The term "non-compliance" is too vague; it has many meanings. Our officers are trained to distinguish between passive vs. active resistance. Courts also apply these terms.*
4. **Section I. C. [De-escalation]** is first described in this section and repeated (with some differences) in all four of the proposed policies. De-escalation, as a policy, is only tangentially related to the use of force. Given the emphasis on de-escalation, it should be contained in its own order.

De-escalation tactics are the opposite of use of force tactics ("officers should employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and to increase the likelihood of voluntary compliance"). Yet the proposed CED policy describes "arcing" the CED (which, per that policy, is a reportable use of force) in order to achieve voluntary compliance without the use of force. This implies that a reportable use of force may be a valid de-escalation tactic. But it seems to conflict with the other language emphasizing de-escalation.

- a. Any reference to a suspect's "criminal intent" should be removed.
- b. *Does this policy only apply if the subject is "actively endangering the safety of the public or an officer, fleeing or destroying evidence [sic]" as is written? If a suspect is a passive resister, officers need not attempt to resolve the incident and obtain voluntary compliance through de-escalation?*
- c. *What does the Department mean by the phrase "actively endangering"? Is it less than actually assaulting an officer or another person? (This would presumably invoke self-defense/defense of another responsibilities.) If a suspect repeatedly endangers another person, stops endangering them, and then begins again in a repeating cycle, what are the implications vis-a-vis this policy?*

- d. This policy indicates that officers shouldn't use force against a suspect meeting the criteria in this section and instead should attempt de-escalation. *Does that mean officers cannot point their firearms at a suspect (a reportable use of force) who possess a deadly weapon but is not actively endangering another person? Can officers no longer point their firearms at suspects during high-risk felony stops unless those suspects are attempting to flee, destroy evidence or actively endanger another person?*
- e. Under the proposed Unit Order for CEDs, the tactic of "arcing" in order to obtain voluntary compliance is discussed and recommended; however, that would appear to be in conflict with the de-escalation policy for the scenarios discussed in that order.
- f. *In the short span of time it takes most incidents to resolve, how can the Department expect an officer to know and understand why a particular subject is non-compliant AND utilize that knowledge?*
- g. The list of de-escalation tactics assumes that an officer has sufficient resources on-hand for "isolating and containing the subject" and protecting any bystanders wishing to record the encounter. It further implies a duty to retreat from a non-compliant individual ("Create time and distance from the subject by establishing a buffer zone") that is not consistent with California law nor case law. The language implies that officers are "aggressors" ("[create distance] to avoid creating an immediate threat that may require the use of force"), again in defiance (or ignorance) of legal precedent.
- h. This policy would require officers to tactically re-position as often as necessary to maintain the reaction gap, protect the public and preserve officer safety, which would seem to mean that as often as the suspect moves the officers would be obligated to move as well. This is inherently dangerous. It compromises officers' ability to contain suspects. Constant repositioning by officers increases suspects' opportunities to escape, assault officers or attack civilians or take them hostage. This change sounds good on paper but on the streets it will unnecessarily expose all parties to increased danger.

- i. Point 4 states that an officer on scene is to “designate an(other) officer to engage in thoughtful communication with the subject without time constraint”. *Who makes this decision? What criteria are used to designate the officer? How will that information be effectively communicated? Under what circumstances and what authority could that initial decision be modified or countermanded? How is the designated officer supposed to ‘thoughtfully communicate’, with what tools and training, and under what constraints (other than time)?*
5. **Section I. D. [Proportionality]** discusses the severity of the offense or threat to human life juxtaposed with the level of force used against the suspect.
 - a. The first part of the first sentence: “It is important that an officer’s level of force be proportional to the severity of the offense committed,” is problematic. The initial offense committed is not necessarily a determining factor in the reasonableness of the force used, and therefore may not be “important.” For example, a person who commits the crime of fare evasion (an infraction), who then flees detention may be lawfully pursued and force may be reasonably used in order to take this person into custody, despite the fact that the initial crime was “minor”. And, in the opinion of the POA, an individual who initially flees from a fare evasion incident and then fires on pursuing officers should no longer be considered a “fare evader.”
 - b. The second part of the first sentence of this policy is legally accurate, and it says no more than the standard concept of criminal law that deadly force may not be used to defend against non-deadly force. However, most of the examples that the Department provides in the next sentence, “an edged weapon, improvised weapon, baseball bat, brick, bottle or other object” are examples of armed suspect encounters where the use of deadly force by the threatened officer COULD be justified. If an officer faces a suspect armed with a baseball bat or knife, this is a deadly force encounter and the officer would be inadequately defended with less-than-deadly force. This is EXACTLY the reason that, when deploying less-lethal tactics (ERIW, etc.), officers do not attempt deployment

without having a cover officer properly armed with a deadly force option.

- c. *What are the "principles of proportionality?" If it is the Department's intention that lower levels of force can be "proportionally" used to defend against lower level, but still potentially deadly threats, does the converse also apply? If a suspect has a mass casualty device, what would the officer's "proportional" response be?*
- d. The last sentence implies that there is always one and only one correct option in the use of force ("Officers may only use the degree of force that is reasonable and necessary..."). This is an inaccurate implication; officers may use ANY degree of force so long as the force used is reasonable. There is no requirement that the force used be minimal or optimal for the given situation; in fact, the courts (9th Circuit) have repeatedly stated that the fact that another officer may have used a different force option, or that a different force option would have been more effective in any specific encounter is irrelevant so long as the option chosen was reasonable from the point of view of an officer with similar training and experience.

6. **Section II. A. 5 [Use of Force Must Be For A Lawful Purpose]**

describes instances when an officer may use reasonable force including: *"To prevent a person from injuring himself/herself, unless the person also poses an imminent danger of death or serious bodily injury to another life or officer."*

- a. This is confusing: *Can an officer use non-deadly force on a subject who is injuring themselves?*
- b. Careless use of terms. The Department uses "imminent" and "immediate" in different sections, without distinguishing their meaning. Officers have been trained and understand the difference. But the Department must be more careful in intermixing terminology with different legal definitions. [See section II. B. 1.] [Also see #1 in this letter.]

7. **Section II. B [Use of Force Must Be Reasonable]** states: *"Under the Fourth Amendment of the United States Constitution and California Penal Code section 835(a), an officer's decision to use force, and to use a*

particular type and degree of force, must be objectively reasonable under the totality of the circumstances.”

- a. Current DGO 5.01 cites the exact language of California Penal Code section 835a. This gives California peace officers the authority to use reasonable force. We encourage the draft DGO to include this important language as well:

“Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, or to prevent escape, or to overcome resistance.”

- b. The proposed DGO omits the majority of 835a PC. *Does the Department disagree with those parts? If not, why the omission in light of its applicability?*

8. **Section II. E [Duty to Provide Medical Assessment]** states, *“If the emergency medical response is excessively delayed under the circumstances, officers should contact a supervisor to coordinate and expedite the medical assessment or evaluation of the subject.”*

- a. *What is an excessive delay? Who determines what is excessive? As written, the duty seems to fall on the officers to make this determination. What medical training will officers receive in order to judge the reasonableness of any delay? Under current police protocols, officers are not responsible for determining the code (i.e., 1-3) of a responding ambulance. If an officer makes a determination that there is an excessive delay, and the officer’s determination violates medical response protocols, does the responding supervisor follow the existing protocol governing medical response or does the supervisor override DEM’s determination based on the officer’s judgment? Are DEM and SFFD aware of these proposed changes to existing protocols? Will a*

dispute between agencies expose the City or the Department to additional liability?

- b. We need data. *How can officers and supervisors be responsible for outside agency medical response to their requests? We are unfamiliar with any data suggesting that subjects are not getting prompt medical treatment. Can you provide data suggesting otherwise?*
- c. Unnecessary liability. *We encourage the Department to work with outside agencies (S.F.F.D. and AMR) to develop response protocols to critical incidents involving injured parties. However, we have concerns that this language in the proposed DGO will expose our members to unnecessary liability.*

9. **Section II. F. 2 [Supervisor's Responsibility]** states: *"When officers are dispatched to or on-view a subject with a weapon, a supervisor shall immediately remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources."*

- a. *Does the Department expect supervisors to repeat this reminder every time officers "are dispatched to or on-view a subject with a weapon?" Will they carry the reminder (or admonition) in their pockets like a Miranda card to recite verbatim as the DGO suggests?*
- b. *Has the Department considered the significant officer safety concerns when officers or dispatchers are trying to give critical information and supervisors are trampling on the radio to recite this reminder to responding units? Historically, when an officer calls "Code 33," it means the radio traffic is cleared for emergency communications only. Does this reminder serve as an emergency?*
- c. *Is the Department changing the active shooter response methods by its personnel? Current training involves members "moving to contact" active shooter suspects without delay. It seems contrary to every recent study to have officers "finding cover" and "engaging*

in thoughtful communication" when, for instance, children are actively being slaughtered in a school.

- d. *Does the Department actually expect that a supervisor will respond to every call received and dispatched by DEM where the untested information given indicates that a suspect has a weapon? If so, will the Department be increasing supervisor staffing levels to account for the increased calls for service as well as the additional workload and supervisor documentation contemplated in this and the other proposed orders? Also since point 3 of this section requires that supervisors, "Upon arrival, assuming command" of the incident, regardless of what the actual incident is, does the Department intend that supervisors retain command formally (with a command post, etc.) or informally until the resolution of every call for service they respond to, regardless of merit?*

10. **Section III [Force Options]** omits the use of a police dog as a reportable use of force.

11. **Section III. A. 1. [Force Options...Purpose]** The phrase "minimal use of force" is not required by the 9th Circuit. The test is reasonableness under the totality of circumstances.

12. **Section III. A. 3. [Prohibited Use Of Control Holds]** *Officers are prohibited from using the following control holds: a. Carotid restraint; and b. Choke hold.*

- a. Banning the carotid restraint makes no sense. There are approximately 35 carotid restraints per year by SFPD. It is a force option used with significantly greater frequency than deadly force. The POA knows of no instance where a suspect suffered serious injury as a result of carotid restraint. Not only were suspects not seriously injured, but others (officer, suspect, civilian) avoided serious injury BECAUSE the carotid restraint was used. The Department has access to these reports. *Have they been reviewed, or considered, and will this data be shared?*
- b. The choke hold myth. The SFPD has never trained in "choke holds." *Why is the Department banning something never taught to its officers? Can the Department provide any examples of this hold*

being used? What specific holds are meant in this prohibition against the "choke hold"?

- c. *Is it the Department's intention to leave smaller officers with no recourse when dealing with an assault from an unarmed but larger suspect than to use their firearm? The effectiveness of liquid chemical agents is compromised in close quarters (and may pose a threat to the officer or officers), and normal physical controls and baton strikes are frequently ineffective when encountering suspects with a sufficient size differential. How does the Department expect these officers to respond without this effective tool, short of headlong flight or the use of a firearm against an unarmed attacker?*
- d. The carotid restraint has proven to be very effective against suspects who are on stimulants and/or hallucinogens, where other levels of force historically fail or would be ineffective. Without this tool, officers encountering an unarmed suspect under the influence of a controlled substance who is a threat to the officers or the public may have no reasonable means to take the suspect into custody short of the use of lethal force. *Is it the Department's intent to leave officers with no force option other than their firearms when dealing with such suspects?*
- e. The Police Executive Research Forum (PERF) reviewed the SFPD policies in 2008, issued a written report, and found the Carotid to be a reasonable force option. *Has PERF's position since changed? SFPD recently retained its carotid restraint and was praised by its independent police auditor.*

13. Section III. C. 3. [Impact Weapons-Prohibited Uses] *"Officers shall not (B.) Strike a handcuffed prisoner with an impact weapon. (C.) Raise an impact weapon above the head to strike a subject."*

- a. The Working Group must watch the scenario from the Department's Force Options training which involves a handcuffed (hands behind back) subject walking through a mall with a security guard. The suspect, who clearly has expert martial arts skills, jumps through the handcuffs, moving them from behind his body to the front, then proceeds to beat people to death using his handcuffs and feet.

Officers are EXPECTED to immediately engage the suspect. Most use a baton to do so, and it is a reasonable response. (*A member of the media who took this training could not stop shooting her firearm into the crowd of civilians to get the subject to stop.)

- b. Current training teaches officers where to strike (or where not to strike) a suspect. *Why does it matter if an officer raises his or her arms above his or her head to accomplish a lawful tactic?* If a suspect was at some level above an officer and threatening the officer or another individual, the officer may have no recourse but to raise his or her baton above his or her head in order to strike the suspect. This prohibition seems arbitrary and should be fully explained.

14. **Section III. D. [Extended Range Impact Weapon (ERIW)]** states that "An ERIW is generally not considered to be a lethal weapon when used at range of 15 feet or more." This language is problematic; for instance, it implies that an ERIW *is* generally considered a lethal weapon when used at a range of less than 15 feet. This contradicts DB 15-234, which holds the optimal range to be between 15-60 feet. The language should be more consistent with the existing Department bulletin and relevant training.

The E.R.I.W. has been the equivalent of a baton until now. This draft mandates that a suspect be armed with a weapon. *Why would an E.R.I.W be limited in these instances if it might prevent the use of a firearm by an officer?*

15. **The last two sentences of this DGO draft state the following:** "*If exceptional circumstances occur, not contemplated by this order, an officer's use of force shall be reasonably necessary to protect others or himself or herself. The officer shall articulate the reasons for employing such use of force.*"

- a. We recommend giving this paragraph a heading and moving these sentences to the first page of this order—just like the current DGO 5.01. Exceptional circumstances happen and can never be fully anticipated by any order. Officers need to know that we expect them to survive under any circumstance they might face.

- b. We understand that we are providing multiple examples of “exceptional” circumstances in this response. We do NOT believe you can ban or prohibit an action in one section of the order only to rely on this language when you find the officers’ actions reasonable. We expect the City Attorney’s Office should be able to weigh in on this argument, as it has in the past.

Draft DGO 5.01.1 (Use of Force Reporting)

16. Section I.A. [Reportable Uses of Force] *“Officers shall report any use of force involving physical controls where the subject is injured or claims to be injured, personal body weapons, chemical agents, impact weapons, extended range impact weapons, vehicle interventions, conducted energy devices, and firearms. Additionally, officers shall report the intentional pointing of conducted energy devices and firearms at a subject.”*

- a. It is difficult to judge this new policy in part because it refers to a form that does not exist (“Supervisory Use of Force Evaluation form”, which is apparently different from the Use of Force log, also listed).
- b. *Since the Department wants to expansively increase its use of force reporting requirements, has consideration been given to how it will explain the inevitable resulting increase in use of force to the public and Police Commissioners? While the POA appreciates and accepts most of these options listed above are in fact “uses of force,” no court requires they all be “reportable” uses of force. In the specific instance of pointing a firearm, it remains the ONLY reportable use of force that CANNOT be the proximate cause of any injury or complain of pain by the subject. We expect that, if this is adopted, that both the Department and Police Commission educate themselves and the public as to why reportable force incidents are increasing.*
- c. Unlike current use of force reporting, there will be many cases where a subject is unaware reportable force was even used against him. That is because a person may submit to the arrest and not even see force options pointing in his direction.
- d. The current use of force log is not an effective means of complying with use of force reporting requirements. It is unnecessarily

redundant in many situations. It tracks force by each member and each subject separately. In a case where 4 armed robbery suspects are stopped on a high-risk felony traffic stop, there *should be* numerous police officers with firearms drawn. These reportable force incidents should be tracked by incident number. That will list all the involved parties and accomplish your goals.

17. Intentionally pointing a CED at a suspect is a reportable use of force. However, in the Bureau Order, it is suggested that when verbal warnings are ineffective, an officer may choose to display the electrical arc (provided that a cartridge has not been loaded into the devise), or the laser in a further attempt to gain compliance prior to the application of the CED. So, in order to display the arc or laser sighting, an officer has to reasonably point his or her CED at the suspect. An officer will get cited for a reportable use of force in a de-escalation strategy to avoid using force. Pointing a CED at a suspect to gain voluntary compliance should not be a reportable use of force.

18. **Section II. B. [Supervisor's Responsibility]** states that the responsibility for conducting a "supervisory evaluation" along with filling out the appropriate "Supervisory Use of Force Evaluation Form", making the Use of Force Log entry, and reviewing the report falls on the senior supervisor present regardless of district or assignment (or by implication, rank). *Is it the Department's intention that whoever is the highest ranking and senior-most supervisor on-scene shall handle the evaluation? Does that include scenes at which lieutenants, captains, ranking members of specialized units, SIT sergeants, etc., respond to? Is the responsible supervisor required to review the incident report prior to ending his or her shift, as implied in this order?*

Draft DGO 5.02 (Use of Firearms)

Note that as much of the wording in the first few paragraphs of this order mirrors that of the proposed DGO 5.01, the same comments and questions apply.

19. **Section I. A. [General]** states, "It is the policy of this Department to discharge a firearm or use other lethal force only when other force options would be ineffective or inadequate to protect the safety of the public and the safety of police officers." This is an incomplete statement in general and is inconsistent with **Section I. D. 1. [Discharge of firearms or other**

use of lethal force]. Officers may use lethal force under the current policy AND under this draft under the following circumstances:

- a. *In self-defense when the officer has reasonable cause to believe that he or she is in imminent danger of death or serious bodily injury; or*
- b. *In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury. However, an officer may not discharge a firearm at, or use lethal force against, a person who presents a danger only to him or herself, and there is no reasonable cause to believe that the person poses an imminent danger of death or serious bodily injury to the officer or any other person; or*
- c. *To apprehend a person when both of the following circumstances exist:*
 - i. *The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of lethal force; AND*
 - ii. *The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed; or*
 - iii. *To kill a dangerous animal. To kill an animal that is so badly injured that humanity requires its removal from further suffering where other alternatives are impractical and the owner, if present, gives permission; or*
 - iv. *To signal for help for an urgent purpose when no other reasonable means can be used.*

20. **Section I. B. 1. [De-escalation]** repeats much of the language from DGO 5.01, except that this section is even less appropriate in a Use of Firearms policy. Officers may use lethal force only if a fairly serious set of circumstances exist. *Does the Department believe that officers, when faced with the imminent threat of death or great bodily injury to themselves or an innocent member of the public, should attempt to initiate de-*

escalation tactics? If an officer, believing that an innocent bystander is about to be killed by an armed assailant, attempts a de-escalation tactic which then fails, resulting in the death of that innocent bystander, does the Department believe the officer has appropriately discharged their duty to safeguard the public?

21. **Section I. B. 3. [Subjects Armed With Weapons Other Than Firearms]** states: *"Except where circumstances make it reasonable for an officer to take action to protect human life or prevent serious bodily injury, immediately disarming the subject and taking the subject into custody is a lower priority than preserving the sanctity of human life. Officers who proceed accordingly and delay taking a subject into custody, while keeping the public and officers safe, will not be found to have neglected their duty. They will be found to have fulfilled it."* This is the equivalent of stating that the determination of whether an officer acted properly or not is dependent upon the outcome, not on the circumstances and the reasonableness of the actions taken by the officers on scene. This is dangerous, and substitutes good luck for good tactics.

Does the Department believe that only firearms are deadly weapons? If not, why create a two-tiered system of "firearms" and "weapons other than firearms"? Edged weapons, improvised weapons, baseball bats, bricks, bottles, and other objects are all examples of deadly weapons. Additionally, a suspect may be armed with an explosive or incendiary device, which, as contemplated by this order, would be classified as a "weapon other than a firearm" and theoretically pose a lesser threat than a firearm.

22. **Section I. D. 5. [Moving Vehicles]** *"An officer shall not discharge at the operator or occupant of a moving vehicle unless the operator or occupant poses an **immediate** threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle."* The current DGO 5.02 was last revised in 2011. This proposed new version erases a one-page worth of language about engaging threats in moving vehicles. Unfortunately, the language removed described exceptions to the current restrictive policy. This is clearly now a policy of prohibition. The exceptions in the current policy allowed for the use of a firearm for the following reasons:

- a. When the officer had no reasonable and apparent way to retreat or otherwise move to a place of safety. Now it would seem an officer must choose between her life or violating policy.
- b. In defense of another person when the officer has reasonable cause to believe that the [innocent] person is in imminent danger of death or serious bodily injury. If a person is armed with *only* a vehicle and actively plowing through a crowd of people during a parade the officer would, under this policy, only be able to stand and watch.
- c. To apprehend a person who has committed a violent felony involving lethal force AND a substantial risk exists that the person will cause death or serious bodily injury if apprehension is delayed. Unlike a suspect on foot who is a violent, fleeing felon—a suspect who enters a vehicle will now be free to leave. This proposal turns a vehicle into a safety zone for violent felons to escape.

Notes regarding threats posed by vehicles in motion:

- The latest quarterly summary provided to the Police Commission of officer-involved shootings lists a brief synopsis of cases since 2000. This is a public document that we encourage you to review again.
- Since DGO 5.02 was adopted in March of 2011, there have been 11 cases involving a threat in a moving vehicle. None of those cases would now be “In Policy” if the language in this draft is adopted. However, any reasonable person reviewing the facts of these cases would find it impossible to believe that the officers acted improperly.
- One may wish that threats caused by moving vehicles will cease. But in the real world, where police officers patrol, there will be cases involving violent suspects seeking to harm innocents by way of their vehicles. The only question remaining is if the Department and Police Commission will trust them to make reasonable choices in dangerous, rapidly-evolving situations. This proposed policy change precludes that.

Draft Bureau Order for Conducted Energy Devices (CED)

23. The POA has authored a draft CED policy. It should be considered. Numerous concerns undermine this Department draft policy. *Why would*

the Department limit permissible use to only "armed" suspects? If an officer or citizen is being beaten to death by the hands or feet of a suspect, an officer could articulate a reasonable need to use a firearm. Why would an ECD be limited in these instances if it might prevent the use of a firearm by an officer?

24. The language for what constitutes deployment and activation, for example, which are both defined in the Section II of the order, are used in different manners throughout the orders. For example, the CED policy states that both "deployment" and "activation" require a supervisor response and documentation and reference the Use of Force DGO (5.01), yet in DGO 5.01, there is no reference to deploying or activating a CED, and in DGO 5.01.01 only pointing CED is listed as a reportable use of force. Furthermore, there are several inconsistencies as to when and how the laser on the CED may be activated as well as follow-up procedures. This is true as well for arcing the CED.
25. The limited deployment of the CEDs to Specialists and the Tactical Unit makes it unlikely that a CED will be available in a timely manner. Furthermore, since CED use is prohibited following the use of liquid chemical agent (and indeed, the current Sabre Red OC specifically prohibits the use CEDs subsequent to the deployment of OC), even if specialists and or Tactical Unit members arrive on scene, it will be likely that OC will have been deployed precluding the use of CEDs.
26. Officers are only permitted to use a CED when encountering suspects armed with a weapon other than a firearm, such as an edged weapon, baseball bat, or brick, and the suspect poses an immediate threat to the safety of the public or the officer(s). An officer is not permitted to use a CED on a violent but unarmed suspect who is larger and stronger than the officer and who threatens the officer's safety. This is despite the fact that if the unarmed suspect begins to grapple with the officer, the officer will have to defend him or herself from a stronger opponent while practicing weapon retention techniques for two separate weapons (CED and firearm) located on opposite sides of the officer's body. This policy contemplates use of a CED only based on what the suspect is armed with, and not the individual circumstances of the encounter. This flies in the face of the current legal standard of "reasonable" force, and is not in line with the best practices of other agencies.

27. Under **Section III. F. [Prohibited Use]**, the use of a CED to psychologically torment, punish, or inflict pain is listed. The use of a CED in these circumstances would undoubtedly result in criminal charges against the officers; administratively prohibiting criminal use seems unnecessary.
28. Likewise, under the same section, officers are effectively prohibited from using CED against a series of subjects. (The text prohibits CED use against these subjects when armed with a weapon other than a firearm; as the previous section prohibits the use of a CED against unarmed suspect, and CED use is only allowed when the suspect is armed with a weapon other than a firearm, use against these subjects is apparently prohibited in all circumstances). Among the categories of prohibited persons are:
- A subject who is only a danger to him/herself, which requires an officer know the suspect's current and evolving state of mind—a knife to the neck can become a thrown and deadly missile.
 - Females who are obviously pregnant, which requires an officer to observe a woman's body and determine from visual inspection if a large midsection indicates pregnancy, obesity, a hidden object, or some combination of these.
 - The visibly frail, which has multiple definitions from "easily led into evil" to "weak and delicate". It is hard to think of a more ambiguous term that could have been used.
 - Children (who appear under 14 years of age), without reference to how that apparent age is to be determined and by whom. Furthermore, if an officer is faced with a 6', 200lbs 13 year old with a baseball bat, this order would prohibit the use of the CED to safely resolve the incident.
 - Other issues with the proposed language in this section abound.
29. *What purpose is served in prohibiting the use of a CED in drive stun mode?* Other agencies recognize the use of a CED in drive stun mode (and indeed, recognize it as a lesser use of force than to deploy it by firing the probes).
30. The prohibitions listed in this order should contain the caveat that exceptional circumstances not contemplated by this order may result in

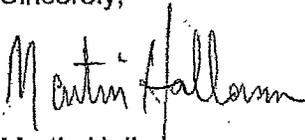
President Suzy Loftus
San Francisco Police Commission
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the appropriate use of a CED in otherwise prohibited circumstances. For example, an officer may appropriately deploy a CED in order to restrain a handcuffed individual who slips his handcuffs to the front and arms himself with a weapon; yet this is currently prohibited under this order.

31. Other concerns/questions involve the very limited authorized users, when it can (or cannot) be used, how it is reported and investigated. We believe it would be better served to start from scratch with regard to considering this Department draft.

Finally, there are several areas in all four of the proposed policies where the phrase is used, "officers shall, if practical..." This is statement creates areas of confusion and therefore liability for the Department and our members. For example, in proposed **DGO 5.01 Section III. C. 2 [Impact Weapon – Warning]**, it states that, "When using an impact weapon, an officer shall, if practical: Announce a warning..." One way to interpret this would be, "officers are required to announce a warning if they think the warning will be effective in gaining voluntary compliance," meaning that officers don't have to announce a warning if they DON'T think a warning would be effective in gaining voluntary compliance, thus effectively negating the need for "shall." On the other hand, another interpretation would be, "officers are required to announce a warning if SOMEONE ELSE at a later date thinks a warning would have been effective in gaining voluntary compliance." This is of course, problematic. A simple solution would be to replace all instances of "shall, if practical" with "if feasible," as appropriate.

Sincerely,



Martin Halloran
President

cc: Greg Suhr, Chief of Police, San Francisco Police Department
Micki Callahan, Director of Human Resources, City and County of San Francisco

Kilshaw, Rachael (POL)

From: Cyndee Bates <Cyndee@sfpoa.org>
Sent: Tuesday, March 01, 2016 1:34 PM
To: Kilshaw, Rachael (POL); Suhr, Chief (POL); Callahan, Micki (HRD)
Subject: From SFPOA President Martin Halloran
Attachments: DS_Cameron.pdf; Blake Loeb.pdf

President Loftus, Chief Suhr and Ms. Callahan:

Attached are two independent opinions from noted Use of Force subject matter experts.



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February 27, 2016

**TO: Marty Halloran, President-Executive Board, San Francisco Police Officer's Association
Michael Nevin, Secretary-Executive Board, San Francisco Police Officer's Association**

Re: Review Suggested Changes to SFPD Use of Force General Orders

I. BACKGROUND:

A. The Assignment:

You have asked me to give you my evaluation of purposed policy changes to SFPD's polices 5.01 - 5.02 and Special Operation Bureau Order 2/10/16 (CED).

B. My Qualifications:

I was police officer with the Berkeley Police Department from 1966 through 1972 and the B.A.R.T. Police Department from 1972 through 1981 approximately 15 years of police experience as a patrol officer, a senior patrol officer, a Police Sergeant and a police trainer. I was one of the first trainers that was qualified by P.O.S.T. (California Commission on Peace Officers Training and Standards) to present P.O.S.T. courses in the 1960's. I was the only presenter of physical courses to be accepted by the Federal Mandated Consent Decree Committee for the San Francisco Police Department to present Physical Courses to SFPD in the 1980's.

For the last 48 years, I have been training Police Officers, Sheriff's, State Agents, Federal Agents and Correctional Officers and am still currently training officers at The Sacramento Public Safety Training Center where I teach Instructor courses in arrest and control, use of impact weapons and ground control techniques, The Napa Valley Police and Correctional Academy where I teach in the basic police academy, the correctional core academy the 832 course and the recertification course and the Contra Costa County Law Enforcement Training Center where I teach in the basic academy and in instructor level courses in arrest and control techniques and use of impact weapons. I also provide contractual physical and classroom training to various law enforcement agencies and sheriff departments throughout California and other States. I have trained and certified arrest and control instructors and impact weapon instructors in Hawaii and Nevada; firearms instructors in Georgia and Nevada; S.W.A.T. courses in Idaho, Hawaii and Nevada and citizen self defense courses in California and New York. During my 48 years of training officers I have trained approximately 45,000 law enforcement personnel

I have testified as an expert witness in use of force cases since 1978 and have testified in well over 600 cases regarding use of force, including use of deadly force, laws of arrest, search and

seizure and general police practices. I have testified for both defense and plaintiffs in civil cases, prosecution and defense in criminal cases and both sides in arbitrations. I am certified as a F.B.I. firearms instructor, chemical agents instructor and S.W.A.T. instructor. I am a P.O.S.T. approved Arrest and Control Instructor Trainer, Impact Weapons Instructor Trainer, Firearms Instructor Trainer, Crowd Control Instructor Trainer and Ground Control Instructor Trainer. I have trained San Francisco Officers since 1978. I have trained instructors in arrest and control, impact weapons, firearms, ground control and plain clothes officers in the use of the yawara stick for San Francisco. I have given lectures on use of force, the ADA and use of force, Title II of the ADA, Title 15 of the California Code of Regulations on the use of force, for PORAC, PARMA, ABOTA, law firms, attorney groups and individual agencies.

C. My Experience with P.O.S.T:

P.O.S.T. is the regulatory, certifying and overseer of all police training in the state of California, if an agency does not adhere to P.O.S.T. training standards their academy can be decertified by P.O.S.T. and their officers would not be peace officers recognized by the State of California. A P.O.S.T. Learning Domain is a functional area of law enforcement identified by P.O.S.T. as a requirement that a basic officer must be trained on and reviewed on in In-service courses and emphasized in instructor courses. There are 42 active Learning Domains. These Learning Domains are presented to basic officers over a 5 to 6 month period or a longer amount of time for eight hours a day and tested by paper and pencil or physical application. If an officer fails one test, he/she is remediated, and if they fail again they fail the academy and cannot be a peace officer. All active Learning Domains are reviewed and written by subject matter experts and then a team of attorneys designated by P.O.S.T. check on their accuracy according to current case law at the State and Federal level, in the 9th District, other Districts and the United States Supreme Court.

I am a P.O.S.T. subject matter expert, designated by P.O.S.T. to review, accept, correct or rewrite Learning Domains for the P.O.S.T. Basic Course. I have been one of the subject matter expert writer members of L.D. 20 (use of force) - L.D. 24 (handling disputes/crowd control) - L.D. 33 (arrest and control) - L.D. 35 (firearms) and L.D. 37 (people with disabilities) for over 34 years. In the past three years I have participated in rewriting L.D. 37 - L.D. 33 and L.D. 20.

II. EVALUATION OF SFPD'S PROPOSED CHANGES TO USE OF FORCE GENERAL ORDERS:

A. OVERVIEW:

1. Need For A More Careful Approach:

I applaud San Francisco's attempt to take swift action to correct what the SFPD apparently perceives as deficiencies in its current general orders regarding use of force. But, I must caution the SFPD that acting too quickly, without careful and thoughtful deliberation, can have disastrous, and unintended consequence. Clear and purposeful force guidelines are critically important to officers and the public. A revised policy should not be jumped into haphazardly, as a knee-jerk reaction to criticism from a relatively small, but vocal segment of the total population

of San Francisco. There should be meetings with give and take feedback from that vocal group, members of the overall population, command staff, representatives from the POA, OCC staff, legal counsel, force experts and P.O.S.T. A thorough examination of P.O.S.T. standards, current case law from the 9th circuit, the other circuits, State and Federal standards and the United States Supreme Court should be given to each member or group attending any meetings. Every word within a policy is subject to scrutiny and can be used against the agency and the officers in civil litigation.

When P.O.S.T. considers changing its guidelines, it does so only after careful consideration, taking in a variety of viewpoints to make sure there are no unintended consequences through the words it uses. Any re-write or creation of a P.O.S.T. Learning Domain takes several months over numerous 3 and 4 day sessions to complete and sometimes 1 to 2 years to go into effect, after a review by legal, The P.O.S.T. Commission and a recheck of the domain, because the ramifications of getting it wrong are too high risk for officer and public safety. I do not see any reason why San Francisco would not want to be just as careful.

The changes that San Francisco is proposing are massive and may have a profound effect if adopted. Some of those effect are probably unintended, as I will attempt to outline below. I have been informed that San Francisco is suggesting that these new general orders go into effect without first forming appropriate committees comprised of individuals with diverse backgrounds and experience to provide advice on the proposed changes. Regardless of what policy San Francisco decides to adopt, doing so hastily without taking the time to consider the possible effects of the changes could be disastrous. Force policies, and in particular, lethal force policies, are extremely important to civilians and officers. It would be unfortunate if San Francisco adopts these policies first and then only later takes the time to consider how they can be improved (or unintended consequences removed). Civilian and police lives could be lost by hastily enacting these policies. This policy advises that to avoid hasty decisions that are not based on the best information, officers should "engage in thoughtful communication . . . without time constraint." In my view, the SFPD should apply that same approach to this policy.

2. General, Unintended Consequences Of Enacting This Proposed Policy As Written:

As written, this policy will drastically change an officer's approach to every potential encounter in which the use of force might be an option. While that might be what is intended, making changes this drastic through a General Order, will likely have several unintended consequence. First, these policies seem to change the basic ground rules for when officers may use force. For the last 30 years, since at least the Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (U.S. 1989), officers have been trained through P.O.S.T – and every police academy in California, that they may use force when it is objectively reasonable based on the totality of circumstances known to the officer at time – without the benefit of 20/20 hindsight. All use of force training, all force options classes, all P.O.S.T. training has that core principle in mind.

This policy seems to change that basic concept. Although the previous policy provided that 20/20 hindsight cannot be used to evaluate an officer's decision to use force, this policy has taken that language out. Furthermore, and perhaps more drastic, this policy seems to require that

the use of force be "proportional to the severity of the offense." In my 48 years of providing training to peace officers on use of force, I have never been asked to train an officer to use force "proportional to the severity of the offense." In fact, I am not even sure what that means or how an officer is to make that determination. I attempted to look to case law for guidance, but I was unable to find any published cases that discuss this concept. Therefore, I consulted the dictionary. The dictionary defines proportionality as 1. having due proportion; corresponding. 2. being in or characterized by proportion. 3. of, relating to, or based on proportion; relative. Therefore, proportionality seems to indicate that officers should match force with force, fists to fists, intermediate weapons (knife, brick, bottle, etc.) to baton, helmet, shield. Presumably then, officers would have to be armed with bladed weapons, because they would no longer be allowed to use their firearm against someone threatening them or a civilian with a knife. This policy would also seem to indicate that only officers of the same size can physically engage a suspect. (See advisement that officers consider the size and physical skills of a suspect III.A.1). This also suggests that, essentially, it needs to be a "fair fight" -- that officer can no longer present a show of force sufficient for the suspect to know that resistance is pointless. For example, instead of multiple officers attempting to subdue a resistant individual, under this policy only an officer of similar size and physical skills can intervene.

Alternatively, it could be that the department is merely attempting to state the *Graham* factors in different terms. Under *Graham*, officers are supposed to use that force which is objectively reasonable, based on the totality of circumstances. In *Graham*, the United States Supreme Court held that some of the circumstances that an officer may consider include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. If by "proportionality to the severity of the offense," the new San Francisco general orders merely means that these *Graham* factors continue to apply, then there is no reason for the change, as it will only lead to confusion.

If, however, is what is intended, that is contrary to *Graham*, and contrary to how officers in California have been trained for at least the last 48 years. P.O.S.T. identifies force options for general contacts and situation in L.D. 20, Chapter 2, force options, page 2-6 and 2-7 which is far different than saying - ***"It is critical officers apply the principles of proportionality when encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other object."*** This is the L.D. 20 chart: See Attached chart.

If San Francisco adopts this novel approach to defining the appropriate use of force -- even assuming this is a better approach -- I foresee numerous unintended consequences. First, none of the officers in San Francisco will be adequately trained in this new policy. Changing the basic concept of when force can be used, and why, cannot be accomplished by simply changing the general orders. Much of academy training is designed to help officers develop physical skills "muscle memory" (being able to carry out a physical technique without having to think through it). For this new policy to be effective, all Officers would have to be untrained in the things they learned in the academy and throughout their in-service training and re-trained to meet the requirement of the new policy. In a time for time scenario it would require the same amount of time to re-train skills as it did to initially train the skills or 6 to 8 months in an academy setting.

Another unintended consequence is that San Francisco would likely lose its P.O.S.T. accreditation. Although P.O.S.T. allows for departments to develop their own guidelines, this new proposal, which appears throughout the 20/20 hindsight prohibition, replace “objectively reasonable”, with just “reasonable,” and adopt “proportionality” (whatever that means), would be so different from what is trained, that P.O.S.T. certification would no longer have any application for San Francisco officers. In fact, because P.O.S.T. would continue to teach concepts not just different, but contrary to the new, core San Francisco approaches to uses of force, it might even be counter-productive for San Francisco to require its officers to be P.O.S.T. certified.

A third unintended consequence is that because of this novel approach, (no case law, no other policies, previous training) officer, citizens and lawyers will all be guessing as to what it means. This, of course, is problematic for officers being able to figure out in the field what they can or cannot do, and it will be even more problematic when their actions are second guessed in disciplinary proceedings and civil lawsuits.

B. QUESTIONABLE UNDEFINED TERMS THROUGHOUT THE PROPOSED GENERAL ORDERS:

1. Thoughtful Communication

There are several references in the new proposed orders to require “thoughtful communication.” While that sounds good to say in theory, I am unsure what it means, or whether any officer in the field would know. For example, Is it thoughtful communication to say “drop the gun” or “you’re under arrest put your hands up” or should the officer enter into a discussion as to why the individual needs to drop the gun or why they should put their hands up and would an officer be subject to disciplinary actions if his/her communication was not thoughtful? If officers should no longer say “drop the gun,” or “You are under arrest, put your hand up,” they will need significant new re-training, as discussed above

2. Exceptional Circumstances Not Contemplated By This Order

In the last paragraph, on page 7 of the proposed general orders, there appears to be a catch-all, which allows for officers to use force in “exceptional circumstances” not contemplated by this order. Although I realize that was in San Francisco’s previous general orders, it takes on new problems by being repeated here, because San Francisco appears to be changing so much of what has been previously trained. For example, years ago an individual was driving through San Francisco running over dozens of pedestrians as if he were a participant in a sick video game. This new policy would prevent an officer from shooting that individual to stop him from running down a family of four in a cross-walk, even if the officer had a clean shot, and there was little risk of anyone else being injured. Would that be an “exceptional circumstance”, not contemplated by this order? It does seem exceptional, in that it does not happen often – but neither do officer involved shootings. But, how could it be said to have not been contemplated,

when I am raising the issue now? And, how would anyone know what was contemplated and what was not? And, whose contemplation matters? It is difficult to know what concept is sought to be expressed with this provision, but with a careful and deliberate approach to changing these important orders, perhaps the intent of this language can be achieved, without the difficulties of the language that is currently being proposed, only some of which I have outlined above.

C. USE OF FORCE, Proposed GO 5.01

1. Proposed policy:

“The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using thoughtful communication, and de-escalation principles before resorting to the use of force, whenever practical. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public’s trust.”

2. Suggested Revision

I believe it would be more instructive and a better fit to move a portion of the last paragraph on page 7 to the end of this opening statement and take out the arbitrary and unclear language :

The opening statement would now read:

“The San Francisco Police Department’s highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using communication, and de-escalation principles before resorting to the use of force, whenever practical. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public’s trust.

The purpose of the policy is not to restrict officers from using sufficient force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority.” DE-ESCALATION.

1. Proposed Policy:

"In situations where a subject is not actively endangering the safety of the public or an officer, fleeing or destroying evidence, officers should employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and to increase the likelihood of voluntary compliance.

Officers should consider the possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to use de-escalation techniques while maintaining public safety and officer safety."

2. Proposed Revision:

These potential ADA issues are covered in L.D. 37 [people with disabilities], but the caveat should be as it is in Learning Domain 37 Chapter 1 - Disability Laws, page 1-7 and Chapter 4 - Persons with mental illness, page 4-14). I suggest revising this language to add the P.O.S.T. language.

"People with disabilities are capable of committing crimes. They are not relieved from their obligation to obey the law.

Officers should treat a person who has a disability with the same caution that they would use with any other suspect regarding judgments about enforcement of the law and personal safety. Although the individual may have a disability, that individual may still be capable of injuring the officer.

Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before. (Hainze v Richards, No. 99-50222, 207 F 3d 795 [5th Cir. 2000])

People affected by mental illness can be unpredictable and sometimes violent. Officers should never compromise or jeopardize their own safety or the safety of others when dealing with individuals who display symptoms of a mental illness.

Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before."

E. ANALYSIS OF CONSIDERATIONS GOVERNING ALL USES OF FORCE (II A B).

1. Conform To Penal Code Section 835(a) And Federal Law.

This portion of the policy appears to attempt to re-state federal and California law regarding the use of force. It is unclear if by this statement this policy intends for this to also be the policy in San Francisco or not. If it does, this is confusing because this statement of the law is inconsistent with the undefined idea of "proportional to the severity of the offense committed," found nowhere, that I could tell, in federal or California law. And, as a restatement of the law – the purposes of which are unclear – it does not re-state the law accurately. For example, Penal Code Section 835(a) requires that

“Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.”

That language is not found in this proposed order. Also, California and federal law require that use of force not be judge by 20/20 hindsight, and this section is missing that language as well. Also, the policy is inconsistent in its use of the phrase “objectively reasonable” (found at II.B.) or “reasonable and necessary” (found at I.D.). Inconsistent language describing the analysis of when force can be used can serve no useful purpose.

F. DUTY TO RENDER FIRST AID.

Under the proposed general orders, Officers shall render first aid when a subject is injured or claims injury caused by an officer’s use of force unless first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid.

Under current case law, an officer has fulfilled his/her obligation to render first aid if they call for medical aid to respond to the scene (*Maddox v. City of Los Angeles*, 792 F.2d 1408, 1415 (9th Cir. 1986); *Tatum v. City and County of San Francisco* 441 F. 3d 1090 (9th Cir. 2006) .

This proposed order appears to seek to change the requirement, forcing officers to provide first aid even where they lack sufficient medical training. For example, if after a use of force, the suspect claims he has a severe neck injury. Is the officer, who is not trained in how to provide medical care for a severe neck injury – and who has no tools at his disposal for doing so -- now obligated to provide such aid, rather than to just secure the scene and call for emergency medical aid? If officers are not to assume this duty, they will need significant additional medical training and medical resources at their disposal.

F. SUPERVISOR’S RESPONSIBILITY WITH ARMED SUSPECTS:

1. Proposed policy:

Under Section II. F. 2. [Supervisor’s Responsibility] : “When officers are dispatched to an on-view a subject with a weapon, a supervisor shall immediately remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources.”

2. Concerns with this policy:

If an officer is responding to a suspect with a weapon, the last thing responding officers need to hear is a supervisor coming over the air with a length admonishment as to what officers need to

do, tying up the air at a critical time could jeopardize officer and public safety. If this is just repeating a portion of the new general order, it is a waste of time because presumably the officer will already know the order. Also, as often as officers on-view or are responding to weapons calls, there is a high-likelihood that this type of admonition would just be tuned out, because, by design, it has not particular application to the nature of the particular call. And, the supervisor giving the admonition is not on the scene.

Therefore, this type of admonition would be dangerous, because it would take-up critical air-time and it would be useless because the officers should already know this policy and, reminding them of general orders in this manner will not serve to educate them further. I have advised 100's of different departments over my 48 years and have never heard of any department requiring anything remotely like this. If the department would simply apply this idea to a few real world scenarios, it would see how disastrous it could be. For example, in a case that was litigated a few years ago involving an active shooter driving through San Francisco, if this admonition were given it is very possible that lives would have been lost because during the time it would take to give this admonition – after the officer already called Code 33 – other officers would have missed critical information being relayed by the following officer. Code 33 exists for a reason – to clear the air and allow for critical transmissions. To allow this non-critical transition to plug up 30 seconds of life-or-death air time, will endanger officers and citizens for no useful purpose.

G. Carotid Restraint / Chock Holds

1. Proposed policy:

Section III. A. 3. [Prohibited Use Of Control Holds] Officers are prohibited from using the following control holds: a. Carotid restraint; and b. Choke hold

2. Concerns regarding proposed policy

P.O.S.T. mandates that the carotid restraint control hold be taught in all P.O.S.T. basic academies under L.D. 33, testing and training specifications 33-9 E. An exercise test that requires the student to demonstrate competency in the carotid restraint control hold.

The student will demonstrate competency in the following performance dimensions:

1. Safety
2. Awareness
3. Balance
4. Control
5. Controlling Force
6. Proper Techniques
7. Verbal Commands/Instructions
8. First Aid Assessment

Presenters must use the POST-developed Arrest and Control Competency Exercise Test Form or a presenter-developed form approved by POST, which minimally includes the performance dimensions used for this exercise test.

The carotid restraint control hold should not be confused with the bar-arm choke hold or any other form of choke hold where pressure is applied to restrict the flow of air into the body by compression of the airway at the front of the throat.

Choke holds create the potential for a subject to panic and react with greater resistance when pressure is applied in this manner by a peace officer. Also, there is greater risk of serious injury to the subject.

The carotid restraint control hold has been challenged in the court system as a hold that is equal to deadly force, but that challenge has been overturned by the 9th Circuit.

(*Nava-Bennett v. California Highway Patrol*, No. C 93-01309 CW, U.S. Dist. Ct., N.D. Calif., December 21, 1994 - injection placed on the CHP to only use the carotid restraint control hold in situations that threaten death or serious injury.

Nava v. City of Dublin, 121 F.3d 453 (9th Cir. 1997). Overturned the injection against CHP from only using the carotid in situations that threaten death or serious injury.

The CHP thought that they did not have to teach the carotid restraint control hold based on this original injunction, but during a P.O.S.T. audit, when the auditor discovered that they were not teaching the carotid restraint control hold, the CPD had to arrange to teach all the officers that had previously not been trained on the hold or be de-certified.

H. SECTION III. C. 3. [IMPACT WEAPONS-PROHIBITED USES] .

1. Proposed policy

“Officers shall not (B.) Strike a handcuffed prisoner with an impact weapon. (C.) Raise an impact weapon above the head to strike a subject.”

2. Concerns regarding proposed policy

A categorical restriction on striking a handcuffed individual with an impact weapon is a mistake. Handcuffed individual can pose a significant risk to the safety of officers and civilians (See attached article “Handcuffed suspect breaks officer’s leg.”

There is no reason that I can imagine why the general force analysis would apply any less to a handcuffed individual. If they pose no threat, then use of force is inappropriate. If they pose a threat, then why take away one of the officer’s tools for stopping that threat. To do so only makes the use of lethal force more likely. For example, if a handcuffed individual is attempting to grab an officer’s gun, and the officer can stop the individual with his baton, wouldn’t that be a preferable outcome to the officer using his firearm?

In addition, there is no reason that I can see to categorically prevent over-head strikes with a baton. The location of the strike is what matters, not the type of arm-movement that caused the strike.

I have trained the SFPD impact weapon instructors since 1978 to strike to zone 1 (waist to shoulders) and zone 2 (waist to feet). The angle of the strike, side to side, high to low or low to high has no bearing on the target. The zones are what the officers and instructors are taught. Diagonal strikes are taught to strike to the hands or kicking feet, which may appear to an on looker as an overhead strike.

I. THE USE OF THE TERMS "IMMEDIATE" AND "IMMINENT" INTERCHANGEABLY IS A PROBLEM.

The terms immediate and imminent must be used in their proper contents: As listed by Lexapol in their policies there is a difference.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes any of the following:

1. The person has a weapon or is attempting to access one and it is reasonable to believe the person intends to use it against the officer or another.
2. The person is capable of causing serious bodily injury or death without a weapon and it is reasonable to believe the person intends to do so.

J. PRIOR TO THE DISCHARGE OF FIREARM OR LETHAL FORCE.

1. Proposed language

When safe and practical under the totality of circumstances, officers shall consider other force options before discharging a firearm or using other lethal force.

2. Concerns regarding this language

By case law officers are not required to use lesser force options, only objectively reasonable force (*Forrester v. San Diego*, 25 F. 3d 804 (9th Cir. 1994) whether less painful, less injurious, or more effect force is available is not an issue as long as the force used is objectively reasonable); *Scott v. Henrich* 39 F. 3d 912 (9th Cir. 1994) Officers are not required to use the "least intrusive alternative" when confronted with a deadly force threat. Appropriate inquiry is whether officers "acted reasonably, not whether they had less intrusive alternatives available to them." so the section should read:

When safe and practical under the totality of circumstances, officers shall consider, but are not required to use other force options before discharging a firearm or using other lethal force.

K. SHOOTING AT DRIVERS OF MOVING VEHICLES:

1. Proposed policy

Section I. D. 5. [Moving Vehicles] "An officer shall not discharge at the operator or occupant of a moving vehicle unless the operator or occupant poses an immediate threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle."

2. Concerns I have with this policy

A motor vehicle generates approximately 750+ ft/lbs energy at 3 MPH - 2,000 + ft/lbs energy at 5 MPH - 4,200+ ft/lbs energy at 7 MPH and 8,50+ ft/lbs energy at 10 MPH. A 9 mm bullet generates between 280 and 400 ft/lbs energy. A motor vehicle driven at a person is equal to the use of deadly force. ("Selective Ammunition Tests") - Article "Selective Ammunition Tests" by Patrick N. Dowden in "The Tactical Edge" - Summer 1992

P.O.S.T. defines times when an officer may use deadly force in L.D. 20, Chapter 3, page 3-14 - Considerations before using deadly force. In some instances, peace officers may have time to evaluate and assess all aspects of a situation. In most situations, split-second decisions must be made. As part of the mental process for preparing to use deadly force, peace officers should consider several important factors before a situation requiring the use of deadly force arises. The following chart suggests, but is not limited to, a few of the circumstances that should be considered.

Circumstances:

Considerations:

Threat to life

Does the subject present a credible threat to the officer or others?

NOTE: Peace officers may use reasonable force to defend their lives or the lives of others.

Imminent threat

Does the subject present an imminent threat to life?

Is the subject threatening the officer or others with a weapon?

Subject's access to weapons or potential weapons

Proximity of subject to the officer

Type of crime/subjects

Is the nature of the crime violent or non-violent?

Is there a large number of subjects to be confronted?

Type of weapon

Can it cause serious bodily injury or death?

Subject's capabilities

Does the subject demonstrate superior physical skill over the officer?

**** A motor vehicle is a weapon that can cause serious bodily injury or death.***

The Revised Policy defines lethal force as:

Lethal force is any use of force designed to and likely to cause death or serious physical injury, including but not limited to the discharge of a firearm, the use of impact weapons under some circumstances (see DGO 5.01, Use of Force), and certain interventions to stop a subject's vehicle (see DGO 5.05, Response and Pursuit Driving). ***By this definition a motor vehicle driven at an officer or civilian is lethal and should be dealt with like any other lethal force threat.***

A better policy on shooting at a vehicle would be the Lexapol model:

"SHOOTING AT OR FROM MOVING VEHICLES.

Shots fired at or from a moving vehicle are rarely effective. Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants. ***An officer should only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle,*** or if deadly force other than the vehicle is directed at the officer or others. Officers should not shoot at any part of a vehicle in an attempt to disable the vehicle.

This phrase from the United States Supreme Court seems to have been left out of this reviewed policy: The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

III. CONCLUSION

These are my recommendations for revisions to the revised SFPD Use of Force Policy based on my training and experience as stated in this correspondence.

I would be more than happy to answer any question regarding these recommendations or participant in any meetings or ongoing discussions.

Sincerely:



D.S. Cameron;
Cameron Consultants

Resistance

[20.02.EO3]

Introduction

Subjects' resistance/actions to an arrest will determine the type of force used by peace officers.

Subjects actions

The following chart illustrates how a subject's resistance/actions can correlate to the force applied by an officer:

Subject's Actions	Description	Possible Force Option
Cooperative	Subject offers no resistance	<ul style="list-style-type: none">- Mere professional appearance- Nonverbal actions- Verbal requests and commands
Passive non-compliance	Does not respond to verbal commands but also offers no physical form of resistance	<ul style="list-style-type: none">- Officer's strength to take physical control, including lifting/carrying- Control holds and techniques to direct movement or immobilize a subject
Active resistance	Physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, running away, or verbally signaling an intention to avoid or prevent being taken into or retained in custody	<ul style="list-style-type: none">- Control holds and techniques to control the subject and situation- Use of personal weapons in self-defense and to gain advantage over the subject- Use of devices to secure compliance and ultimately gain control of the situation

Continued on next page

Resistance, Continued

Subjects
actions
(continued)

Subject's Actions	Description	Possible Force Option
Assaultive	Aggressive or combative; attempting or threatening to assault the officer or another person	<ul style="list-style-type: none"> - Use of devices and/or techniques to secure compliance and ultimately gain control of the situation - Use of personal body weapons in self-defense and to gain advantage over the subject
Life-threatening	Any action likely to result in serious injury or possibly the death of the officer or another person	<ul style="list-style-type: none"> - Utilizing firearms or any other available weapon or action in defense of self and others

NOTE: Officers must take into account the *totality of the circumstances* when selecting a reasonable force option. It is not the intent of this chart to imply that an officer's force options are limited based on any single factor.

NOTE: Officers must be aware of and comply with their specific agency policies regarding appropriate force options.

Constant
reevaluation

Peace officers must use the force option appropriate for the situation as conditions may change rapidly. Officers must continually reevaluate the subject's action and must be prepared to transition as needed to the appropriate force options.

Continued on next page

MEMORANDUM

DATE: February 29, 2016
TO: Marty Halloran, President-Executive Board
Michael Nevin, Secretary-Executive Board
FROM: Blake P. Loeb
RE: *Review of proposed SFPD General Orders related to use of force and use of lethal force.*

1. Introduction

I have been asked by the San Francisco Police Officers Association (“SFPOA”) to provide an analysis, both from a legal and practical prospective, of the proposed revisions to San Francisco Police Department’s (“SFPD”) department general orders (“DGOs”) 5.01, 5.01.1 and 5.02 (the “Proposed Orders”). Below are my initial impressions, understanding that many of these issues are complex and would benefit from further analysis and empirical evaluation.

2. My Background

I am partner at Meyers Nave and the head of the Police Defense practice group. Before joining Meyers Nave, I served for 22 years as a Deputy City Attorney for the City and County of San Francisco. For nine of those years, I was the Chief of Civil Rights Litigation, focusing primarily on supervising a 22-member trial team on civil rights litigation matters, and personally defending officers and the SFPD against claims of excessive force stemming from officer-involved-shootings. While at the City Attorney’s Office, I also provided instruction at the SFPD police academy regarding officer involved shootings.

As a Deputy City Attorney, I served as first chair in over 25 civil jury trials. I have briefed and argued numerous appeals before the Ninth Circuit and the California Court of

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Appeal.¹ I have also assisted the SFPD, shaping policy on matters including use of force, officer-involved shootings, and vehicle pursuits.

3. Hastily Enacted, Substantial Modifications To Any DGOs Could Have Disastrous And Unintended Consequences.

The Proposed Orders reflect sweeping and novel changes to the guidelines concerning appropriate use of force. Changes of this magnitude need careful consideration of the legal and practical impact such changes may have. Ideally, a committee would be formed consisting of individuals with a variety of viewpoints to help advise on each policy change, just like the California Commission on Police Officer Standards and Training ("P.O.S.T.") does before changing its learning domains. The existing general orders in place regarding use of force have largely been in effect since 1995. There is no doubt that some of the language should be changed and updated. But, the scope of the changes contained in the Proposed Order is so broad that more deliberation and deeper evaluation is necessary to avoid creating unclear, inappropriate policy and unintended consequences.

Below, I have attempted, with the limited time afforded to me, to outline the primary areas of concern I have with the Proposed Orders that I hope will be given greater consideration and analysis before the Proposed Orders are enacted by the SFPD.

¹ The following is a select list of the cases that I worked on for the SFPD: *Espinosa v. City and County of San Francisco* (allegation that officers shot and killed an unarmed man in his home without provocation; defense verdict after a one-month jury trial); *Boyd v. City and County of San Francisco* (allegations that an officer executed an unarmed disabled man; defense verdict after a six-week jury trial; affirmed on appeal; \$120,000 in costs awarded to defendants); *Dunklin v. City and County of San Francisco* (allegations that officers shot an unarmed man in a wheelchair; summary judgment for defense; affirmed by the Ninth Circuit); *Moll v. City and County of San Francisco* (allegations that officers shot and killed an unarmed 19-year old; plaintiff dismissed for a waiver of costs one month before trial); *Sheehan v. City and County of San Francisco* (allegations that officers unnecessarily shot an emotionally disturbed woman; defendants won on summary judgment; matter recently decided by the United States Supreme Court); *Wu v. City and County of San Francisco* (allegations that an officer unnecessarily shot an emotionally disturbed man armed holding a pair of scissors; plaintiff dismissed for a waiver of costs one month before trial); *Tapueluelu v. City and County of San Francisco* (allegations of excessive force causing death; defendants won on summary judgment; affirmed on appeal).

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4. Specific Aspects Of The Proposed DGOs, Which Left Uncorrected, Could Have Disastrous And Unintended Consequences.

a. Requiring Force To Be “Proportional To The Severity Of The Offense Committed,” Without Further Clarification Is Problematic.

The concept of “proportional force” is not entirely new. A few federal cases discuss “proportional force,” and officers in Seattle are required to use “proportional” force. In each case that I have reviewed that discusses “proportional force,” and with Seattle Police Department’s General Orders, the requirement to use proportional force does not stand on its own. And, the concept is tied not just to the “severity of the offense,” but also to the threat to the officer or the public. Furthermore, in every other instance in which I have seen that term used (with one exception), it is directly tied to the *Graham v. Connor*, 490 U.S. 386 (1989) framework for evaluating use of force.²

For example, Seattle defines “proportional” as follows: “The level of force applied must reflect the totality of circumstances surrounding the situation, including the presence of imminent danger to officers or others. Proportional force does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be objectively reasonable and necessary to counter it.” (Seattle PD General Orders 8.200.1.) Seattle’s use of the term proportionality is consistent with the Supreme Court’s seminal holding *Graham v. Connor*, 490 U.S. 386 (U.S. 1989) (Officers may use force that is objectively reasonable based on the totality of circumstances known to the officer at time, without the benefit of 20/20 hindsight).

² The Police Executive Research Forum (“PERF”) also proposed that officers should be required to use “proportional” force and defined proportional as “how the general public might view the action.” This suggestion has come under almost universal criticism, for essentially requiring that officers defer to future Youtube commentary for determining whether the use of force is appropriate at the time, instead of what is objectively reasonable, from a police officer’s prospective, based on the totality of circumstances that were known at the time – which has been the law for thirty years. In the event San Francisco is intending to adopt PERF’s requirement, it would be wise to give such a radical change extremely careful consideration before doing so.

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The primary concern that I have with San Francisco's proposed use of the phrase "proportional force," is that it is unclear whether San Francisco intends that phrase to be consistent with *Graham* or a departure from that legal standard. Unfortunately, San Francisco's proposal *does not* define what is meant by "proportional force," which is deeply concerning. In fact, San Francisco's proposal could suggest that "proportional" means that the officers are required to match the degree of force being used by the suspect. In other words, if an officer is being threatened by a knife, the maximum force the officer can use in response is a knife – even though officers are not equipped with knives and are not trained on how to use them. Section III.A.1, seems to support this implication. Section III.A.1 states that Officers must consider the "relative size and physical capabilities of the subject compared to that of the officer." This could suggest that a big officer cannot engage a small suspect, and that two officers cannot engage one suspect. If that is what is intended by this language, all SFPD officers will need to be retrained, and SFPD could lose its P.O.S.T accreditation. (See the analysis of Don Cameron, renowned police procedures expert who literally helped write the book on use of force – the P.O.S.T. force Learning Domains.)

b. The Use Of Reasonable Force Section (II.B.), Which Purports To State The Law Under The Fourth Amendment And Penal Code Section 835(a), Misstates The Law.

Although Section II.B. purports to describe use of force law under the Fourth Amendment and Penal Code Section 835(a), it does so inaccurately. First, although it mentions that force must be objectively reasonable under the totality of circumstances,³ it neglects to say that the use of force should not be judged based on 20/20 hindsight. This is an extremely important aspect of the *Graham* analysis, was part of the previous general orders, but is inexplicably absent from this Proposed Order. This aspect of *Graham* is part of P.O.S.T training and included in the Ninth Circuit Model Jury Instructions, which apply to all federal claims of excessive force in California.

The removal of the 20/20 hindsight qualifier suggests that it was *intentionally* omitted with the objective of making San Francisco the only city in the country where an officer's

³ I mention that this section only "appears" to state that these tests apply. Oddly, this portion of the proposed general order does not use the words "shall," or "may" or "must." This portion merely states that it is describing the law under the Fourth Amendment and Penal Code Section 835(a). It does not state that this is required of San Francisco police officers, although that may be implied.

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use of force can now be analyzed based on 20/20 hindsight. If the omission was unintentional, it should, obviously, be corrected. Removal of the 20/20 hindsight qualifier would effect a radical change to the established perspective for analyzing officer involved uses of force. This inconsistency could have undesirable implications for officer training and accreditation under P.O.S.T.

This portion of the Proposed Orders also misstates the factors under *Graham* and its progeny that make up the "totality of circumstances" that an officer may properly consider when making the decision to use force. Buried between these well-established factors is proposed "factor" No. 5, which provides that: "[a]ny force should be proportional to the severity of the offense committed for which the officer is taking action." There are three things wrong with listing this as a *Graham* factor. First, it is not a "factor" at all. Rather, it represents a standard that force should be proportional. Factors, on the other hand, are circumstances that the officer should consider, such as "the severity of the crime," or "whether the subject poses an immediate threat." If San Francisco intends to require "proportionality," whatever that ultimately is intended to mean, it is inappropriate to place it among the *Graham* factors as if it were a "factor" itself. Second, not only is this not a *Graham* factor or a factor under Penal Code Section 835(a), I have been unable to find it listed as a factor in any other reported decision. Third, as discussed above, "proportional," as used in this context, is impermissibly vague – "proportional" is not defined, and could be interpreted in a variety of ways, many of which would lead to absurd outcomes, such requiring an officer to defend himself with a broken bottle when he is attacked with a broken bottle.⁴

Furthermore, although Section II.B purports to state the law under Penal Code Section 835(a), it does not. In particular, Penal Code Section 835(a) states "[a] peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." Inexplicably, although purporting to describe the legal requirements of Penal Code Section 835(a), a very short statute, this language is omitted.

⁴ From my research, this phrase "proportional to the severity of the offense committed," seems to be used almost exclusively in the criminal sentencing context, where it is appropriate for the sentence to be "proportional" to the crime.

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Finally, if San Francisco implements entirely new force guidelines not found in P.O.S.T., or any reported decision, it will be very difficult for officers to know what conduct is allowed, and what conduct is prohibited. Their force training as cadets, field training, experience as officers, and their P.O.S.T. training will be inapplicable. And, neither they, nor the Academy instructors will have anywhere other than the Proposed Order to look to see what is prohibited and what is allowed because these guidelines are unprecedented. The obvious problem with relying on mere general orders to usher in an entirely novel approach to using force is that guidance in the general orders will be inconsistent with the classroom and real world training officers receive. (*See Don Cameron's report*)

c. The Definition of "Thoughtful Communication" Is Unclear.

The phrase "thoughtful communication" is used throughout the proposed revisions. Section I.B, which appears to be a definition of "thoughtful communications," states that "communication with non-compliant subjects is most effective when officers establish a rapport, use proper voice intonation, ask questions and provide advice to diffuse conflict and achieve voluntary compliance before resorting to force options." This policy will be confusing to officers, is problematic from a legal perspective and is contradicted by other portions of the Proposed Order. For example, if an officer sees an individual with a gun about to shoot a child, does this portion of the Proposed Order require the officer to "use proper voice intonation," and "ask questions and provide advice," or, can the officer aim his gun at the suspect as he or she yells "drop the gun!" At a minimum, this section of the Proposed Order should distinguish the circumstances when "thoughtful communication," as defined in the Proposed Order, is appropriate from those where more direct and commanding communication should be used.

d. The Proposed Use Of Force Guidelines For When A Person Is A Danger To Himself Or Others Make No Sense. (II.A.5)

Under section II.A.5, Officers are advised that they can use force to prevent a person from injuring themselves or others "unless the person also poses an imminent danger of death or serious bodily injury to another life or officer." Read literally, this order would prevent officers from using any force to stop someone who is not only trying to injure themselves, but others. This not only conflicts with common sense, but with revised DGO 5.02, which allows officers to use lethal force to stop someone from injuring themselves if they are also presenting an imminent threat of death or serious injury to others. This is probably just an oversight, but if left uncorrected it will create confusing and contradictory instructions.

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e. The Proposed Supervisors' Responsibilities For When An Officer Responds To A Weapons Call Are Potentially Dangerous To Everyone While Both Unnecessary, And Accomplishing Little or Nothing.

Proposed Section II. F. 2, requires that when an officer is dispatched to confront or on-views a subject with a weapon, "a supervisor shall immediately remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources." In other words, if an officer says over the radio that he sees someone with a shotgun, running out of a bank with a bag of money and jumping into a car and correctly calls Code 33 – the supervisor is then required to go on the air (which blocks all other transmissions) and remind the officer "to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources."

This is potentially dangerous to civilians and officers because in the 10-15 seconds in which the supervisor would clog the air waves with this generic announcement, the officer on the scene would have been prevented from conveying critical information such as "shots fired," or "officer down" or calling out the direction the suspect has fled. This requirement may be unnecessary because it entails merely repeating general orders that the officer should already have in mind (assuming that this language is added elsewhere to the general orders). Although SFPD should conduct appropriate empirical analysis of the expected benefits of such a policy, it would seem that *requiring* a supervisor to reiterate general policies, it in the heat of action, accomplishes little or nothing. As a generic announcement heard dozens of times each day, officers in the field will likely begin to tune it out. Moreover, such an announcement runs contrary to the very purpose of Code 33 – which is to clear the air of all unnecessary chatter so that the lead officer can send critical information regarding the emergency. It is notable that no other law enforcement department in the country, of which I am aware, has such a requirement.

In sum, without a very clear and compelling empirical basis for such a requirement, its speculative benefits would appear to be greatly outweighed by the potential for endangering the public and officers.

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f. Two Aspects Of The Proposals Prohibiting The Use of Impact Weapons Are Problematic.

i. The Prohibition On Striking A Handcuffed Prisoner With An Impact Weapon Does Not Make Sense.

It is well documented that someone in handcuffs can still be dangerous – even lethal. To prevent officers from using an impact weapon against a dangerous individual, whether handcuffed or otherwise, only increases the risk of injury to the officer and the individual. Impact weapons are a non-lethal alternative use of force. The more non-lethal options that are removed from an officer's arsenal, the more likely the incident will escalate to the point where the officer's only option is lethal force. Proper use of force guidelines and corresponding disciplinary consequences are the appropriate means of addressing the risk that an officer will use an impact weapon on an individual who is not posing a threat. Therefore, there is no value in having a blanket prohibition against use of impact weapons on individuals who are handcuffed.

ii. The Prohibition On Raising An Impact Weapon Above The Head To Strike Would Accomplish Nothing Except Increase Liability And Set Officers Up For Unfair Discipline.

Policies that reduce inappropriate baton strikes are commendable, but a ban on over-head strikes does nothing to accomplish that goal. San Francisco policies, academy and P.O.S.T. training already focus on the appropriate areas of the body to strike an individual with impact weapons, not whether the blow is delivered with a forehand swing, a backhand or an overhand strike. Because it is the part of the individual being struck that matters (head versus thigh), a categorical restriction on how the strike is delivered is nonsensical. Specifically, an over-hand strike may not be any more likely to result in an inappropriate strike than a side-arm strike. Nor is an over-head strike likely to deliver more force than a side-arm strike. (See analysis of Don Cameron, who has trained over 45,000 police officers on the use of force.) In addition, what is or is not an over-head strike is not always clear. If the officer is bent over, is a strike over the officer's head an overhead strike? If the officer is on the ground, would any strike be prohibited as "over-head"? If the suspect is above the officer, is an officer prohibited from reaching up to strike the individual on the thigh? The likely unintended consequence of this categorical ban on overhead-strikes is that officers will be less likely to use this non-lethal option, even when appropriate. Such an outcome will not increase safety.

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g. The Prohibition On The Carotid Restraint Does Not Seem Warranted and Should Not Be Absolute.

Section III.A.3. provides that officers are prohibited from using the carotid restraint. Based on my 22 years at the City Attorney's Office, I cannot recall a single case in which an individual claimed injury from the carotid restraint. And, I am informed by the SFPOA, that they have searched their files and cannot find one either. I am also informed by Don Cameron that the carotid restraint can be a very effective means to gain control over a suspect without causing injury. I have also been informed that when the CHP attempted to eliminate the carotid restraint, it risked losing P.O.S.T. accreditation. As with other non-lethal force options, the more options at an officer's disposal, the greater the chance the officer will not have to resort to lethal force. If it has not already been done, I would recommend that the SFPD conduct a study of the use of the carotid restraint to determine if its use has been problematic before banning the technique. Regardless, if the SFPD wants to ban this otherwise approved technique, it should not do so categorically. The SFPD should, at minimum, be allow to use this technique in the same situations where using lethal force is justified. I cannot see any reason for why an officer could be in a situation in which he or she was justified in using lethal force, but should be prohibited from using this non-lethal technique.

h. The Ban On Officers Shooting At The Operator Of A Vehicle Who Is Only Using The Vehicle As A Weapon Will Endanger The Public And Officers Or Require Officers To Choose Between Saving A Life Or Their Job.

It is beyond dispute that individuals can and do use their vehicle as a lethal weapons. It is also beyond dispute that officers can and have successfully saved lives by shooting at the operator of the vehicle to prevent them from killing officers or others.

In the past, one of the concerns was that officers were unnecessarily shooting at drivers when the officer could have instead gotten out of the way. The previous general order, which was revised in 2011, directly addressed that concern, providing that officers could only shoot at the driver if there was an imminent threat of serious bodily injury or death *and* the officer had no reasonable or apparent means of retreat. The Proposed Order eliminates that language, and thus prevents an officer from shooting at the driver of a vehicle, even if there is no means of retreat, and where the officer or a bystander will likely be killed if the officer cannot shoot. In addition, this categorical ban prevents an officer from shooting at a driver of a vehicle to prevent their escape, even where there is a

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substantial risk that the driver will cause death or serious injury to others if allowed to escape.

Two examples illustrate these dangers: First, if an individual were driving around San Francisco in an SUV, and running over pedestrians for fun, the Proposed Order would prevent an officer from shooting the driver to prevent that driver from killing a family of four in a cross-walk, even if the officer had a clear shot and there was little risk of injury to anyone else. Under the proposed policy, the officer would be required to hold his or her fire and watch the driver run over the family. This is not an abstract hypothetical. (On August 30, 2006, Omeed Aziz Popal, struck 18 pedestrians, killing one in San Francisco with his Honda Pilot SUV).

Second, after a high-speed chase through San Francisco, an individual who had been firing at police during the chase comes to a stop. Just as he is pulling away at under 5 m.p.h., an officer has an opportunity to shoot the driver. Under the proposed policy, the officer would be prohibited from taking the shot. Instead, a high-speed chase would likely ensue, endangering far more civilians. This is not an abstract hypothetical either. (On May 5, 2004, an officer appropriately shot at Cameron Boyd to keep him from killing or injuring others.)

i. The "Exceptional Circumstances, Not Contemplated By This Order," Language Of The Proposed General Order Is Too Vague To Be Any Guide To Officers.

The last two sentences of the Proposed Order state that: "If exceptional circumstances occur, not contemplated by this order, an officer's use of force shall be reasonably necessary to protect others or himself or herself. The officer shall articulate the reasons for employing such use of force." The Proposed Order, however, does not provide any description of what constitutes "exceptional circumstances," or provide any examples, nor does it state what was or was not "contemplated by the order." Because this provision is vague, officers and civilians will be left to guess whether conduct is or is not permitted, which is contrary to the purpose of a general order. I recommend that the Proposed Order either define what is meant by "exceptional circumstances, not contemplated by this order," provide some examples, or consider dropping this language entirely.

5. Conclusion

This represents only a fraction of some of the issues that I believe will be created if these Proposed Orders go into effect as they are. One overall concern I have is that different terms are used interchangeably, and the standard for use of force is mentioned

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repeatedly, but using different language throughout the Proposed Orders. When it comes to general orders and litigation, words matter. Even one word used incorrectly, or unintentionally, can have disastrous results. I would hope that the SFPD can take the necessary time to consider the possible ramifications of these Proposed Orders, for the good of the community and the fine men and women who make up the SFPD.

Thank you for requesting my advice on these important issue. Please let me know if I can be of any further assistance. If there is an opportunity to work directly with the SFPD on revising the Proposed Orders, I would be honored to assist.

Blake Loebis



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SACRAMENTO
SAN FRANCISCO

March 24, 2016

VIA E-MAIL AND REGULAR MAIL

Suzy Loftus
President
San Francisco Police Commission
1245 3rd Street
San Francisco, California 94158
E-mail: suzyloftus@hotmail.com

Re: Use of Force Stakeholder Meetings

Dear Suzy:

The San Francisco Police Officers' Association (POA) recently participated, in an observer status, in a series of stakeholder meetings concerning the Department's proposed new use of force policy. The meetings were cordial and productive, notwithstanding the wide array of views expressed by the participants.

From the POA's perspective, we gained a much better understanding and respect for the positions—even those "in opposition" to our views—articulated by the stakeholder groups. And we believe that the stakeholders saw not obstructionism in the positions articulated by the POA and the other PEG groups, but a genuine effort to adopt reforms that enable our officers to perform their duties safely and with practical guidance.

In fact, the only downside to the meetings is that they were ended so quickly by a seemingly arbitrary deadline set by the Commission.

The scope of these changes are massive. They are the most significant changes in twenty years to SFPD's use of force policy.

Discussion of them deserves more time.

Very truly yours,

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March 24, 2016

Suzy Loftus

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cc: San Francisco Police Commission
Greg Suhr, Chief of Police, San Francisco Police Department
Hector Sainez, Deputy Chief, San Francisco Police Department
Toney Chaplin, Commander, Investigations
Rachael Kilshaw, Secretary, San Francisco Police Commission
Samara Marion, Office of Citizen Complaints
Yulanda Williams, Officers for Justice
Monty Harvey, Officers for Justice
Brian Kneuker, Asian Police Officers' Association
Paul Yep, Asian Police Officers' Association
Marcial Marquez, Latino Police Officers' Association
Allan Schlosser, American Civil Liberties Union
Julie Traun, San Francisco Bar Association
Jennifer Friedenbach, Coalition on Homelessness
Cecile Coco, Crisis Intervention Training Working Group
Terry Bohrer, Crisis Intervention Training Working Group
Rebecca Young, Public Defender
Jeff Adachi, Public Defender
Colin West, Blue Ribbon Panel
Teresa Gracie, President Pride Alliance
Martin D. Halloran, President, San Francisco POA
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**San Francisco Police Officers Association
Proposed General Order**

Use of Force
Rev. 4/6/16

USE OF FORCE¹

The San Francisco Police Department's highest priority is the safety of the residents and visitors to San Francisco and the men and women who protect them. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using communication and de-escalation principles before resorting to the use of force, whenever appropriate. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unreasonable force. These are key factors in keeping the public safe and safeguarding the public's trust. The purpose of the policy is not to restrict officers from using reasonable force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority.²

I. GENERAL USE OF FORCE POLICY

Peace officers are authorized by the U.S. Constitution and the laws of the State of California to use **reasonable force** to effect an arrest, to prevent escape, to overcome resistance, in self-defense, or in defense of others while acting in the lawful performance of their duties.

Reasonable force is a legal term for how much and what kind of force a peace officer may use in a given circumstance. The proper objective for the use of force by a peace officer in any enforcement situation is to ultimately gain and maintain control of the situation or individual(s) encountered.

¹ The following policy proposal includes language from the Peace Officer Standards and Training (P.O.S.T.) learning domain (LD) #20 (Use of Force) that was last revised in October 2015. It includes SFPD (both current and draft policy) and POA proposed language. Unless footnoted, all material derives from P.O.S.T. LD #20.

² POA

1. Fourth Amendment “objective reasonableness” standard

The United States Supreme Court decided *Graham v. Connor*, 490 U.S. 386 (1989), which established that a peace officer’s use of force would be judged under the Fourth Amendment using an “objective reasonableness” standard.

The Supreme Court balanced a subject’s Fourth Amendment right to remain free from unreasonable seizure against the government’s interest in maintaining order through effective law enforcement.

The Court’s determination of the objective reasonableness of a use of force is fact specific and based on the totality of circumstances confronting the officer at the time force was used. The determination of reasonableness recognizes that peace officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, not with 20/20 hindsight, and without regard to the officer’s underlying intent or motivation.

When a use of force intrudes upon an individual’s liberty interest, it is measured by the type and amount of force employed. The type of force used and foreseeable injury resulting from it must be **objectively reasonable** in light of the facts and circumstances confronting the officer.

An officer is not required to choose the “best” or “most” reasonable action as long as the officer’s conduct falls within the range of conduct that is reasonable under the circumstances.

Officers may use the degree of force reasonable and necessary to protect others or themselves, but no more. If exceptional circumstances occur which are not contemplated by this order, officers should use any force reasonably necessary to protect themselves or others; however, they must be able to articulate the reasons for employing such force.³

A. Graham Factors

When balanced against the type and amount of force used, the Graham factors used to determine whether an officer’s use of force is objectively reasonable are:

- the severity of the crime at issue
- whether the suspect posed an immediate threat to the safety of the officers or others
- whether the suspect was actively resisting arrest
- whether the suspect was attempting to evade arrest by flight

Of these factors, the most important is whether the individual poses an immediate threat to the officer or public.

³ This last paragraph is SFPD current policy

B. Other Factors to be Considered

The reasonableness inquiry is not limited to the consideration of those factors alone. Other factors which may determine reasonableness in a use of force incident may include:

- availability of other reasonable force options⁴
- number of officers/subjects
- age, size, gender, and relative strength of officers/subjects
- specialized knowledge, skills, or abilities of subjects
- prior contact
- injury or exhaustion of officers
- access to potential weapons
- environmental factors, including but not limited to lighting, footing, sound conditions, crowds, traffic, and other hazards
- whether the officer has reason to believe that the subject is mentally ill, emotionally disturbed, or under the influence of alcohol or drugs
- whether there was an opportunity to warn about the use of force prior to force being used, and, if so, was such a warning given
- whether there was any assessment by the officer of the subject's ability to cease resistance and/or comply with the officer's commands

C. Reasonable Officer Standard asks:

- would another officer
- with like or similar training and experience,
- facing like or similar circumstance,
- act in the same way or use similar judgment?

2. Sufficiency of Fear

An officer's subjective fear alone does not justify the use of force. A simple statement of fear for your safety is not enough; there must be objective factors to justify your concern.

- It must be objectively reasonable.
- It must be based on the facts and circumstances known to the officer at the time.

3. The Use of Force Should Be Proportional

The level of force applied must reflect the totality of circumstances known or perceived by the officer at the time force is applied, including imminent danger to officers or others.

⁴ Not in same listed order as POST. This was moved to the top of list. *See Bryan v McPherson*, 608 F.3d 614 (9th Cir. 2010)

Proportional force, however, does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be objectively reasonable and necessary to counter it.⁵

4. California Law Regarding Use of Force

California Penal Code section 835a states that: "Any officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect an arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."

II. IMPORTANCE OF EFFECTIVE COMMUNICATION AND DE-ESCALATION

1. EFFECTIVE COMMUNICATION⁶

A major goal of law enforcement is to gain voluntary compliance without resorting to physical force, and effective communication can be the key to gaining voluntary compliance. Communication involves both command presence and words resulting in improved safety and professionalism. In fact, vast majority of law enforcement responsibilities involve effective communication. Effective communication is the most basic element of the use of force. In particular, effective communication may enable a peace officer to gain cooperation and voluntary compliance in stressful situations (e.g., confronting a hostile subject). Communication with non-compliant subjects can be very effective when officers are able to establish a rapport, use the proper voice intonation, ask questions and /or provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.

2. DE-ESCALATION⁷

If a subject is not endangering the safety of the public or an officer, fleeing, or destroying evidence, officers should, when feasible, employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and to increase

⁵ Edited are based on Seattle's Use of Force Policy.

⁶ This section is a combination of POST and SF proposed revisions.

⁷ This section is a combination of POST and SF proposed revisions.

the likelihood of voluntary compliance. Where feasible, in considering the totality of the circumstances, officers should consider the possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public safety and officer safety.

III. COMMUNITY POLICING

Community members want police officers to possess the skills necessary to subdue violent and dangerous subjects. Officers should use these skills to apply only the amount of force that is objectively reasonable under the totality of circumstances known to the officer. Force should never be used to punish subjects. In the American criminal justice system, punishment in the form of judgment is the sole responsibility of the courts.

IV. DUTY TO RENDER FIRST AID/NOTIFICATION OF EMERGENCY MEDICAL PERSONNEL⁸

Officers shall render first aid when a subject is injured or claims injury caused by an officer's use of force *unless* first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid.

Officers shall arrange for a medical *assessment* by emergency medical personnel when a subject is injured or complains of injury caused by an officer's use of force, or complains of pain that persists beyond the use of a physical control hold, and the scene is safe. If the subject requires medical *evaluation*, the subject shall be transported to a medical facility.

V. PERMISSIBLE CIRCUMSTANCES FOR USE OF FORCE

- 1. Officers May Use Reasonable Force Options In The Performance Of Their Duties In The Following Circumstances:⁹**
 - A. To prevent the commission of a public offense.
 - B. To effect a lawful arrest or detention and/or to prevent escape.
 - C. In self-defense or in the defense of another person.

⁸ SFPD draft language

⁹ POA and SFPD language

- D. To prevent a person from injuring himself/herself. However, an officer is prohibited from using deadly force against a person who presents only a danger to himself/herself and does not pose an imminent threat of death or serious bodily injury to another person or officer.

2. An Officer's Force Options Are Largely Dictated by The Subject's Actions

Force options are choices available to a peace officer to overcome resistance, to effect arrest, to prevent escape, to defend self or others, and to gain control of a particular situation. What constitutes reasonable force is in large part dependent on the subject's actions.

A. Categories of Subject's Actions

Situations confronting peace officers may change rapidly. Therefore, officers must continually reevaluate the subject's action and must be prepared to escalate or deescalate as needed. But, in general, as subject's actions can be broken down into five categories:

- **Compliant:** Subject offers no resistance.
- **Passive Non-Compliance:** Does not respond to verbal commands but also offers no physical form of resistance.
- **Active Resistance:** Physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, running away, verbally, or physically signaling an intention to avoid or prevent being taken into or retained in custody.
- **Assaultive:** Aggressive or combative; attempting to assault the officer or another person, verbally or physically displays an intention to assault the officer or another person.
- **Life-Threatening:** Any action likely to result in serious bodily injury or death of the officer or another person.

B. Types of Force:

Types of force include: non-deadly force; non-deadly intermediate force; and deadly force.

- **Non-deadly force:** force that poses a minimal risk of injury or harm.
- **Intermediate force:** force that poses a foreseeable risk of significant injury or harm.

Case law decisions have specifically identified and established that certain force options such as pepper spray, probe deployment with a TASER, impact projectiles, canine bites and baton strikes are classified as intermediate force likely to result in significant injury. Intermediate force will typically only be acceptable when officers are confronted with active resistance and a threat to the safety of officers or others.

- **Deadly force:** force with a substantial risk of causing serious bodily injury or death.

The circumstances in which deadly force may be used is discussed in detail below. The following force options, including but not limited to vehicle intervention (Deflection)¹⁰ and the use of firearms, are considered deadly force.

C. Tools and Techniques for Force Options

The following tools and techniques are not in a particular order nor are they all inclusive.

- Verbal Commands/Instructions/Command Presence
- Control Holds/Takedowns
- Impact Weapons
- Electronic Weapons (Tasers, Stun Guns, etc.)
- Chemical Agents (Pepper Spray, OC, etc.)
- Police Canine
- Vehicle Intervention (Deflection)
- Firearms
- Personal Body Weapons
- Impact Projectile
- Carotid Restraint Control Hold

D. Force Options Chart

The following chart illustrates how a subject's resistance/actions can correlate to the force applied by an officer:

Subject's Actions	Description	Possible Force Option
Compliance	Subject offers no resistance	<ul style="list-style-type: none">• Mere professional appearance• Nonverbal actions• Verbal requests and commands• Handcuffing and control

¹⁰ SFPD, not POST. Specifically, DGO 5.05

Subject's Actions	Description	Possible Force Option
		holds
Passive non-compliance	Does not respond to verbal commands but also offers no physical form of resistance	<ul style="list-style-type: none"> • Officer's strength to take physical control, including lifting/carrying • Pain compliance control holds, takedowns and techniques to direct movement or immobilize
Active resistance	Physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, running away, verbally, or physically signaling an intention to avoid or prevent being taken into or retained in custody	<ul style="list-style-type: none"> • Use of personal body weapons to gain advantage over the subject • Pain compliance control holds, takedowns and techniques to direct movement or immobilize a subject
Assaultive	Aggressive or combative; attempting to assault the officer or another person, verbally or physically displays an intention to assault the officer or another person	<ul style="list-style-type: none"> • Use of devices and/or techniques to ultimately gain control of the situation • Use of personal body weapons to gain advantage over the subject • Carotid restraint
Life-threatening	Any action likely to result in serious bodily injury or death of the officer or another person	<ul style="list-style-type: none"> • Utilizing firearms or any other available weapon or action in defense of self and others to stop the threat • Vehicle intervention (Deflection)

3. Verbal Warning

If feasible, and if doing so would not increase the danger to the officer or others, an officer shall give a verbal warning to submit to the authority of the officer before using any intermediate or deadly force option.¹¹

VI. DEADLY FORCE

The use of deadly force is the most serious decision a peace officer may ever make. Such a decision should be guided by reverence for human life (including the officer's life and others that may be in imminent danger) and used only when other means of control are unreasonable or have been exhausted.

Deadly force is force applied by a peace officer that poses a substantial risk of serious bodily injury or death.

Reverence for all life is the foundation on which the use of deadly force rests. The authority to use deadly force is a serious responsibility given to peace officers by the people who expect them to exercise that authority judiciously.

1. When an Officer May Use Deadly Force

A. To Protect Self or Life

An officer may use deadly force when the officer has the objective and reasonable belief that the subject's actions pose an **imminent threat** of death or **serious bodily injury** to the officer or another person, based upon the totality of the facts and circumstances known to the officer at the time.

Imminent threat: means a significant threat that peace officers reasonably believe will result in death or serious bodily injury to themselves or to other persons. Imminent danger is not limited to "immediate" or "instantaneous." A person may pose an imminent danger even if they are not at the very moment pointing a weapon at another person.

Serious bodily injury: means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement. (California Penal Code section 243(f)(4).)

B. Use of Deadly Force on Fleeing Subject

Deadly force may be used on a fleeing subject only where:

¹¹ POA

- 1) The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force;
- 2) The suspect poses a threat of serious physical harm to the officer or to others if the subject's apprehension is delayed
- 3) The use of deadly force is reasonably necessary to prevent escape;
- 4) Where feasible, some warning should be given before deadly force is used under these circumstances.

VII. DISCHARGE OF FIREARMS: PERMISSIBLE CIRCUMSTANCES¹²

1. When An Officer May Discharge A Firearm:

An officer may discharge a firearm in any of the following circumstances:

- A. In self-defense when the officer has reasonable cause to believe that he or she is in imminent danger of death or serious bodily injury.
- B. In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury. However, an officer may not discharge a firearm at a person who presents a danger only to him or herself, and there is no reasonable cause to believe that the person poses an imminent danger of death or serious bodily injury to the officer or any other person.
- C. To apprehend a person when both of the following circumstances exist:
 - (1) The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force; AND
 - (2) The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed.
- D. To kill a dangerous animal. To kill an animal that is so badly injured that humanity requires its removal from further suffering where other alternatives are impractical and the owner, if present, gives permission.

¹² This entire section is current SFPD policy

- E. To signal for help for an urgent purpose when no other reasonable means can be used.

An officer may generally not discharge a firearm as a warning.

2. Reasonable Care

To the extent practical, an officer shall take reasonable care when discharging his or her firearm so as not to jeopardize the safety of innocent members of the public.

3. Moving Vehicles

The following policies shall govern the discharge of firearms at or from a moving vehicle or at the operator or occupant of a moving vehicle:

- A. At a Moving Vehicle. An officer shall not discharge a firearm at a moving vehicle with the intent to disable the vehicle.
- B. From a Moving Vehicle. An officer shall not discharge a firearm from a moving vehicle unless the officer has reasonable cause to believe there is an imminent danger of death or serious bodily injury to the officer or to others.
- C. At the Operator or Occupant of a Moving Vehicle. Discharging a firearm at the operator or occupant of a moving vehicle is inherently dangerous to officers and the public. Disabling the operator will not necessarily eliminate an imminent danger of death or serious bodily injury. Further, a moving vehicle with a disabled operator may crash and cause injury to innocent members of the public or officers. Accordingly, it is the policy of the Department that **officers are prohibited from discharging their firearm at the operator or occupant of a moving vehicle except in the narrow circumstances set in this subsection.** An officer shall not discharge a firearm at the operator or occupant of a moving vehicle except under the following circumstances:
 - (a) If the operator or occupant of a moving vehicle is threatening the officer with imminent danger of death or serious bodily injury by means other than the vehicle itself.
 - (b) If the operator of the moving vehicle is threatening the officer with imminent danger of death or serious bodily injury by means of the vehicle, and the officer has no reasonable and apparent way to retreat or otherwise move to a place of safety.

- (c) In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury.
- (d) To apprehend a person when both of the following circumstances exist:
 - (i) The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force; AND
 - (ii) The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed.

In reviewing incidents involving the discharge of firearms from a moving vehicle or at an operator or occupant of a moving vehicle, the Department will consider the totality of the circumstances, including but not limited to whether the officer or others were in imminent danger of death or serious bodily injury and whether the officers who were present employed tactics consistent with Department approved training.

VIII. UNREASONABLE FORCE

Unreasonable force occurs when the type, degree, or duration of force employed was not objectively reasonable under the totality of the circumstances as evaluated using the standards and authorities described in the previous chapters.

Malicious assaults and batteries committed by peace officers constitute unlawful conduct. (California Penal Code section 149.) When the force used is objectively unreasonable, the officer can face criminal and civil liability, and disciplinary action.

IX. DUTY TO INTERVENE¹³

Where an officers have a reasonable opportunity to do so, officers shall intercede when they know, or have reason to know, that another officer is about to use, or is using, unreasonable force under color of state law. Officers shall promptly report any use of unreasonable force and the efforts made to intercede to a supervisor.

¹³ SFPD draft language

Kilshaw, Rachael (POL)

From: Cyndee Bates <Cyndee@sfpoa.org>
Sent: Monday, May 02, 2016 3:06 PM
To: Kilshaw, Rachael (POL)
Subject: FW: Latest versions
Attachments: POA 5 01 response.pdf; POA 5.02 response.pdf; POA response to minimal force.pdf; Propsed Use of Force 5-2-16.pdf

From: Cyndee Bates
Sent: Monday, May 02, 2016 3:02 PM
To: Michael Nevin; Marty Halloran
Subject: Latest versions

Cyndee Bates | Office Manager | San Francisco Police Officers' Association | 800 Bryant Street, 2nd Floor | San Francisco, CA 94103 | Office: (415)-861-5060 | Fax: (415)552-5741



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MEMORANDUM

DATE: May 2, 2016
TO: San Francisco Police Commission
FROM: San Francisco Police Officers' Association
RE: **San Francisco Police Officers Association's
Evaluation of Proposed General Order 5.01, as revised on 3/21/2016.**

The following is a discussion of the revised, proposed General Order 5.01 submitted by the San Francisco Police Department on March 21, 2016. The Department's proposed language appears in black italics text and the comments of the San Francisco Police Officers' Association ("SFPOA") appear in blue text. **The SFPOA offers these comments only in its capacity as a stakeholder and these comments do not substitute for, and are not a waiver of, its right to meet and confer over any changes to policy that are within the scope of bargaining or otherwise impact the working conditions of San Francisco police officers.**

INTRODUCTION

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using communication and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unreasonable force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

The purpose of the policy is not to restrict officers from using reasonable force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority.

SFPOA'S PROPOSED CHANGE:

1. The Department should acknowledge that the highest priority should be

protecting the people of San Francisco.

While the SFPOA believes that the Department should emphasize the importance of all human life in the use of force general orders, failing to acknowledge that the primary purpose of any police force is to help protect its citizens sends a confusing message. We believe that the SFPOA proposed mission statement¹ is preferable because it combines the two concepts and better captures what truly is the highest priority of the Department. Unfortunately, in our society, there are occasions in which a suspect fails to share this reverence for human life and threatens civilians and officers. When that happens, an officer's "highest duty" is to protect the innocent from the suspect. Were this not the case, an officer would never be justified in using deadly force. As stated, this mission statement appears to place the "sanctity" of a suspect threatening to kill an innocent civilian or officer on par with the "sanctity" of the civilian or officer being threatened. This is contrary to the remainder of this general order, which authorizes an officer to use deadly force to protect him or herself or others.

2. Substitute the word "sanctity" for "reverence," or some other synonym for importance.

The term "sanctity" has a religious connotation inappropriate for a San Francisco general order. For example, the Wikipedia definition of the phrase "sanctity of human life" is as follows:

"The phrase **sanctity of life** refers to the idea that **human life** is sacred and holy and precious, argued mainly by the pro-life side in political and moral debates over such controversial issues as abortion, contraception, euthanasia, embryonic stem-cell research, and the "right to die."

Accordingly, the SFPOA suggest that the Department substitute the word "reverence," which is defined as "a deep respect for something," which is the term used by P.O.S.T. and in SFPOA'S proposal.

3. Change the statement that the Law Enforcement Code of Ethics "requires" anything, to indicate only what it "states."

The Law Enforcement Code of Ethics represents ideals to be strived towards for officers. It does not represent requirements. Although our initial proposal also uses the word "requires" in this context, it would be more accurate to use the word "states," so as to avoid confusion.

I. POLICY

- A. SANCTITY OF HUMAN LIFE.** *The Department is committed to the sanctity and preservation of all human life, human rights, and human dignity.*

¹ On April 6, 2016, the SFPOA submitted to the San Francisco Police Commission an alternative revision to the San Francisco Police Department General Orders 5.01 and 5.02, which is attached.

SFPOA'S PROPOSED CHANGE

1. Change the word "sanctity" to "reverence" and consider moving any non-repetitive language to the introduction.

The SFPOA has the same concern with use of term "sanctity" as mentioned above. Moreover, the introduction is a better-suited section for addressing such general principles, and in any event, there is no reason to repeat them twice within the first page of the general order. A general order must be clear and concise. Unnecessary repetition creates confusion.

- B. *ESTABLISH COMMUNICATION.*** *Communication with non-compliant subjects is most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.*

SFPOA'S PROPOSED CHANGE:

1. The SFPOA suggests that this language be removed, or significantly altered, as suggested in SFPOA'S proposed model policy.

First, any street officer would reject the categorical statement that "communication with a non-compliant subjects *is* most effective when officers establish rapport...." For example, is "establishing rapport" with a bank robber who just exited a bank with a gun in his hand the "most effective" means of communication in that circumstance? No. The most effective communication at that point would be for the officer to order to say "Police, drop the gun!" while the officer draws his or her weapon.

The main problem with the proposed language is that it crams all communications with all non-compliant suspects into one bag. Policing is not a one-size-fits-all proposition. This concern illustrates a recurring problem with much of the Department's proposed language. It seems as though the drafters had one specific scenario in mind, but drafted broad language that covers many situation that were never considered. A chief concern of the SFPOA is that the use of broad sweeping language to address a specific scenario will have unintended and harmful consequences. It may be appropriate in many situations for an officer to establish rapport with a suspect and speak in a calm tone— that already frequently happens— but it is not appropriate in *all* circumstances. The proposed language erroneously mandates one specific communication approach regardless of the circumstances. That is dangerous, counter-productive and ineffective.

- C. *DE-ESCALATION.*** *If a subject is not endangering the safety of the public or an officer, fleeing, or destroying evidence, officers should, when feasible, employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and to increase the likelihood of voluntary compliance. Officers should consider the possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These*

situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public safety and officer safety.

SFPOA'S PROPOSED CHANGE:

1. The SFPOA supports giving greater emphasis to de-escalation in the general orders. But this language must be redrafted to avoid unintended harmful consequences.

As drafted, there will be practically no actual circumstances facing officers in the field where de-escalation techniques will be required. Contrary to P.O.S.T. and the SFPOA's proposed revisions to the general orders, the language in this proposed policy *drastically limits* the situations in which officers should use de-escalation techniques. Specifically, this policy states that de-escalation should only be attempted where "a subject is not endangering the safety of the public or an officer, fleeing, or destroying evidence." P.O.S.T. and the SFPOA disagree. De-escalation is an important tool that officers should have available even where the suspect *is* endangering the public. For example, in a hostage situation where a suspect has a gun to a civilian's head, appropriate de-escalation techniques might be the only thing that could save the civilian's life. This portion of the Department's proposed general order illustrates again the problem of drafting a "general" order with only a specific situation in mind. Here, apparently attempting to expand the use of de-escalation techniques, this policy actually limits them.

Members should use the following de-escalation tactics, when safe and feasible under the totality of the circumstances known to the officer:

1. *Attempt to isolate and contain the subject;*
2. *Create time and distance from the subject by establishing a buffer zone ("reaction gap") and utilize cover to avoid creating an immediate threat that may require the use of force;*
3. *Request additional resources, such as Crisis Intervention Team (CIT) trained officers, Crisis/Hostage Negotiation Team, Conducted Energy Devices, or Extended Range Impact Weapon;*
4. *Designate an officer to establish rapport and engage in communication with the subject without time constraint;*
5. *Tactically re-position as often as necessary to maintain the reaction gap, protect the public, and preserve officer safety;*
6. *Continue de-escalation techniques and take as much time as necessary to resolve the incident, without having to use force, if feasible.*

Other options, not listed above, may be available to assist in de-escalating the situation.

Supervisors who become aware of a situation where an officer is using de-escalation techniques should monitor the radio communications and evaluate the need to respond to the scene.

SFPOA'S PROPOSED CHANGE:

1. The attempt to list appropriate de-escalation techniques further confuses an almost incomprehensible policy and needs to be re-considered, placed in a separate policy or, better yet, left to training.

This policy makes no sense. First, it says that de-escalation should be used to “decrease the likelihood of the need to use force.” The first de-escalation technique noted is that the officer should “isolate and contain” the suspect. *How is an officer expected to isolate and contain a suspect without using any force – especially since under this policy pointing a firearm is considered a use of force?*

Next, officers are told to create time and distance from the suspect, which sounds a lot like retreating. This reads as if the officer is supposed to use an unidentified non-forceful technique to isolate and contain the suspect while simultaneously retreating. *If that occurred, what would keep the suspect isolated and contained?* It is contrary to P.O.S.T., academy training and common sense to suggest that an officer can keep a subject isolated and contained, while at the same time retreating and not using any force. Then, under this policy, the officer must request additional assistance, and designate an officer to establish rapport without time constraints while continuing to re-position (retreat) in order to maintain a reaction gap. Presumably this means that if the suspect advances on the officer, the officer must continue to retreat, call for assistance, and try to designate one of the other retreating officers who are not using any force (which would preclude any officer pointing a weapon) to establish rapport with the advancing suspect. And this would only occur if the suspect was not threatening anyone – if he was, then this policy makes de-escalation inappropriate.

As with other poorly drafted proposals being advanced by the Department, it appears that the drafters had one specific scenario in mind – albeit one which rarely if ever presents itself. As a result, the current policy language will not offer officers or the public meaningful guidance as to when or how to use de-escalation techniques. A lack of effective guidance will endanger officers and the public. SFPOA consulted with noted police procedures expert Don Cameron – who has personally trained over 45,000 officers in California – as to how he would train on this policy and he responded that it would be impossible because it is incomprehensible. We owe the public and our officers better.

This portion of the proposed policy tries to do too much and end up doing nothing. Methods of appropriate de-escalation should be taught in an academy setting, not parsed in contradictory general order language. It is a mistake to attempt to teach something as situation-specific as de-escalation through a general order, as the hypothetical above illustrates. For example, the requirement that officers “use cover to avoid creating an immediate threat” is confusing and nonsensical. Cover, as it is generally understood by officers, is used to protect *the officers* from a threat, not the suspect from the officers. If the Department intends to require officers to hide from suspects so that the suspects do not feel threatened – if that is what is in fact intended by the language – officers will need additional training on how to properly hide, while at the same time protecting civilians and isolating and containing a dangerous suspect – which seems like an impossible task. In addition, officers will need additional training on how to be non-threatening while pointing a deadly weapon at a suspect, which also seems contradictory.

Alternatively, the Department should develop an entire general order dedicated to the very complex and important topic of de-escalation, with the assistance of an experienced tactical instructor such as Don Cameron.

- D. *PROPORTIONALITY.*** *The Department requires that officers use only the degree of force that is reasonable for the purpose of accomplishing their duties. The degree and kind of force used should be proportional to the severity of the offense committed or the threat posed to human life; however, the principle of proportionality does not require officers to refrain from using reasonable force to overcome a threat to the safety of the public or officers or to overcome resistance.*

SFPOA'S PROPOSED CHANGE:

1. The proportionality requirement should be clarified or eliminated.

Proportionality, as it relates to use of force, is not a well-defined term in case law or P.O.S.T. Therefore, if the San Francisco Police Department wishes to use this term, it is important to clearly explain *exactly* what it means. The proposed policy fails to do that in several respects. First, the definition seems to suggest three different ways to measure whether force is proportional – but then states that none of that matters anyway, so long as the force was reasonable. Specifically, the definition states that (1) proportionality relates to that force necessary for an officer to accomplish their duties. Then it states that (2) proportionality is measured by the severity of the offense or (3) the threat posed to human life. Next, the definition states that regardless of what are considered proportional under any of the three proposed tests for proportionality, the officer can still use reasonable force to overcome a threat or resistance, which has always been the requirement before anyone suggested anything about proportionality. The proposed definition of this term is so muddled that it effectively lacks any meaning, which will only lead to confusion and endanger the public and officers. The SFPOA suggests that, if San Francisco insists on using the term “proportionality” in its general order, it adopt the definition used by Seattle:

“Proportional Force: The level of force applied must reflect the totality of circumstances known or perceived by the officer at the time force is applied, including imminent danger to officers or others. Proportional force, however, does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be objectively reasonable and necessary to counter it.”

The better approach, however, is to eliminate any reference to proportionality entirely. SFPD's proposed general orders contain a detailed description of when force can be used and how it should be evaluated. It will only lead to confusion if the proportionality test is different from the other test described in the general orders. If the proportionality tests is meant to be synonymous with the other use of force directives in the general orders, it is unnecessarily redundant and, yet, potentially harmful due to the resulting likelihood of confusion. A general order that has multiple and possibly conflicting directives gives either no guidance at all, or

worse, inconsistent and/or unpredictable guidance. Such an outcome is precisely what a general order is intended to avoid.

- E. *DUTY TO INTERVENE.*** *Officers shall intervene when they reasonably believe another officer is about to use, or is using, unreasonable force. Officers shall promptly report any use of unreasonable force and the efforts made to intervene to a supervisor.*

SFPOA'S PROPOSED CHANGE:

- 1. The duty to intervene language should include a requirement that the officer have a reasonable opportunity to do so.

An officer's duty to intervene can be found in Ninth Circuit case law regardless of whether it is in a department's general orders, so the SFPOA believes it is appropriate to add this requirement. Consistent with case law, however, the Department should clarify that officers are required to intervene only when they have a reasonable opportunity to do so.

II. *CONSIDERATIONS GOVERNING ALL USES OF FORCE.*

- A. *USE OF FORCE MUST BE FOR A LAWFUL PURPOSE.*** *Under the Fourth Amendment of the United States Constitution and the California Penal Code section 835a, officers may use reasonable force in the performance of their duties, for the following purposes:*

- 1. *To effect a lawful arrest, detention, or search.*
- 2. *To overcome resistance or to prevent escape.*
- 3. *To prevent the commission of a public offense.*
- 4. *In defense of others or in self-defense.*
- 5. *To gain compliance with a lawful order.*
- 6. *To prevent a person from injuring himself/herself. However, an officer is prohibited from using lethal force against a person who presents only a danger to himself/herself and does not pose an imminent threat of death or serious bodily injury to another person or officer. See DGO 5.02, Use of Firearms and Lethal Force.*

SFPOA'S PROPOSED CHANGE: None.

- B. *USE OF FORCE MUST BE REASONABLE.*** *Under the Fourth Amendment of the United States Constitution an officer's decision to use force, and to use a particular type and degree of force, must be objectively reasonable under the totality of the circumstances known to the officer. Furthermore, California Penal Code section 835a states, in part, that a peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by*

reason of resistance or threatened resistance of the person being arrested; nor shall such officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, or to prevent escape, or to overcome resistance. An officer must be able to clearly articulate the objective reasons, based on the information available to the officer at the time, why a particular force option was used. Relevant factors include but are not limited to:

1. ***Whether the subject poses an immediate threat to the safety of the public or officers, and the degree of that threat;***
2. ***Proximity, access to and type of weapons available to the subject;***
3. ***Time available to an officer to make a decision;***
4. ***Availability of additional officers or resources to de-escalate the situation;***
5. ***Any force should be proportional to the severity of the offense committed for which the officer is taking action;***
6. ***Environmental factors and/or other exigent circumstances;***
7. ***Severity of the crime(s) at issue;***
8. ***Whether the subject is attempting to evade arrest by flight or is actively resisting, and the degree of that resistance;***
9. ***Whether the subject's escape could pose a future safety risk.***

Not all of the above factors may be present or relevant in a particular situation, and there may be additional factors not listed.

SFPOA'S PROPOSED CHANGE:

1. The Department should remove "proportionality" as a factor and /or provide a consistent and reasonable definition of the term.

Of the nine "factors" listed in the Department's proposal that officers should consider when analyzing the totality of the circumstances, only number 5, the "proportionality" factor is problematic and should be removed. Proportionality should not be listed as one of the factors for several reasons.

First, it is not a "factor." As that term is used in case law, it is merely a different term for "reasonable." Listing a synonym for reasonable as a "factor" is confusing and muddles the point being made with the list of appropriate factors an officer should consider.

Second, because the previous definition proposed by the Department for proportionality is so confusing, it would be harmful for the Department to include proportionality as a factor (even though it is not a factor) without better defining that term.

Third, proportionality in this section of the proposed general order appears to be defined differently from before. Earlier, the proposed general orders suggests that proportionality is measured either by: (1) the force necessary for an officer to accomplish their duties; (2) the severity of the offense; or (3) the threat posed to human life. Here, in contrast, proportionality appears to be measured only by the "severity of the offense." Having different definitions for the same concept in the same general order is confusing and counter-productive.

Fourth, because proportional force is not well-defined in the proposed general orders, it is unclear whether its inclusion requires officers to meet like force with like force. According to Webster's Dictionary "proportional" means "corresponding in size, degree, or intensity." Under this definition, if an officer is threatened by a suspect brandishing a knife, must that officer resort to using a knife as well in order to defend him or herself? If that is not what the Department intends, it should clarify precisely what proportional force does mean in the proposed general orders. If, however, the Department does intend to require officers to meet like force with like force, this creates a host of additional problems. Currently, officers are trained to use a higher level of force than their attacker so that they and the civilians they might be trying to help are not seriously injured or killed. If the Department wishes to usher in a new era of law enforcement in which Officers must meet like force with like force, all officers must be re-trained, San Francisco may lose its P.O.S.T. certification and the Department will endanger its officers and the public. In addition, the re-training that is necessary will be difficult to accomplish and expensive. It will be difficult to find any certified instructors to do the training, or an equipment belt large enough to hold all of the possible weapons an officer might encounter in the field.²

2. The Department should specifically include the requirement that an officer's use of force is not to be evaluated by 20/20 hindsight.

Probably the single most important criterion in evaluating an officer's use of force, is the prohibition on using 20/20 hindsight. Although the proposed general order does not expressly advocate using 20/20 hindsight – indeed no reasonable commentators make that suggestion – this criterion is of such vital importance that it should be explicitly included in the use of force general orders, as is the case for almost every other police department in the county.

- C. ***UNLAWFUL PURPOSES. Penal Code Section 149 provides criminal penalties for every public officer who "under color of authority, without lawful necessity, assaults or beats any person." Any assaults and batteries committed by officers constitute gross and unlawful misconduct and will be criminally investigated.***

SFPOA'S PROPOSED CHANGE: None.

- D. ***DUTY TO RENDER FIRST AID. Officers shall render first aid when a subject is injured or claims injury caused by an officer's use of force unless first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid.***

SFPOA'S PROPOSED CHANGE:

1. This provision should be changed to require officers to render first aid only to

² Don Cameron has stated that he knows of no certified instructors who could train San Francisco police officers in gladiator-style fighting techniques, where the police officers must be equipped with knives, bottles, rocks and chains depending on the specific weapons expected to be used by the subjects they encounter.

the extent they are trained to do so.

Officers are not medical doctors, EMT's or paramedics. Their first-aid training is mostly limited to CPR. To require officers to render first-aid that they are unqualified to perform, is irresponsible, dangerous and would create potential liability for officers and the City. Furthermore, patrol vehicles are equipped with only very small medical kits, while officers on foot patrol do not carry any medical equipment at all. If the Department is going to require officers to render first aid, it needs to provide officers with the appropriate medical training, certification and equipment. Under current case law, an officer has fulfilled his or her obligation to render first aid if they call for medical aid to respond to the scene. The Department should not change this rule until and unless officers are provided with appropriate medical training and equipment. Alternatively, the Department should require officers to render first-aid only to the extent of their first aid training, and only to the extent they have the proper equipment to do so. If the Department wishes to make the provision of "first-aid" by officers a requirement, it must also define what exactly is meant by first-aid. For example, if a suspect complains that he has a severe neck injury as a result of a struggle with an officer, *does this rule require the officer attempt to provide first-aid, which if done improperly could cause paralysis?*

2. If officers are going to be trained in providing first-aid and provided with appropriate medical equipment, it does not make sense to limit the circumstances in which they provide first-aid to suspects complaining of injury from an officer.

If the Department is going to invest in training all officers as EMT's so that they can provide appropriate first-aid after a use of force, it does not make sense to limit their medical services to only those individuals complaining of injury from a use of force by the officer. Officers frequently encounter civilians in need of first-aid. The SFPOA cannot think of a justification for why an individual who is injured by a use of force is entitled to different medical treatment than a civilian who is injured by another. For example, under the proposed policy, if an officer arrives on a scene in which a suspect has just stabbed an individual, and the officer uses force to detain that suspect, causing the suspect to scrape his knee, the officer would be required to attend to the suspect's scrapped knee while leaving the stabbing victim unattended. Again, this proposal seems to have been written with one particular circumstance in mind without considering the possible ramifications when the general order is applied to other circumstances. This is short-sighted and dangerous.

- E. ***DUTY TO PROVIDE MEDICAL ASSESSMENT. Officers shall arrange for a medical assessment by emergency medical personnel when a subject is injured or complains of injury caused by a use of force, or complains of pain that persists beyond the use of a physical control hold, and the scene is safe. If the subject requires medical evaluation, the subject shall be transported to a medical facility. If the emergency medical response is excessively delayed under the circumstances, officers should contact a supervisor to coordinate and expedite the medical assessment or evaluation of the subject, e.g., transport subject to nearest medical facility by SFPD. See DGO 5.18. Prisoner Handling and Transportation.***

SFPOA'S PROPOSED CHANGE:

1. This provision should be changed to require only that officers call for medical assistance when appropriate and that they should make repeated efforts to obtain medical assistance if emergency personnel appear to be delayed. Officers should not be required to ensure prompt medical care to individuals injured by a use of force and should never be required to provide transportation to a medical facility where someone is seriously injured.

Even though officers have no control over whether emergency medical personnel will respond to a scene after being requested, or how long they will take, this proposal appears to hold officers responsible for ensuring that citizens receive appropriate medical treatment in a timely manner – but only if the individual was injured by an officer. This is not only unfair, but could lead to bizarre and unintended results. For example, if a suspect shot a civilian and then was shot by an officer before the suspect could shoot another civilian, the officer would be responsible for ensuring that the suspect receives prompt medical attention, but would not have a similar obligation toward the civilian. If the ambulance did not arrive promptly, the officer would be required to load the suspect into his or her police vehicle and drive to a hospital, but would have no such obligation to further assist the injured civilian. Although an officer should not be required to drive anyone to a hospital – especially in San Francisco with an area of only 7x7 miles – it makes no sense to elevate the physical wellbeing of a suspect over that of the civilian(s) or officers they may have injured.

2. Officers should not be required to provide transportation in an SFPD vehicle even if an ambulance is delayed.

This proposal will place citizens in danger, expose the City to unnecessary liability and place an unfair burden on officers. Ambulances and trained medical personnel are not only intended to provide rapid transportation, but they can provide immediate medical attention at the scene and medical attention during transport (in a sterile environment) that might be necessary to save the patient's life. SFPD vehicles are not equipped with the tools necessary to provide anything remotely close to comparable care. If untrained officers are required to provide emergency transportation in an unequipped, unhygienic SFPD vehicle because an ambulance is delayed, citizens could die who might otherwise have been saved because they will have been denied appropriate medical attention. Moreover, the back seats of SFPD vehicles are cramped and not sterile. *Is the Department proposing that a suspect with a gunshot wound is better served by being loaded into the back of an SFPD patrol vehicle instead of waiting a few minutes for an ambulance?* It would be unwise and dangerous for the Department to require officers to transport seriously injured individuals to a hospital in the back of a patrol vehicle. No other department in the country has such a requirement. And, San Francisco already has numerous emergency vehicles at the ready to provide exactly this service – ambulances.

Before interfering with the manner in which citizens in San Francisco receive first-aid and emergency transportation to a medical facility, the Department should consult with appropriate healthcare providers to make sure that the proposed policy will not endanger the public, as this proposed policy unquestionably does.

F. SUBJECT ARMED WITH A WEAPON — NOTIFICATION AND COMMAND. *In situations where a subject is armed with a weapon, officers and supervisors shall comply with the following:*

1. *OFFICER'S RESPONSIBILITY. Upon being dispatched to or on-viewing a subject with a weapon, an officer shall call a supervisor immediately, or as soon as feasible. When safe and feasible under the totality of the circumstances, officers should consider the principles listed in Section I. A-E.*
2. *SUPERVISORS' RESPONSIBILITIES. When notified that officers are dispatched to or on-view a subject armed with a weapon, a supervisor shall immediately, or as soon as feasible:*
 - (a) *Notify DEM, monitor radio communications, respond to the incident (e.g., "3X100, I'm monitoring the incident and responding");*
 - (b) *Remind responding officers, while en-route, absent a "Code 33" or other articulable reasons why it would be unsafe to do so, to protect life, isolate and contain the subject, maintain distance, find cover, build rapport, engage in communication without time constraint, and call for appropriate resources;*
 - (c) *Upon arrival, assume command, and ensure appropriate resources are on-scene or are responding.*

SFPOA'S PROPOSED CHANGE:

1. The requirement that supervisors read a *Miranda*-type admonition over the air each time there is a call or on-view of a suspect with a weapon should be eliminated.

This requirement is dangerous, makes no sense, and will not in any way encourage de-escalation, for many reasons. First, although the revised proposal has an exception for Code 33 situations, this does not solve the safety problem. In many situations, a call that an individual has a weapon is not immediately a Code 33 – but it can become a Code 33 in the 10-15 seconds that a supervisor would spend reading this admonition over the air. If this policy is in place, valuable time will be lost during the 10-15 second admonition which could cost civilians and officers their lives.

Second, this admonition will be ineffective at best and dangerous at worst, even if it does not interfere with valuable air-time. This proposal requires that, *regardless of the circumstances*, a supervisor who is not on the scene and does not know anything about the situation, must go over the air and give advice to the on-scene officer about how to handle the call. This is nuts. Suppose, for example, that an on-scene officer arrives to a weapons call and finds a suspect about to shoot a child: *Should that officer heed his supervisor's canned advice to "build*

rapport," or should the officer make an appropriate decision based on what he or she observes based on the totality of circumstances known to him or her? The obvious answer is that the on-scene officer should ignore any advice that does not apply to that particular situation. If the on-scene officer does not ignore the canned advice, however, but treats the admonition as a directive from a supervisor, this could endanger the public and officers. Officers might be taking cover when it is unsafe to do so, maintaining distance when they should be advancing on the suspect and trying to establish a rapport when they should be quiet – all because they believe they are following a supervisor's orders.

Third, almost none of this advice would apply to the great majority of the routine calls officers receive about individuals armed with weapons. For any of these admonitions to be appropriate, the following circumstances must apply: (1) the call is for an armed suspect; (2) but, the suspect is not immediately threatening anyone; (3) the suspect is sufficiently far from any possible victims that the officer can maintain distance, build rapport, call for additional resources, take cover and engage in communications without time restraints and without jeopardizing anyone's safety; and, (4) the scene is sufficiently secure and controlled that command of the scene can be transferred from the on-scene officer to the later arriving supervisor. The only scenario in which this would be applicable is a very rare critical incident situation (such as a barricaded suspect situation), which is addressed by other general orders. Therefore, if this proposal is approved, the Department would be requiring that, regardless of the situation, supervisors must dispense advice that is almost never going to be applicable.

Moreover, the blanket application of these de-escalation principles would turn many routine weapons calls into dangerous critical incidents. Situations that might be resolved merely by the officer ordering a suspect to drop a weapon will now require the officer to retreat, call for backup and obtain cover. For example, in response to our survey, one officer recounted the following scenario: The officer responded to a weapons call and found a mentally unstable woman lying on her bed saying that she wanted to kill herself. The officer approached. The woman moved her leg and revealed a knife under her leg (which she was not holding – yet). Without saying another word, the officers grabbed the woman, and moved her away from the knife. The woman struggled, spat, and was held for a 5150. If the officer had instead backed off to establish rapport, with no time constraint, called a supervisor, took cover and created a "reaction gap," this situation could have turned disastrous. The quick action by the officer resolved the situation and probably saved the woman's life.

Fourth, if the Department believes that officers should be instructed about de-escalation and the "sanctity" of human life, the worst, most dangerous and least effective means of achieving this is for supervisors to repeat those words over the air 20 times a day in situations where the admonitions do not apply and officers are responding to a potentially dangerous situation. Instead, the Department should provide additional training and draft appropriate general orders.

Fifth, the Department does not have the resources for a supervisor to be dispatched to every weapons call. The Mission district receives dozens of similar calls a day, but only has a limited number of patrol sergeants at any given time. The SFPOA suggests that if the Department still believes that some variation of this policy is appropriate, it should study the practical effect of this policy before implementation to avoid the possible chaos that might

follow.

No police department in the entire country has a policy like this. San Francisco should not be the first.

III. FORCE OPTIONS

The force options authorized by the Department are physical controls, personal body weapons, chemical agents, impact weapons, extended range impact weapons, vehicle interventions, conducted energy devices, and firearms.

SFPOA'S PROPOSED CHANGE: None.

A. PHYSICAL CONTROLS/PERSONAL BODY WEAPONS. *Physical controls, such as control holds, takedowns, strikes with "personal body weapons" (i.e., body parts such as a hand, foot, knee, elbow, head butt, etc.) and other weaponless techniques are designed to incapacitate and subdue subjects.*

1. *PURPOSE. Officers should consider the relative size and possible physical capabilities of the subject compared to the size, physical capabilities, skills, and experience of the officer. When faced with a situation that may necessitate the use of physical controls, officers should consider requesting additional resources to the scene prior to making contact with the subject, if feasible. Different physical controls involve different levels of force and risk of injury to a subject or to an officer. Some physical controls may actually involve a greater risk of injury or pain to a subject than other force options.*

SFPOA'S PROPOSED CHANGE: None.

2. **USE.** *When a subject offers some degree of passive or active resistance to a lawful order, in addition to thoughtful communication, officers may use physical controls to gain compliance, consistent with Department training. A subject's level of resistance and the threat posed by the subject are important factors in determining what type of physical controls or personal body weapons should be used.*

SFPOA'S PROPOSED CHANGE:

1. *The SFPOA believes that this provision should be revised, consistent with P.O.S.T. and the SFPOA's proposal to explain the various force options available to officers given various levels of threat.*

While this requirement is not harmful, it is incomplete and fails to properly explain the various factors that an officer should consider before using physical controls or personal body

weapons. P.O.S.T. training, which is reflected in the SFPOA's proposal, has carefully considered these issues and provides a far more comprehensive analysis than the Department's proposal.

3. **PROHIBITED USE OF CONTROL HOLDS.** *Officers are prohibited from using choke holds, i.e., choking by means of pressure to the subject's trachea.*
4. **MANDATORY MEDICAL ASSESSMENT.** *Any subject who has been injured, complains of an injury in the presence of officers, or complains of pain that persists beyond the use of the physical control hold shall be medically assessed by emergency medical personnel. (See Section II.E.)*
5. **REPORTING.** *Use of physical controls is a reportable use of force when the subject is injured, complains of injury in the presence of officers, or complains of pain that persists beyond the use of a physical control hold. Striking a subject with a personal body weapon (i.e., body parts such as a hand, foot, knee, elbow, head butt, etc.) is a reportable use of force. (See DGO 5.01.1)*

SFPOA'S PROPOSED CHANGE: None, specifically, although the SFPOA's proposal provides clearer guidance to officers.

B. CHEMICAL AGENTS. *Chemical agents, such as Oleoresin Capsicum (OC) Spray, are designed to cause irritation and temporarily incapacitate a subject.*

1. **PURPOSE.** *Chemical agents can be used to subdue an unarmed attacker or to overcome active resistance (unarmed or armed with a weapon other than a firearm) that is likely to result in injury to either the subject or the officer. In many instances, chemical agents can reduce or eliminate the necessity to use other force options to gain compliance, consistent with Department training*
2. **WARNING.** *Officers shall provide a warning prior to deploying a chemical agent, if feasible:*
 - (a) *Announce a warning to the subject and other officers of the intent to deploy the chemical agent if the subject does not comply with officer commands; and*
 - (b) *Give the subject a reasonable opportunity to voluntarily comply unless it would pose a risk to the community- or the officer, or permit the subject to undermine the deployment of the chemical agent.*
3. **MANDATORY FIRST AID.** *At the scene or as soon as possible, officers shall administer first aid by:*

Seating the subject or other person(s) exposed to a chemical agent in an upright position, and Flushing his/her eyes out with clean water and ventilate with fresh air.

4. *MANDATORY MEDICAL ASSESSMENT. Any person exposed to a chemical agent shall be medically assessed by emergency medical personnel. (See Section II.E,.) Any exposed person shall be kept under direct visual observation until he/she has been medically assessed. If an exposed person loses consciousness or has difficulty breathing, that information shall be provided to dispatch to expedite emergency medical personnel.*
5. *TRANSPORTATION. Subjects in custody exposed to a chemical agent must be transported in an upright position by two officers. The passenger officer shall closely monitor the subject for any signs of distress. If the subject loses consciousness or has difficulty breathing, officers shall immediately seek emergency medical attention. Hobble cords or similar types of restraints shall only be used to secure a subject's legs together. They shall not be used to connect the subject's legs to his/her waist or hands in a "trussed" manner or to a fixed object.*
6. *BOOKING FORM. Officers shall note on the booking form that the subject has been exposed to a chemical agent.*
7. *REPORTING. If an officer deploys a chemical agent on or near someone, it is a reportable use of force. (See DGO 5.01.1)*

SFPOA'S PROPOSED CHANGE: None.

- C. *IMPACT WEAPON.*** *Impact weapons, such as a baton, are designed to temporarily incapacitate a subject.*
1. *PURPOSE. An impact weapon may be used to administer strikes to non-vital areas of the body, which can subdue an aggressive subject in accordance with Department training Only Department issued or authorized impact weapons shall be used. If under unusual circumstances, officers need to resort to the use of other objects as impact weapons, such as a flashlight or police radio, officers shall articulate the reason for doing so.*
 2. *WARNING. When using an impact weapon, an officer shall, if feasible:*
 - (a) *Announce a warning to the subject of the intent to use the impact weapon if the subject does not comply with officer's commands; and*

SFPOA'S PROPOSED CHANGE: None.

- (b) *Give the subject a reasonable opportunity to voluntarily comply, except that officers need not do so where it would pose a risk to the community or the officer or permit the subject to undermine the use of the impact weapon.*
3. **RESTRICTED USES.** *Unless exceptional circumstances exist, officers should not:*
- (a) *raise an impact weapon above the head to strike a subject, or*
 - (b) *Strike vital areas, including the head, neck, face, throat, spine, groin or kidney.*

SFPOA'S PROPOSED CHANGE:

1. The policy should restrict strikes to inappropriate parts of the body, not overhead strikes.

Policies that reduce inappropriate baton strikes are commendable. But a ban on overhead strikes does nothing to accomplish that goal. SF policies, academy, and P.O.S.T. training already focus on the appropriate areas of the body to strike an individual with impact weapons, not whether the blow is delivered with a forehand swing, a backhand or an overhead strike. Because it is the part of the individual being struck that matters (head versus thigh), a restriction on how the strike is delivered is nonsensical. Specifically, an over-hand strike may not be any more likely to result in an inappropriate strike than a side-arm strike. Nor is an overhead strike likely to deliver more force than a sidearm strike. In addition, what constitutes an overhead strike is not always clear. *If the officer is bent over, is a strike over the officer's head an overhead strike? If the officer is on the ground, would any strike be prohibited as "over-head"? If the suspect is above the officer, is an officer prohibited from reaching up to strike the individual on the thigh?* The likely unintended consequence of this ban on overhead strikes is that officers will be less likely to use this non-lethal option, even when appropriate to do so. Such an outcome will not increase safety.

4. **PROHIBITED USES.** Officers shall not:
- (a) Use the impact weapon to intimidate a subject or person, such as slapping the palm of their hand with an impact weapon or;
 - (b) Strike a handcuffed prisoner with an impact weapon

SFPOA'S PROPOSED CHANGE:

1. The policy should not categorically prohibit striking a handcuffed prisoner with an impact weapon.

It is well documented that someone in handcuffs can still be dangerous -- even deadly. To prevent officers from using an impact weapon against a dangerous individual, whether handcuffed or otherwise, only increases the risk of injury to the officer and the individual. Impact weapons are a non-lethal alternative use of force. The more non-lethal options that are removed from an officer's arsenal, the more likely the incident will escalate to the point where the officer's only option is deadly force. Proper use of force guidelines and corresponding disciplinary consequences are the appropriate means of addressing the risk that an officer will use an impact weapon on an individual who is not posing a threat, whether they are handcuffed or not. Therefore, there is no value in having a blanket prohibition against use of impact weapons on individuals who are handcuffed, and dangerous to do so.

5. *MANDATORY MEDICAL ASSESSMENT. Any officer who strikes a subject with an impact weapon shall ensure the subject is medically assessed. (See Section II.E.)*
6. *REPORTING. If an officer strikes a subject with an impact weapon, it is a reportable use of force. (See DGO 5.01.1)*

SFPOA'S PROPOSED CHANGE: None.

- D. EXTENDED RANGE IMPACT WEAPON (ERIW).** An Extended Range Impact Weapon (ERIW), such as a beanbag shotgun, is a weapon that fires a bean bag or other projectile designed to temporarily incapacitate a subject. An ERIW is generally not considered to be a lethal weapon when used at a range of 15 feet or more.
1. **PURPOSE.** The ERIW may be used on a subject who is armed with a weapon, other than a firearm, that could cause serious injury or death. This includes, but is not limited to, edged weapons and improvised weapons such as baseball bats, bricks, bottles, or other objects. The ERIW may also be used to subdue an aggressive, unarmed subject who poses an imminent threat of injury to another person or the officer in accordance with Department training.
 2. **USE.** The ERIW shall be properly loaded and locked in the shotgun rack of the passenger compartment of the vehicle. Officers should observe the following guidelines:
 - (a) An ERIW officer shall always have a lethal cover officer. When more than one officer is deploying an ERIW, good tactical judgment in accordance with Department training will dictate the appropriate number of lethal cover officers. In most circumstances, there should be fewer lethal cover officers than the number of ERIWs deployed.

- (b) The ERIW officer's point of aim should be Zone 2 (waist and below). The ERIW officer's point of aim may be Zone 1 (waist and above) if:
 - Zone 2 is unavailable; or
 - The ERIW officer is delivering the round from 60 feet; or
 - Shots to Zone 2 have been ineffective.

Keep in mind that ERIW strikes have the potential to cause serious injury or death if vital areas are struck or if the subject is physically frail.

- (c) The ERIW officer shall assess the effect of the ERIW after each shot. If subsequent ERIW rounds are needed, the officer should aim at a different target area.
3. LIMITED USES. The ERIW should not normally be used in the following circumstances:
- (a) The subject is at the extremes of age (elderly and children) or physically frail.
 - (b) The subject is in an elevated position where a fall is likely to cause serious injury or death.
 - (c) The subject is known to be or appears pregnant.
 - (d) At ranges of less than 15 feet.
4. WARNING. When using the ERIW, an officer shall, if feasible:
- (a) Announce to other officers the intent to use the ERIW by stating "Red Light! Less Lethal! Less Lethal!"
 - (b) All other officers at scene to acknowledge imminent deployment of ERIW by echoing, "Red Light! Less Lethal! Less Lethal!"
 - (c) Announce a warning to the subject that the ERIW will be used if the subject does not comply with officer commands;
 - (d) Give the subject a reasonable opportunity to voluntarily comply unless it would pose a risk to the community or the officer, or permit the subject to undermine the deployment of the ERIW.
5. MANDATORY MEDICAL ASSESSMENT. Any subject who has been struck by an ERIW round shall be medically assessed by emergency medical personnel. (See Section II.E.)

6. **BOOKING FORM.** Persons who have been struck by an ERIW round shall have that noted on the booking form.
7. **REPORTING.** Discharge of an ERIW is a reportable use of force. (See DGO 5.01.1)

SFPOA'S PROPOSED CHANGE:

1. None, although the SFPOA believes that a more helpful way to discuss force options is to analyze them together along with the suspects' actions that might make the force appropriate, as is done by P.O.S.T., as explained in the SFPOA's proposal.

- E. VEHICLE INTERVENTIONS.** An officer's use of a police vehicle as a "deflection" technique, creation of a roadblock by any means, or deployment of spike strips, or any other interventions resulting in the intentional contact with a noncompliant subject's vehicle for the purpose of making a detention or arrest, are considered a use of force and must be reasonable under the circumstances. The Department's policies concerning such vehicle intervention tactics are set forth in DGO 5.05, Response and Pursuit Driving.

SFPOA'S PROPOSED CHANGE: None.

- F. CAROTID RESTRAINT.** While the carotid restraint is not lethal force, the carotid restraint is an allowable force option only in situations where lethal force would otherwise be justified. The carotid restraint is a control technique in which the carotid arteries on the sides of the neck are compressed, restricting blood flow to the brain, causing the subject to lose consciousness.
1. **WARNING BEFORE USE.** When deploying the carotid restraint, an officer shall, if feasible:
 - (a) Announce a warning to the subject to stop resisting; and
 - (b) Give the subject a reasonable opportunity to voluntarily comply, except that officers need not do so where it would pose a risk to safety or permit the subject to undermine the deployment of the carotid restraint.
 2. **MANDATORY MEDICAL ASSESSMENT.** In all cases where the carotid restraint is used, the subject shall be medically assessed and medically evaluated. Officers shall monitor the subject's vital signs closely. Additionally, if the subject has difficulty breathing or does not immediately regain consciousness, officers shall immediately seek medical care by trained personnel. (See Section II.E.)

3. **BOOKING FORM.** Persons who have been the subject of a carotid restraint shall have that noted on the booking form.
4. **REPORTING.** Use of carotid restraint, even if unsuccessful, is a reportable use of force. (See DGO 5.01.1)

SFPOA'S PROPOSED CHANGE:

1. The SFPOA believes that the carotid restraint should be considered intermediate, not deadly force.

The carotid restraint is not a choke-hold, and should not be treated as such. The carotid restraint is an intermediate level of force, which can be used to subdue an actively resisting suspect without any injury to the suspect or the officer. The SFPD has successfully used the carotid restraint for years without incident. As with other non-lethal force options, the more such options at an officer's disposal, the greater the chance the officer will not have to resort to lethal force. Limiting the use of the carotid restraint to only those situations in which lethal force can be used will effectively eliminate this valuable tool from an officer's arsenal, making the use of actual deadly force more likely. Limiting the use of the carotid restraint to lethal force situations helps no one and endangers the public and officers. In response to our survey, one of our officers wrote the following:

"I am a 5'4" female that has rarely used force in my 28 years of law enforcement; however, in the moments where I have been attacked the Carotid Restraint has saved my life. It has saved my life 3 times because the person that attacked me was huge and extremely violent. The carotid restraint was applied correctly (due to training), was perfectly effective, and caused no injury to the suspect. It is a tool that can be effectively used by all officers - small/large/male/female - to safely manage a violent suspect."

IV. EXCEPTIONAL CIRCUMSTANCES. If exceptional circumstances occur, an officer's use of force shall be reasonably necessary to protect others or him/herself. The officer shall articulate the reasons for employing such use of force.

SFPOA'S PROPOSED CHANGE:

1. The SFPOA proposes changing this language slightly to give clearer guidance to officers.

As drafted, this language does not make sense. It states that "if exceptional circumstances occur, an officer's use of force *shall* be reasonably necessary to protect others." But, this is not correct. It is not "exceptional circumstances" that make it reasonably necessary for an officer to protect themselves—it is a suspect's violent behavior. Equally, the existence of "exceptional circumstances" does not necessarily make an officer's use of force reasonable, which is what is stated by the use of the mandatory term "shall." It could be that exceptional

circumstances existed, but the officer's use of force was still unreasonable. What this language appears to be trying to express is that if there are circumstances in which an officer deviates from these orders to protect others or him or herself, the Department will carefully consider those circumstances so long as the officer can articulate why the actions taken were necessary and appropriate. The SFPOA suggests the following alternative language in order to better achieve this goal:

"It is understood that this policy may not cover every situation that may arise. Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy and to the Department's use-of-force principles. Any deviation from the provisions of this policy shall be examined rigorously on a case-by-case basis. The involved officers must be able to articulate clearly the reason for any deviation from this policy."



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MEMORANDUM

DATE: May 2, 2016
TO: San Francisco Police Commission
FROM: San Francisco Police Officers' Association
RE: **San Francisco Police Officer's Associations' Evaluation of Proposed General Order 5.02, as revised on 3/21/2016**

The following is a discussion of the proposed General Order 5.02 submitted by the San Francisco Police Department on March 21, 2016. The Department's proposed language appears in black italic text and the comments of the San Francisco Police Officers' Association ("SFPOA") appear in blue text.

USE OF FIREARMS AND LETHAL FORCE

The San Francisco Police Department's highest priority is safeguarding the sanctity of all human life. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using communication and de-escalation principles before resorting to the use of force, whenever feasible. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unreasonable force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

The purpose of the policy is not to restrict officers from using reasonable force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority.

This order establishes policies and reporting procedures regarding the use of firearms and lethal force. Officers' use of firearms and any other lethal force shall be in accordance with DGO 5.01, Use of Force, and this General Order.

SFPOA'S PROPOSED CHANGE:

1. The Department should acknowledge that its highest priority is to protect the people of San Francisco.

While the SFPOA believes that the Department should emphasize the importance of all human life in its use of force general orders, failing to acknowledge that the primary purpose of any police force is to help protect its citizens is a mistake. We believe that the SFPOA proposed mission statement¹ is preferable because it combines the two concepts and better captures the highest priority of the Department. Unfortunately, in our society, there are occasions in which a suspect fails to share this reverence for human life and threatens civilians and officers. When that happens, an officer's "highest duty" is to protect innocent people from the suspect. Were this not the case, an officer would never be justified in using lethal force. The Department's proposed mission statement appears to place the "sanctity" of a suspect threatening to kill an innocent civilian or officer on par with the "sanctity" of the civilian or officer being threatened, which is contrary to the remainder of the general order, which authorizes an officer to use lethal force to protect him or herself or others. This is only exacerbated by the eight separate references in the general orders to the "sanctity" of all human life -- three times in DGO 5.01 and four times in 5.02.

2. Substitute the word "sanctity" for "reverence," or some other synonym for importance.

The term "sanctity" has a religious connotation inappropriate for a San Francisco general order. For example, the Wikipedia definition of the phrase "sanctity of human life," is as follows:

"The phrase sanctity of life refers to the idea that human life is sacred and holy and precious, argued mainly by the pro-life side in political and moral debates over such controversial issues as abortion, contraception, euthanasia, embryonic stem-cell research, and the "right to die."

Accordingly, the SFPOA suggests that the Department substitute the word "reverence," which is defined as "a deep respect for something," which is the term used by P.O.S.T. and by the SFPOA in its proposal.

3. Change the statement addressing what the Law Enforcement Code of Ethics "requires" to indicate only what it "states."

The Law Enforcement Code of Ethics represents ideals to be strived towards for officers. It does not represent requirements. Although our initial proposal also uses the word "requires" in this context, it would be more accurate to use the word "states," so as to avoid confusion.

¹ On April 6, 2016, the SFPOA submitted to the San Francisco Police Commission an alternative revision of San Francisco General Orders 5.01 and 5.02, which is attached.

I. **POLICY**

- A. **GENERAL.** *The Department is committed to the sanctity and preservation of all human life, human rights, and human dignity. It is the policy of this Department to use lethal force only when no other reasonable options are available to protect the safety of the public and the safety of police officers. Lethal force is any use of force designed to and likely to cause death or serious physical injury, including but not limited to the discharge of a firearm, the use of impact weapons under some circumstances (see DGO 5.01, Use of Force), and certain interventions to stop a subject's vehicle (see DGO 5.05, Response and Pursuit Driving).*

SFPOA'S PROPOSED CHANGE:

1. Change the word "sanctity" to "reverence" and consider moving non-repetitive language to the introduction, while eliminating any repetitive language.

The SFPOA has the same concern with use of term "sanctity" as discussed above. Moreover, the introduction is a better-suited section for addressing general principles, and in any event, there is no reason to repeat this general principle twice within the first page of the general order. A good general order is clear and concise. Unnecessary repetition creates confusion.

2. Eliminate any general discussion as to when lethal force can be used because the language used here conflicts with other language in this proposal, proposed DGO 5.01 and case law. At a minimum, the Department should change the word "available" to "appropriate."

The purpose of general orders is to provide officers with clear instructions concerning departmental requirements. Conflicting orders lead to confusion and should be avoided. Here, this general policy conflicts with other portions of the same proposed order, the Department's proposed DGO 5.01 and relevant case law. Specifically, this proposal states that lethal force should only be used when "no other reasonable options are available." The Department's proposed DGO 5.02 (B), proposed DGO 5.01, Ninth Circuit and Supreme Court case law, however, provide that an officer's use of force must be objectively reasonable based on the totality of circumstances known to the officer at the time. The availability of less intrusive alternatives is a *factor* to be considered in evaluating the totality of circumstances, but it is not the only factor that should be considered, as this proposal suggests. For example, if an officer is attacked by an individual with a knife in close quarters, it might be reasonable for an officer to use his or her baton (which is normally not appropriate for lethal situations), *but* it might also be reasonable for an officer to use his or her firearm. An officer should not be subjected to discipline merely because the officer used one of a number of reasonable options under the circumstances. This language is confusing, conflicts with proposed DGO 5.01 and relevant case law and should not be included in this

general order.

Alternatively, the Department should substitute the term "available" for "appropriate." Force options other than the use of deadly force are always "available" to an officer, but they are often not appropriate. For example, if a bank robber is pointing a shotgun at an officer, an officer would have the use of his personal body weapons, and/or OC spray "available" but no one would suggest that it would be appropriate to use them in that circumstance. Under this language, an officer would never be justified in using deadly force because other force options are always "available," even if inappropriate.

3. Change the definition of "lethal force" to comport with case law, P.O.S.T. and every other police department in California, and consider using the term "deadly" instead of "lethal."

This proposed general order defines lethal force as "any use of force designed to *and* likely to cause death or serious physical injury." Under at least one reasonable interpretation, this definition does not make sense, and is in conflict with all Ninth Circuit case law, P.O.S.T. and every other police department in California of which the SFPOA is aware. Furthermore, this definition could be read to exclude the use of every type of deadly force by officers, including firearms. Officers are not trained to use force with the "design" to kill anyone. They are trained to use force to stop a threat. If this policy addresses only those situations in which it was an officer's "design" to kill, it would never be applicable. In addition, the application of this policy would be based on the subjective intent of the individual officer, which case law and this Department's other general orders hold is not the appropriate measure. Rather, a use of force should be judged by whether the use of force was "objectively," not subjectively, reasonable. The appropriate definition, which is used by P.O.S.T., the Ninth Circuit and every other police department of which the SFPOA is aware, is that deadly force is "force that is substantially likely to cause serious bodily injury or death." The Department should adopt this definition.

In addition, the preferred term used by most agencies, the courts and P.O.S.T. is "deadly" as opposed to "lethal" force, although the terms are generally interchangeable.

- B. *ALTERNATIVES TO LETHAL FORCE.*** *When safe and feasible under the totality of circumstances known to the officer, officers shall consider other force options before discharging a firearm or using other lethal force. Further, officers are reminded to consider the principles outlined in DGO 5.01, I.A. Sanctity of Human Life, I.B. Establish Communications, I.C. De-escalation, I.D. Proportionality, and I.E. Duty to Intervene, to decisions about the use of lethal force.*

SFPOA'S PROPOSED CHANGE:

1. The requirement that officers consider the de-escalation tactics in 5.01 should

be eliminated from this proposal because they conflict.

Proposed 5.01 states that de-escalation tactics apply only where “a subject is not endangering the safety of the public or an officer, fleeing, or destroying evidence.” Presumably, any time an officer is considering using a firearm, the subject is “endangering the safety of the public.” Therefore, the provision above purports to require that officers consider a proposed DGO 5.01, which, as a practical matter, won’t apply to any situation where the use of a firearm would be considered.

C. SUBJECTS ARMED WITH WEAPONS OTHER THAN FIREARMS.

When encountering a subject who is armed with a weapon other than a firearm, such as an edged weapon, improvised weapon, baseball bat, brick, bottle, or other object, officers shall follow DGO 5.01, II.F. Subject Armed with a Weapon—Notification and Command. Where officers can safely mitigate the immediacy of threat, and there are no exigent circumstances, officers should isolate and contain the subject, call for additional resources and engage in appropriate de-escalation techniques without time constraints. It is far more important to take as much time as needed to resolve the incident in keeping with the Department's highest priority of safeguarding all human life. Except where circumstances make it reasonable for an officer to take action including the use of lethal force to protect human life or prevent serious bodily injury, immediately disarming the subject and taking the subject into custody is a lower priority than preserving the sanctity of human life. Officers who proceed accordingly and delay taking a subject into custody, while keeping the public and officers safe, will not be found to have neglected their duty. They will be found to have fulfilled it.

SFPOA’S PROPOSED CHANGE:

1. The Department should eliminate this entire paragraph because it jumbles unrelated terms, is incompressible and directly conflicts with proposed DGO 5.01.

The paragraph should be eliminated entirely. First, it implies that the notification provisions of DGO 5.01 only apply to suspects armed with a weapon other than a firearm. This directly conflicts with proposed DGO 5.01, which states that the notification provisions apply to any “weapons” without limitation, which would include a firearm. Moreover, although the SFPOA does not believe that the notification provisions of proposed DGO 5.01 are appropriate, it does not make any sense to have them limited to individuals without a firearm. If anything, the notification provisions would seem more appropriate if a suspect is armed with a firearm.

Next, the proposed paragraph states that “where officers can safely mitigate the immediacy of threat, and there are no *exigent circumstances*, officers should isolate and

contain the subject, call for additional resources and engage in appropriate de-escalation techniques without time constraints.” This mixes and matches different unrelated terms that have very specific meanings in law enforcement and make little sense when combined together. “Exigent circumstances,” for example, relates to specific circumstances in which an officer can search or enter without a warrant. Exigent circumstances is defined as “those circumstances that would cause a reasonable person to believe that entry [or search] ... was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.” *United States v. Camou*, 773 F.3d 932, 940 (9th Cir. 2014). The concept of “exigent circumstances” has never been applied to the use of force.

Moreover, the portion of the proposed paragraph that relates to de-escalation unnecessarily repeats the de-escalation requirements of proposed DGO 5.01, but uses different wording. This is unnecessary and dangerous. If the Department is attempting to describe a different de-escalation policy than what’s contained in proposed DGO 5.01, officers will be confused because both appear to apply to the same situations – individuals who are not a direct threat, who are not attempting to escape or destroy evidence. If the Department is attempting to describe the same de-escalation policy as proposed in DGO 5.01, then it should employ the same wording. Using different wording in two related general orders to provide guidance for officers, guarantees confusion that can easily be avoided by ensuring that the language used is identical.

Finally, the last provisions of the proposed paragraph – “except where circumstances make it reasonable for an officer to take action including the use of lethal force to protect human life or prevent serious bodily injury, immediately disarming the subject and taking the subject into custody is a lower priority than preserving the sanctity of human life” – is the most problematic. If this language is suggesting that officers who use of force should be evaluated based on whether their actions were “reasonable” after the fact, using 20/20 hindsight, this would be in conflict with proposed DGO 5.01, P.O.S.T., applicable law, all officer use-of-force training, common sense and basic fairness. If the Department is not suggesting that officers should be evaluated using 20/20 hindsight, and instead evaluated on what would have been objectively reasonable based on the totality of the circumstances known to the officer at the time, then this paragraph adds nothing that isn’t found in proposed DGO 5.01.

The bottom line is that there is no reason for the Department to include the proposed paragraph. It either fails to add anything new, or is in conflict with other general orders.

D. HANDLING, DRAWING AND POINTING FIREARMS.

- 1. HANDLING FIREARMS.** *An officer shall handle and manipulate a firearm in accordance with Department-approved firearms training. An officer shall not manually cock the hammer of the Department-*

issued handgun to defeat the first shot double-action feature.

2. **AUTHORIZED USES** *An officer may draw, exhibit or point a firearm in the line of duty when the officer has reasonable cause to believe it may be necessary for the safety of others or for his or her own safety. When an officer determines that the threat is over, the officer shall holster his or her firearm or shoulder the weapon in the port arms position pointed or slung in a manner consistent with Department-approved firearms training. If an officer points a firearm at a person, the primary officer shall, if feasible, advise the subject the reason why the officer(s) pointed the firearm.*

SFPOA'S PROPOSED CHANGE:

1. The requirement to advise suspects of the reason a firearm was pointed at them should only occur *after* the incident has been resolved.

Requiring an officer to advise a suspect why a firearm is being pointed at the suspect, while the weapon is being pointed at the suspect is dangerous and suggests a misunderstanding of the reason for pointing a firearm at a suspect. If a situation is sufficiently dangerous that an officer believes it is necessary to point a gun at a suspect, it will *never* be appropriate for the officer to engage the suspect in conversation about the reason for the gun pointing while the gun is still being pointed. The officer will have much more urgent matters to attend to, such as making the very difficult and often split-second decision as to whether to fire the weapon. The SFPOA cannot envision a scenario where it would be appropriate for an officer pointing a weapon at a suspect to – at that moment – explain why he or she is pointing the weapon. If an officer sees a bank robber exit a bank with a shotgun and a bag of money, should the officer shout “I am pointing my gun at you because I think you might try to kill me or someone else”? If an officer is making a high-risk felony stop and the suspect makes a sudden move for an open glove-box, should the officer be required to say “I am now pointing my gun at you because you appear to be reaching for a weapon to try and kill me or my fellow officers”?

3. **DRAWING OTHERWISE PROHIBITED.** *Except for maintenance, safekeeping, inspection by a superior officer, Department-approved training, or as otherwise authorized by this order, an officer shall not draw a Department-issued firearm.*
4. **REPORTING.** *When an officer intentionally points any firearm at a person, it shall be considered a reportable use of force. Such use of force must be reasonable under the objective facts and circumstances.*

SFPOA'S PROPOSED CHANGE: None.

D. DISCHARGE OF FIREARMS OR OTHER USE OF LETHAL FORCE.

1. **PERMISSIBLE CIRCUMSTANCES.** *Except as limited by Sections D.4 and D.5., an officer may discharge a firearm or use other lethal force in any of the following circumstances:*
 - a. *In self-defense when the officer has reasonable cause to believe that he or she is in imminent danger of death or serious bodily injury; or*
 - b. *In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury. However, an officer may not discharge a firearm at, or use lethal force against, a person who presents a danger only to him or herself, and there is no reasonable cause to believe that the person poses an imminent danger of death or serious bodily injury to the officer or any other person; or*
 - c. *To apprehend a person when both of the following circumstances exist:*
 - i. *The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of lethal force; AND*
 - ii. *The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed; or*
 - d. *To kill an animal posing an imminent threat. To kill an animal that is so badly injured that humanity requires its removal from further suffering where other alternatives are impractical and the owner, if present, gives permission; or*
 - e. *To signal for help for an urgent purpose when no other reasonable means can be used.*

The above circumstances (D.1 a-e) apply to each and every discharge of a firearm or application of lethal force. Officers should constantly reassess the situation, as feasible, to determine whether the subject continues to pose an active threat.

SFPOA'S PROPOSED CHANGE:

1. Officers should not be required to reassess the danger before each individual shot is fired. In deadly force encounters officers shoot AND reassess simultaneously.

If this proposed policy is meant to require officers to reassess after each individual shot, this would be contrary to all officer training, P.O.S.T., Supreme Court precedent, inconsistent with every other police department in the country and exceedingly dangerous for officers and civilians. When officers are engaged in a potentially deadly situation, where the use of a firearm is appropriate, they are trained to shoot until the threat is stopped. Sometimes, depending on the situation, an officer may be able to fire one shot and reassess the situation. Often, however, that is impossible. Including such a requirement will get officers killed. For example, suppose a suspect who just robbed a bank emerges from the bank with a shotgun and aims it at an officer. If after a shot is fired, the officer is required to determine if the suspect has been incapacitated before firing again, the officer will likely be killed. While this proposal states that the officer should only reassess when feasible, the Department should make it clear that it is not requiring that an officer reassess between every shot unless it is safe and appropriate to do so.

2. **VERBAL WARNING.** *If feasible, and if doing so would not increase the danger to the officer or others, an officer shall give a verbal warning to submit to the authority of the officer before discharging a firearm or using other lethal force.*
3. **REASONABLE CARE FOR THE PUBLIC.** *To the extent feasible, an officer shall take reasonable care when discharging his or her firearm so as not to jeopardize the safety of the public or officers.*
4. **PROHIBITED CIRCUMSTANCE.** *Officers shall not discharge their firearm:*
 - a. *As a warning; or*
 - b. *At a person who presents a danger only to him or herself.*

SFPOA'S PROPOSED CHANGE: None.

5. **MOVING VEHICLES.** An officer shall not discharge a firearm at the operator or occupant of a moving vehicle unless the operator or occupant poses an imminent threat of death or serious bodily injury to the public or an officer by means other than the vehicle. Officers shall not discharge a firearm from his or her moving vehicle.

SFPOA'S PROPOSED CHANGE:

1. The blanket prohibition against officers shooting at occupants of vehicles who are using their vehicles as weapons should be removed.

It is beyond dispute that individuals can and do use their vehicle as a deadly weapon. It is also beyond dispute that officers can and have successfully saved lives by shooting at the operator of the vehicle to prevent them from killing officers or others.

In the past, there has been a concern that officers were unnecessarily shooting at drivers when the officer could have instead gotten out of the way. The previous general order, which was revised in 2011, directly addressed that concern, providing that officers could only shoot at the driver if there was an imminent threat of serious bodily injury or death *and* the officer had no reasonable or apparent means of retreat. The Proposed Order eliminates that language, and thus prevents an officer from shooting at the driver of a vehicle, even if there is no means of retreat, and where the officer or a bystander will likely be killed if the officer cannot shoot. In addition, this categorical ban prevents an officer from shooting at a driver of a vehicle to prevent their escape, even where there is a substantial risk that the driver will cause death or serious injury to others if allowed to escape.

Three examples illustrate the dangers of the proposed provision: First, if an individual were driving around San Francisco in an SUV, and running over pedestrians for fun, this policy would prevent an officer from shooting the driver to prevent that driver from killing a family of four in a cross-walk, even if the officer had a clear shot and there was little risk of injury to anyone else. Under the proposed policy, the officer would be required to hold his or her fire and watch the driver run over the family. This is not an abstract hypothetical. On August 30, 2006, Omeed Aziz Popal, struck 18 pedestrians, killing one in San Francisco with his Honda Pilot SUV.

Second, under the proposed policy, if a suspect driving their vehicle straight at an officer, who has no means of escape or retreat, the officer would have to choose between his or her life or violating the policy. Officers risking their lives for the citizens of San Francisco should never be forced to make that choice when it can be avoided by a carefully drafted, restrictive policy, such as the one that currently exists.

Third, under the proposed policy, if a terrorist was escaping after killing numerous civilians, an officer would be justified in using deadly force to stop the terrorist, but only as long as the terrorist was fleeing on foot. Once the terrorist got into a car, the officer would be precluded from stopping the terrorist, even if the car was barely moving at the time the officer had a clear shot. This proposal turns a vehicle into a safety zone for violent felons to escape.

The United States Supreme Court and the Ninth Circuit have repeatedly found that it can be reasonable for an officer to shoot at a suspect who is using their vehicle itself as a weapon. The dangers of an overly permissive policy can be, and have been, addressed by the Department's current policy. There have been no incidents of the current policy failing to

achieve the goal of protecting civilians and officers alike to warrant any re-evaluation of the existing policy. Other cities, such as Oakland, Portland, New Orleans, and Milwaukee, which have been held up as examples for San Francisco, have policies very similar to San Francisco's current policy, which allows for a narrow exception to the prohibition against officers shooting at drivers who are using their vehicle itself as a weapon.

One may wish that threats caused by moving vehicles will cease. But in the real world confronting police officers, there will be cases involving violent suspects seeking to harm innocent people using their vehicles. The only question remaining is if the Department and Police Commission will trust officers to make reasonable choices in dangerous, rapidly-evolving situations. This proposed policy change precludes that.

2. The Department's proposed blanket prohibition against shooting from a moving vehicle should be removed.

Similar to the blanket prohibition on officers shooting at suspects using their vehicle as a weapon, the Department should allow some latitude for situations in which it might be appropriate for an officer to fire from a moving vehicle. For example, if the officer's vehicle is moving slowly to a stop, but has not quite stopped, it would seem inappropriate to require the passenger officer who is being fired at by suspects to hold his or her fire until the vehicle has come to a complete halt, assuming that the officer can fire without unnecessarily endangering other people. An appropriate policy can craft very restrictive language that would allow for an officer to fire in that circumstance.

6. REPORTING.

- (a) **DISCHARGE OF FIREARMS.** Except for firearm discharges at an approved range or during lawful recreational activity, an officer who discharges a firearm, either on or off duty, shall report the discharge as required under DGO 8.11, Investigation of Officer Involved Shootings and Discharges. This includes an intentional or unintentional discharge, either within or outside the City and County of San Francisco.
- (b) **OTHER LETHAL FORCE.** An officer who applies other force that results in death shall report the force to the officer's supervisor, and it shall be investigated as required under DGO 8.12, In Custody Deaths. An officer who applies other lethal force that results in serious bodily injury shall report the force to the officer's supervisor. The supervisor shall, regardless whether possible misconduct occurred, immediately report the force to their superior officer and their commanding officer, who shall determine which unit shall be

responsible for further investigation. An officer who applies other lethal force that does not result in serious bodily injury shall report the force as provided in DGO 5.01.1, Reporting and Evaluating Use of Force.

SFPOA'S PROPOSED CHANGE: None.

II. EXCEPTIONAL CIRCUMSTANCES. If exceptional circumstances occur, an officer's use of force shall be reasonably necessary to protect others or him/herself. The officer shall articulate the reasons for employing such use of force.

SFPOA'S PROPOSED CHANGE:

1. The SFPOA proposes changing this language to give more guidance to officers.

As drafted, this language does not make sense. It states that "if exceptional circumstances occur, an officer's use of force *shall* be reasonably necessary to protect others." But, this is not correct. It is not "exceptional circumstances" that make it reasonably necessary for an officer to protect themselves: it is a suspect's violent behavior. And, the existence of "exceptional circumstances" does not necessarily make an officer's use of force reasonable, which is what is stated by the use of the term "shall." It could be that exceptional circumstances existed, but the officer's use of force was still unreasonable. What this language appears to be trying to express is that if there are circumstances in which an officer deviates from these orders to protect others or him or herself, the Department will carefully consider those circumstances so long as the officer can articulate why the actions taken were necessary and appropriate. The SFPOA suggests the following alternative language in order to better achieve this goal:

"It is understood that this policy in regards to discharging a weapon at or from a moving vehicle may not cover every situation that may arise. Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy and to the Department's use-of-force principles. Any deviation from the provisions of this policy shall be examined rigorously on a case-by-case basis. The involved officers must be able to articulate clearly the reason for any deviation from this policy."



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Treasurer
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Sergeant At Arms

MEMORANDUM

DATE: May 2, 2016
TO: San Francisco Police Commission
FROM: San Francisco Police Officers' Association
RE: **San Francisco Police Officers' Association's evaluation of stakeholder proposal to require the use of "minimum force."**

SFPOA POSITION:

The San Francisco Police Officers' Association ("SFPOA") does not object to the Department continuing to require that its officers have a goal of using the minimum amount of force necessary to accomplish a lawful police task, provided however the Department does not require that an officer's use of force is to be evaluated with 20/20 hindsight to determine whether less force could have been used.

ANALYSIS:

Since 1975 the Department has stated that the goal of San Francisco police officers is to use that force that is minimally necessary to accomplish a lawful purpose. The SFPOA agrees that this is an appropriate goal, and that all San Francisco police officers should be trained with that goal in mind. Some of the stakeholders have suggested,¹ however, that the use minimal force should not only remain a goal of the new policy, it should supplant the *Graham v. Conner* analysis for determining whether an officer's use of force is appropriate. This would be a grave mistake and, contrary to the suggestion of the other stakeholders, finds no support in the case law, nor in the general orders of any of the cities that they cite as examples.

Specifically, some of the other stakeholders have claimed that the police departments of Albuquerque, Chicago, Cleveland, Denver, Las Vegas, Los Angeles, Milwaukee, New Orleans, Oakland, Portland, Seattle and Washington D.C. have switched from a requirement

¹ Specifically the OCC, the San Francisco Bar Association, the ACLU, and the Coalition on Homelessness have made this recommendation. For ease of reference, the SFPOA shall refer to those groups collectively as the "other stakeholders."

that an officer's use of force will be examined under *Graham v. Conner*, and will instead look to a new "higher" standard – that officers must use minimal force. This is simply not true. While many of these departments state that officers should use minimal force, or encourage de-escalation, *none of them states that the requirement to use minimal force supplants the objectively reasonable test outlined in Graham v. Conner*. In fact, the general orders of each of these cities explicitly state that the *Graham v. Conner* analysis still governs. What the other stakeholders fail to understand is that these two principles – requiring the use of minimal force and the *Graham v. Conner* analysis – work together, serving different purposes, as has been the case in San Francisco since at least 1989.

Below are summaries of the general orders for each cities cited by the other stakeholders, showing that in each case, although they require officers to use "minimum" amounts of force or emphasize de-escalation, the cities also provide that any use of force by an officer is *not* to be evaluated with 20/20 hindsight, but instead is to be evaluated using the *Graham v. Connor* analysis.

(1) **Albuquerque:** states that officers are to use "the minimum amount of force necessary" and that any use of force shall be evaluated pursuant to the test provided by *Graham v. Connor*. Specifically, Albuquerque provides that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." (Albuquerque Police Department, Procedural Orders, Use of Force, 2-52-1 and 2-52-2.)

(2) **Chicago:** states that its officers should use "the least amount of appropriate force." Chicago also cites *Graham v. Connor* and states that "[t]he reasonableness of a particular use of force will be judged under the totality of the circumstances viewed from the perspective of a reasonable officer on the scene." (Chicago Police Department Use of Force Guidelines, General Orders G03-02 III.C.2. and G03-02-02.II.B.)

(3) **Cleveland:** emphasizes de-escalation procedures before using force. However, citing *Graham v. Connor*, Cleveland also states that "Objectively Reasonable Force is that level of force that is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same circumstances as the officer who actually used force. Objective reasonableness is not analyzed with hindsight, but will take into account, where appropriate, the fact that officers must make rapid decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations." (Cleveland Division of Police General Police Orders 2.1.01 pages 2, 4-5.)

(4) **Denver:** requires its police officer to "exercise control" and "de-escalate the use of force as the situation progresses or circumstances change." Denver, however, also provides that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." The policy further explains "the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain and rapidly evolving, about the amount of force that is

necessary in a particular situation. The reasonableness inquiry in an excessive force case is an objective one; the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Denver also specifically cites *Graham v. Connor*, stating that "Law enforcement officers are permitted to use force to affect an arrest only to the extent that it is 'objectively reasonable' under the circumstances." (Denver Police Department, Use of Force Policy 105.01(1)(a) and 105.01(3)(a).)

(5) **Las Vegas:** introduces its use of force policy by stating that its officers should "place minimal reliance upon the use of force." Las Vegas, however, defines reasonable force as "an objective standard of force viewed from the perspective of a reasonable officer, without the benefit of 20/20 hindsight, and based on the totality of the circumstances presented at the moment the force is used." The policy further explains how to determine objectively reasonable force, citing *Graham v. Connor*: "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight. The reasonableness must account for the fact that officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." (Las Vegas Metropolitan Police Department General Order, Use of Force, GO-008-15, Sections I, II.W. and III.)

(6) **Los Angeles:** states "the police should use physical force to the extent necessary." Los Angeles also cites *Graham v. Connor*, stating that "[t]he reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation. The test of reasonableness is not capable of precise definition or mechanical application." Los Angeles further provides "the force must be reasonable under the circumstances known to the officer at the time the force was used. Therefore, the Department examines all uses of force from an objective standard rather than a subjective standard." (Los Angeles Police Department Policy, 115 and 556.10.)

(7) **Milwaukee:** states that its officers should use "the minimum force and authority necessary to accomplish a proper police purpose." Although Milwaukee does not expressly cite *Graham v. Connor*, it incorporates the *Graham v. Connor* test. Under the "objective reasonableness" section of its policy, it states that "objective reasonableness is judged from the perspective of a reasonable police member facing similar circumstances and is based on the totality of the facts known to the police member at the time the force was applied, along with the member's prior training and experience, without regard to the underlying intent or motivation of the police member." (Milwaukee Police Department Code of Conduct, 6.00 and Milwaukee Police Department General Order 2015-17 460.10.)

(8) **New Orleans:** defines reasonable force as “the minimum amount of force necessary to effect an arrest or protect the officer or other person,” but clarifies this use of force as that which an “objectively reasonable officer would use in light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.” Furthermore, New Orleans states “any evaluation of reasonableness must allow for the fact that officers must sometimes make split-second decisions about the amount of force that is necessary in a particular situation with limited information and in circumstances that are tense, uncertain and rapidly evolving.” (New Orleans Police Department Operations Manual, Chapter 1.3 Use of Force, pages 3, 5.)

(9) **Oakland:** states its “members are required to de-escalate the force when the member reasonably believes a lesser level or no further force is appropriate.” That sentence is preceded with “members are allowed to use a reasonable amount of force based on a totality of the circumstances.” Oakland cites *Graham v. Connor* and says “the determination of reasonableness is not based on the 20/20 vision of hindsight.” (See Oakland Police Department’s General Order K-3, Sections I. A. and C.)

(10) **Portland:** provides that “it is the intention of the Bureau to accomplish its mission as effectively as possible with as little reliance on force as practical.” Portland further “adopts the constitutional standard for the use of force established in *Graham v. Connor*” where “the determination of reasonableness is not based on the 20/20 vision of hindsight.” (Portland Police Department’s Use of Force, Policy 1010.00.)

(11) **Seattle:** states that “it is the policy of the Seattle Police Department to accomplish the police mission with the cooperation of the public and as effectively as possible, and with minimal reliance upon the use of physical force.” Seattle also provides that “the reasonableness of a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” (Seattle Police Department Manual, 8.000.1, 8.050, 8.100.)

(12) **Washington, D.C.:** states “officers of the Metropolitan Police Department shall use the minimum amount of force that the objectively reasonable officer would use in the light of the circumstances to effectively bring an incident or person under control, while protecting the lives of the member or others.” Washington, D.C., also provides, however, that the “reasonableness inquiry is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them” and the force “must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.” (Washington, D.C. Metropolitan Police Department, Use of Force, GO-RAR-901.07, Sections I and III.E.)

Therefore, contrary to the suggestions by the other stakeholders, none of the police departments cited by the other stakeholders has policies that replace the *Graham v. Connor* analysis with a requirement to use minimal force or to de-escalate. In fact, the SFPOA could not find a single department in the entire country which does what the stakeholders are recommending. This is not by accident. Although it is an important and appropriate goal to expect officers to use the minimal amount of force necessary, it is inappropriate to assess whether they did so based on the benefit of 20/20 hindsight vision and without determining what information was known to the officer at the time force was used.

For example, if an individual points an unloaded gun at an officer while yelling "I am going to kill you," but the officer is unaware that the gun is not loaded, it would be appropriate for the officer to use deadly force, based on the totality of the circumstances known to the officer at the time. But, with 20/20 hindsight, the officer could have used non-lethal force because an unloaded gun is not capable of inflicting great bodily injury or death. Thus, with the benefit of 20/20 hindsight the minimal amount of force necessary for the officer to detain the suspect in this hypothetical is far less than what was reasonable for the officer to use based on the totality of circumstances known to the officer *at the time*. This illustrates the distinction between officers having a goal of using minimal force (which is prospective), and officers being disciplined because, in retrospect, they failed to use the least amount of force necessary had they known all of the relevant circumstances.

Although the stakeholders also cite to the PERF position paper that advocates that departments should use a more exacting standard than *Graham v. Conner*, this recommendation by PERF is poorly thought out and has not been followed by any city in the United States. *Graham v. Conner* requires that officers' use of force must be objectively reasonable, based on the totality of circumstances known to the officer at the time. How can a department have a higher standard than "reasonable?" Can it require that the use of force be "extra-reasonable?" or "super-duper-reasonable?" Conversely, do any of the stakeholders believe that an officer should be disciplined if the officer used force that was reasonable under the totality of circumstances known to the officer? Of course not. The notion of asking an officer to strive towards using minimal force, but judging their use of force based on the totality of circumstances known to the officer at the time go hand-in-hand. This is supported by every city in the United States, as well as every court that has addressed this issue.



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**San Francisco Police Officers Association
 Proposed General Order**

Use of Force
 Rev. 5/2/16

USE OF FORCE¹

The San Francisco Police Department's highest priority is the safety of the residents and visitors to San Francisco and the men and women who protect them. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to serve. The Department is committed to using communication and de-escalation principles before resorting to the use of force, whenever appropriate. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unreasonable force. These are key factors in keeping the public safe and safeguarding the public's trust. The purpose of the policy is not to restrict officers from using reasonable force to protect themselves or others but to provide general guidelines that may assist the Department in achieving its highest priority.²

I. GENERAL USE OF FORCE POLICY

Peace officers are authorized by the U.S. Constitution and the laws of the State of California to use **reasonable force** to effect an arrest, to prevent escape, to overcome resistance, in self-defense, or in defense of others while acting in the lawful performance of their duties.

Reasonable force is a legal term for how much and what kind of force a peace officer may use in a given circumstance. The proper objective for the use of force by a peace officer in any enforcement situation is to ultimately gain and maintain control of the situation or individual(s) encountered.

¹ The following policy proposal includes language from the Peace Officer Standards and Training (P.O.S.T.) learning domain (LD) #20 (Use of Force) that was last revised in October 2015. It includes SFPD (both current and draft policy) and POA proposed language. Unless footnoted, all material derives from P.O.S.T. LD #20.

² POA

1. Fourth Amendment “objective reasonableness” standard

The United States Supreme Court decided *Graham v. Connor*, 490 U.S. 386 (1989), which established that a peace officer’s use of force would be judged under the Fourth Amendment using an “objective reasonableness” standard.

The Supreme Court balanced a subject’s Fourth Amendment right to remain free from unreasonable seizure against the government’s interest in maintaining order through effective law enforcement.

The Court’s determination of the objective reasonableness of a use of force is fact specific and based on the totality of circumstances confronting the officer at the time force was used. The determination of reasonableness recognizes that peace officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. The reasonableness of a particular use of force is judged from the perspective of a reasonable officer on the scene, not with 20/20 hindsight, and without regard to the officer’s underlying intent or motivation.

When a use of force intrudes upon an individual’s liberty interest, it is measured by the type and amount of force employed. The type of force used and foreseeable injury resulting from it must be **objectively reasonable** in light of the facts and circumstances confronting the officer.

An officer is not required to choose the “best” or “most” reasonable action as long as the officer’s conduct falls within the range of conduct that is reasonable under the circumstances.

Officers may use the degree of force reasonable and necessary to protect others or themselves, but no more. If exceptional circumstances occur which are not contemplated by this order, officers should use any force reasonably necessary to protect themselves or others; however, they must be able to articulate the reasons for employing such force.³

A. Graham Factors

When balanced against the type and amount of force used, the Graham factors used to determine whether an officer’s use of force is objectively reasonable are:

- the severity of the crime at issue
- whether the suspect posed an immediate threat to the safety of the officers or others
- whether the suspect was actively resisting arrest
- whether the suspect was attempting to evade arrest by flight

Of these factors, the most important is whether the individual poses an immediate threat to the officer or public.

³ This last paragraph is SFPD current policy

B. Other Factors to be Considered

The reasonableness inquiry is not limited to the consideration of those factors alone. Other factors which may determine reasonableness in a use of force incident may include:

- availability of other reasonable force options⁴
- number of officers/subjects
- age, size, gender, and relative strength of officers/subjects
- specialized knowledge, skills, or abilities of subjects
- prior contact
- injury or exhaustion of officers
- access to potential weapons
- environmental factors, including but not limited to lighting, footing, sound conditions, crowds, traffic, and other hazards
- whether the officer has reason to believe that the subject is mentally ill, emotionally disturbed, or under the influence of alcohol or drugs
- whether there was an opportunity to warn about the use of force prior to force being used, and, if so, was such a warning given
- whether there was any assessment by the officer of the subject's ability to cease resistance and/or comply with the officer's commands

C. Reasonable Officer Standard asks:

- would another officer
- with like or similar training and experience,
- facing like or similar circumstance,
- act in the same way or use similar judgment?

2. Sufficiency of Fear

An officer's subjective fear alone does not justify the use of force. A simple statement of fear for your safety is not enough; there must be objective factors to justify your concern.

- It must be objectively reasonable.
- It must be based on the facts and circumstances known to the officer at the time.

3. The Use of Force Should Be Proportional

The level of force applied must reflect the totality of circumstances known or perceived by the officer at the time force is applied, including imminent danger to officers or others.

⁴ Not in same listed order as POST. This was moved to the top of list. *See Bryan v McPherson*, 608 F.3d 614 (9th Cir. 2010)

Proportional force, however, does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be objectively reasonable and necessary to counter it.⁵

4. California Law Regarding Use of Force

California Penal Code section 835a states that: “Any officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect an arrest, to prevent escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.”

II. IMPORTANCE OF EFFECTIVE COMMUNICATION AND DE-ESCALATION

1. EFFECTIVE COMMUNICATION⁶

A major goal of law enforcement is to gain voluntary compliance without resorting to physical force, and effective communication can be the key to gaining voluntary compliance. Communication involves both command presence and words resulting in improved safety and professionalism. In fact, vast majority of law enforcement responsibilities involve effective communication. Effective communication is the most basic element of the use of force. In particular, effective communication may enable a peace officer to gain cooperation and voluntary compliance in stressful situations (e.g., confronting a hostile subject). Communication with non-compliant subjects can be very effective when officers are able to establish a rapport, use the proper voice intonation, ask questions and /or provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.

2. DE-ESCALATION⁷

If a subject is not endangering the safety of the public or an officer, fleeing, or destroying evidence, officers should, when feasible, employ de-escalation techniques to decrease the likelihood of the need to use force during an incident and to increase

⁵ Edited are based on Seattle’s Use of Force Policy.

⁶ This section is a combination of POST and SF proposed revisions.

⁷ This section is a combination of POST and SF proposed revisions.

the likelihood of voluntary compliance. Where feasible, in considering the totality of the circumstances, officers should consider the possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public safety and officer safety.

III. COMMUNITY POLICING

Community members want police officers to possess the skills necessary to subdue violent and dangerous subjects. Officers should use these skills to apply only the amount of force that is objectively reasonable under the totality of circumstances known to the officer. Force should never be used to punish subjects. In the American criminal justice system, punishment in the form of judgment is the sole responsibility of the courts.

IV. DUTY TO RENDER FIRST AID/NOTIFICATION OF EMERGENCY MEDICAL PERSONNEL⁸

If trained to do so, officers shall render first aid when a subject is injured or claims injury caused by an officer's use of force *unless* first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid.

Officers shall arrange for a medical *assessment* by emergency medical personnel when a subject is injured or complains of injury caused by an officer's use of force, or complains of pain that persists beyond the use of a physical control hold, and the scene is safe. If the subject requires medical *evaluation*, the subject shall be transported to a medical facility.

V. PERMISSIBLE CIRCUMSTANCES FOR USE OF FORCE

- 1. Officers May Use Reasonable Force Options In The Performance Of Their Duties In The Following Circumstances:⁹**
 - A. To prevent the commission of a public offense.
 - B. To effect a lawful arrest or detention and/or to prevent escape.
 - C. In self-defense or in the defense of another person.

⁸ SFPD draft language

⁹ POA and SFPD language

- D. To prevent a person from injuring himself/herself. However, an officer is prohibited from using deadly force against a person who presents only a danger to himself/herself and does not pose an imminent threat of death or serious bodily injury to another person or officer.

2. An Officer's Force Options Are Largely Dictated by The Subject's Actions

Force options are choices available to a peace officer to overcome resistance, to effect arrest, to prevent escape, to defend self or others, and to gain control of a particular situation. What constitutes reasonable force is in large part dependent on the subject's actions.

A. Categories of Subject's Actions

Situations confronting peace officers may change rapidly. Therefore, officers must continually reevaluate the subject's action and must be prepared to escalate or deescalate as needed. But, in general, as subject's actions can be broken down into five categories:

- **Compliant:** Subject offers no resistance.
- **Passive Non-Compliance:** Does not respond to verbal commands but also offers no physical form of resistance.
- **Active Resistance:** Physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, running away, verbally, or physically signaling an intention to avoid or prevent being taken into or retained in custody.
- **Assaultive:** Aggressive or combative; attempting to assault the officer or another person, verbally or physically displays an intention to assault the officer or another person.
- **Life-Threatening:** Any action likely to result in serious bodily injury or death of the officer or another person.

B. Types of Force:

Types of force include: non-deadly force; non-deadly intermediate force; and deadly force.

- **Non-deadly force:** force that poses a minimal risk of injury or harm.
- **Intermediate force:** force that poses a foreseeable risk of significant injury or harm.

Case law decisions have specifically identified and established that certain force options such as pepper spray, probe deployment with a TASER, impact projectiles, canine bites and baton strikes are classified as intermediate force likely to result in significant injury. Intermediate force will typically only be acceptable when officers are confronted with active resistance and a threat to the safety of officers or others.

- **Deadly force:** force with a substantial risk of causing serious bodily injury or death.

The circumstances in which deadly force may be used is discussed in detail below. The following force options, including but not limited to vehicle intervention (Deflection)¹⁰ and the use of firearms, are considered deadly force.

C. Tools and Techniques for Force Options

The following tools and techniques are not in a particular order nor are they all inclusive.

- Verbal Commands/Instructions/Command Presence
- Control Holds/Takedowns
- Impact Weapons
- Electronic Weapons (Tasers, Stun Guns, etc.)
- Chemical Agents (Pepper Spray, OC, etc.)
- Police Canine
- Vehicle Intervention (Deflection)
- Firearms
- Personal Body Weapons
- Impact Projectile
- Carotid Restraint Control Hold

D. Force Options Chart

The following chart illustrates how a subject's resistance/actions can correlate to the force applied by an officer:

Subject's Actions	Description	Possible Force Option
Compliance	Subject offers no resistance	<ul style="list-style-type: none">• Mere professional appearance• Nonverbal actions• Verbal requests and commands• Handcuffing and control

¹⁰ SFPD, not POST. Specifically, DGO 5.05

Subject's Actions	Description	Possible Force Option
		holds
Passive non-compliance	Does not respond to verbal commands but also offers no physical form of resistance	<ul style="list-style-type: none"> • Officer's strength to take physical control, including lifting/carrying • Pain compliance control holds, takedowns and techniques to direct movement or immobilize
Active resistance	Physically evasive movements to defeat an officer's attempt at control, including bracing, tensing, running away, verbally, or physically signaling an intention to avoid or prevent being taken into or retained in custody	<ul style="list-style-type: none"> • Use of personal body weapons to gain advantage over the subject • Pain compliance control holds, takedowns and techniques to direct movement or immobilize a subject
Assaultive	Aggressive or combative; attempting to assault the officer or another person, verbally or physically displays an intention to assault the officer or another person	<ul style="list-style-type: none"> • Use of devices and/or techniques to ultimately gain control of the situation • Use of personal body weapons to gain advantage over the subject • Carotid restraint
Life-threatening	Any action likely to result in serious bodily injury or death of the officer or another person	<ul style="list-style-type: none"> • Utilizing firearms or any other available weapon or action in defense of self and others to stop the threat • Vehicle intervention (Deflection)

3. Verbal Warning

If feasible, and if doing so would not increase the danger to the officer or others, an officer shall give a verbal warning to submit to the authority of the officer before using any intermediate or deadly force option.¹¹

VI. DEADLY FORCE

The use of deadly force is the most serious decision a peace officer may ever make. Such a decision should be guided by reverence for human life (including the officer's life and others that may be in imminent danger) and used only when other means of control are unreasonable or have been exhausted.

Deadly force is force applied by a peace officer that poses a substantial risk of serious bodily injury or death.

Reverence for all life is the foundation on which the use of deadly force rests. The authority to use deadly force is a serious responsibility given to peace officers by the people who expect them to exercise that authority judiciously.

1. When an Officer May Use Deadly Force

A. To Protect Self or Life

An officer may use deadly force when the officer has the objective and reasonable belief that the subject's actions pose an **imminent threat** of death or **serious bodily injury** to the officer or another person, based upon the totality of the facts and circumstances known to the officer at the time.

Imminent threat: means a significant threat that peace officers reasonably believe will result in death or serious bodily injury to themselves or to other persons. Imminent danger is not limited to "immediate" or "instantaneous." A person may pose an imminent danger even if they are not at the very moment pointing a weapon at another person.

Serious bodily injury: means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness, concussion, bone fracture, protracted loss or impairment of function of any bodily member or organ, a wound requiring extensive suturing, and serious disfigurement. (California Penal Code section 243(f)(4).)

B. Use of Deadly Force on Fleeing Subject

Deadly force may be used on a fleeing subject only where:

¹¹ POA

- 1) The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force;
- 2) The suspect poses a threat of serious physical harm to the officer or to others if the subject's apprehension is delayed
- 3) The use of deadly force is reasonably necessary to prevent escape;
- 4) Where feasible, some warning should be given before deadly force is used under these circumstances.

VII. DISCHARGE OF FIREARMS: PERMISSIBLE CIRCUMSTANCES¹²

1. When An Officer May Discharge A Firearm:

An officer may discharge a firearm in any of the following circumstances:

- A. In self-defense when the officer has reasonable cause to believe that he or she is in imminent danger of death or serious bodily injury.
- B. In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury. However, an officer may not discharge a firearm at a person who presents a danger only to him or herself, and there is no reasonable cause to believe that the person poses an imminent danger of death or serious bodily injury to the officer or any other person.
- C. To apprehend a person when both of the following circumstances exist:
 - (1) The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force; AND
 - (2) The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed.
- D. To kill a dangerous animal. To kill an animal that is so badly injured that humanity requires its removal from further suffering where other alternatives are impractical and the owner, if present, gives permission.

¹² This section is current SFPD policy

- E. To signal for help for an urgent purpose when no other reasonable means can be used.

An officer may generally not discharge a firearm as a warning.

2. Reasonable Care

To the extent practical, an officer shall take reasonable care when discharging his or her firearm so as not to jeopardize the safety of innocent members of the public.

3. Moving Vehicles

The following policies shall govern the discharge of firearms at or from a moving vehicle or at the operator or occupant of a moving vehicle:

- A. At a Moving Vehicle. An officer shall not discharge a firearm at a moving vehicle with the intent to disable the vehicle.
- B. From a Moving Vehicle. An officer shall not discharge a firearm from a moving vehicle unless the officer has reasonable cause to believe there is an imminent danger of death or serious bodily injury to the officer or to others.
- C. At the Operator or Occupant of a Moving Vehicle. Discharging a firearm at the operator or occupant of a moving vehicle is inherently dangerous to officers and the public. Disabling the operator will not necessarily eliminate an imminent danger of death or serious bodily injury. Further, a moving vehicle with a disabled operator may crash and cause injury to innocent members of the public or officers. Accordingly, it is the policy of the Department that **officers are prohibited from discharging their firearm at the operator or occupant of a moving vehicle except in the narrow circumstances set in this subsection.** An officer shall not discharge a firearm at the operator or occupant of a moving vehicle except under the following circumstances:
 - (a) If the operator or occupant of a moving vehicle is threatening the officer with imminent danger of death or serious bodily injury by means other than the vehicle itself.
 - (b) If the operator of the moving vehicle is threatening the officer with imminent danger of death or serious bodily injury by means of the vehicle, and the officer has no reasonable and apparent way to retreat or otherwise move to a place of safety.

- (c) In defense of another person when the officer has reasonable cause to believe that the person is in imminent danger of death or serious bodily injury.
- (d) To apprehend a person when both of the following circumstances exist:
 - (i) The officer has reasonable cause to believe that the person has committed or has attempted to commit a violent felony involving the use or threatened use of deadly force; AND
 - (ii) The officer has reasonable cause to believe that a substantial risk exists that the person will cause death or serious bodily injury to officers or others if the person's apprehension is delayed.

It is understood that this policy in regards to discharging a weapon at or from a moving vehicle may not cover every situation that may arise. Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy and to the Department's use-of-force principles. Any deviation from the provisions of this policy shall be examined rigorously on a case-by-case basis. The involved officers must be able to articulate clearly the reason for any deviation from this policy.¹³

VIII. UNREASONABLE FORCE

Unreasonable force occurs when the type, degree, or duration of force employed was not objectively reasonable under the totality of the circumstances as evaluated using the standards and authorities described in the previous chapters.

Malicious assaults and batteries committed by peace officers constitute unlawful conduct. (California Penal Code section 149.) When the force used is objectively unreasonable, the officer can face criminal and civil liability, and disciplinary action.

IX. DUTY TO INTERVENE¹⁴

Where an officers have a reasonable opportunity to do so, officers shall intercede when they know, or have reason to know, that another officer is about to use, or is using, unreasonable force under color of state law. Officers shall promptly report any use of unreasonable force and the efforts made to intercede to a supervisor.

¹³ This last paragraph edited by POA, not in current policy

¹⁴ SFPD draft language