



Commonwealth of Massachusetts

Massachusetts Environmental Police

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Colonel Shaun T. Santos

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BY ELECTRONIC MAIL ONLY — john.melander@mass.gov

John H. Melander, Jr.
Deputy General Counsel
Executive Office of Public Safety and Security
One Ashburton Place, Room 2133
Boston, MA 02108

Dear Mr. Melander:

I write to offer the below comments on the proposed regulations of the Municipal Police Training Committee (“MPTC”) and the Peace Officer Standards and Training Commission (“POSTC”) governing the use of force by law enforcement officers. On behalf of the Massachusetts Environmental Police (“MEP”), I am grateful for the opportunity to offer comments and participate in this process. MPTC and POSTC have a herculean task ahead of them in implementing Chapter 253 of the Acts of 2020. We look forward to working with you in this most important endeavor.

Use of Non-Deadly Force and Associated Definitions

1. Purposes of Use of Force

Paragraph 1 limits the use of non-deadly force to situations where it is necessary to serve one of four enumerated purposes. A number of departmental policies, including the MEP policy, specifically allow officers to use force in order to “[p]rotect themselves, others, K9’s and property from physical harm.” While the regulation as written may be broad enough to permit the use of force to protect police dogs and property from physical harm, I suggest explicitly listing K-9s and property in the regulation in order to ensure clarity.

*... prevent imminent **physical** harm **to themselves, others, K-9s and public or private property** and the amount of force used is proportionate to the threat of imminent **physical** harm, ~~while protecting the safety of the officer or others~~ . . .*

2. Passive Resistance

I offer two comments relating to the proposed regulations’ treatment of passive resistance in paragraph 2. First, the definition should more clearly identify the outer bounds of passive resistance by recognizing that a suspect may engage in active resistance through the use of tactics that, while generally regarded as non-violent, are far from passive. I suggest the following definition:

*Passive resistance. An individual who is **verbally** non-compliant with officer commands, **does not use physical strength or body movement to resist an officer**, ~~that is non-violent~~ and does not pose an immediate threat to the officer or the public.*

Second, I suggest striking the reference to issuing summonses in lieu of arrest “where feasible.” In one sense, it is always “feasible” to issue a summons, assuming that an officer is able to properly identify a suspect. However, in my experience, suspects who are passively resistant to officer commands have also been resistant to providing appropriate evidence of their identities. More importantly, feasibility of a summons should not, in every situation, preclude an arrest. Officers are frequently called upon to exercise enforcement discretion in difficult situations. Codifying a preference for summonses over arrests in a regulation fails to recognize that each situation is unique. Sometimes, an arrest can do more to de-escalate a situation and prevent breaches of the peace than a summons can. Rather than include this phrase in the regulation, I suggest that de-escalation training include the various alternatives, including summons and arrest, that officers can use to de-escalate conflicts.

A law enforcement officer shall use only the amount of force necessary against an individual who is engaged in passive resistance to effect the lawful arrest or detention of said individual and shall use de-escalation tactics where feasible, ~~including issuing a summons instead of executing an arrest where feasible.~~

3. Exclusion of Certain Physical Escort / Handcuffing from Scope of Regulation

Paragraph 3 provides that “physically escorting or handcuffing an individual with minimal or no resistance does not constitute a use of force for purposes of this section.” In many training academies, officers are taught that physical escort of a person or handcuffing a person constitutes a use of force. A regulation that indicates that these actions are not a use of force risks diluting that message. It is important that officers understand that these actions are uses of force that should be undertaken only in accordance with department policy and training that governs use of force. Moreover, when an officer decides to physically escort or handcuff an individual, the officer might expect minimal or no resistance, but encounter significant resistance. In order to ensure that officers use force only in appropriate circumstances, it is important to draw the line as to what is and is not a use of force based on the officer’s actions and decisions, not the reactions of an individual to those decisions.

If the MPTC and POSTC decide to adopt this suggestion, I further suggest that the portion of the regulations relating to Use of Force Reporting be amended to exclude “physically escorting or handcuffing an individual with minimal or no resistance” from required use of force reporting. Requirements for reporting, which takes place after an incident is resolved, are more amenable to including this sort of threshold than requirements for actual use of force.

~~Physically escorting or handcuffing an individual with minimal or no resistance does not constitute a use of force for purposes of this section.~~

4. Application of Restraints

Paragraph 6 restricts certain tactics that an officer may use in connection with applying restraints to a combative subject. However, the text as written is unclear in two respects. First, it is not clear which tactics are acceptable for the purpose of applying restraints. Second, it is unclear if the use of the word “temporarily” is intended to provide an additional level of restriction beyond limiting these tactics to the single purpose of applying restraints. If tactics are limited to the purpose of applying restraints, their use is necessarily time-

limited: once restraints are applied the permission to use the tactics ceases. As written, it is unclear whether the use of those tactics must also meet some additional time limit and what that limit would be.

Except to gain, regain or maintain control of an individual and apply restraints, a law enforcement officer shall not intentionally sit, kneel, or stand on an individual's chest, neck, or spine, and shall not force an individual to lie on their stomach, except temporarily to regain and maintain control and apply restraints.

Use of Deadly Force

5. Persons Who Pose a Threat to Themselves

Paragraph 3 governs the use of deadly force against persons who pose a threat to themselves. It properly prohibits the use of deadly force if the sole threat a person presents is to himself. However, in order to ensure clarity, this paragraph could benefit from an additional sentence to more explicitly recognize that some individuals simultaneously pose a threat to themselves and others.

*An officer may not use deadly force against a person who poses only a danger to themselves. **If a person simultaneously poses a danger to themselves and officers or others, an officer shall use deadly force only in accordance with this section.***

6. Moving Motor Vehicles

Paragraph 4 governs the discharge of firearms into or at moving vehicles. MEP has adopted strict limitations on this sort of firearm discharge with respect to both moving vehicles and moving vessels. One aspect of the proposed regulation that is not in MEP policy is condition 2. I suggest the MPTC and POSTC consider whether this condition is necessary and appropriate in view of all of the other requirements in the regulation.

Condition 2 prohibits the discharge of a firearm at or into a moving motor vehicle, even if that discharge is objectively reasonable, necessary to prevent imminent harm to an officer or civilian, and the discharge is proportionate to threat of that imminent harm, solely because of a past decision of "officers" to "position[] themselves in such a way as to create a likelihood of being struck by an occupied vehicle (e.g. surrounding a vehicle at close proximity while dismounted)." This means that even if a passenger in a moving vehicle is shooting at a police officer or a civilian, no officer may discharge a firearm at the shooter solely because other officers positioned themselves improperly earlier in the encounter. If condition 2 is retained, it should be limited to apply to discharge of a firearm because "the vehicle is operated in a manner deliberately intended to strike an officer or another person" (condition 1)(ii)) rather than to discharge of a firearm because "[a] person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle." (condition 1)(i)). I suggest, however, that condition 2 be eliminated as a regulatory requirement for discharging a firearm. Rather, the need to engage in proper positioning to ensure the safety of both responding officers and occupants of vehicles should be a subject of training. Otherwise appropriate use of deadly force should not be rendered unlawful because of a past incorrect decisions, including decisions made by officers other than the one using force or at risk of serious injury or death.

~~... 2) Officers have not positioned themselves in such a way as to create a likelihood of being struck by an occupied vehicle (e.g., surrounding a vehicle at close proximity while dismounted); ...~~

7. Identification as a Police Officer

Paragraph 8 requires that officers verbally identify themselves before using deadly force when feasible. I suggest that the requirement be expanded so that it also applies to the portion of the regulation relating to use of non-deadly force.

Use of Force Reporting

8. Supervisor's Reports

Paragraph 4 places certain reporting requirements on officers who observe excessive force. The observing officer must make a written statement to a supervisor. The supervisor must then include that written statement in the supervisor's report. However, the regulation is silent on the required contents of the supervisor's report and whether that report must be submitted to anyone outside of the agency, such as POSTC. Additional clarity on this subject would be welcome.

Mass Demonstrations, Crowd Management, and Reporting

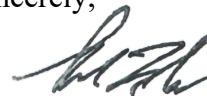
9. Multi-Agency Responses

This portion of the proposed regulation implements the new statutory requirements relating to mass demonstrations and crowd management. As these types of incidents often have multi-agency responses, it would be helpful to define the manner in which agencies that share jurisdictions and responsibility for responding to these incidents can engage in deconfliction and ensure that the requirements of the law are carried out in an efficient, organized fashion. It is not clear whether this would be best addressed in the proposed regulations or through sub-regulatory guidance documents.

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Thank you for the opportunity to comment on these proposed regulations. I, along with the entire MEP organization, very much appreciate the hard work that has gone into and will continue to go into the implementation of this legislation.

Sincerely,



Shaun T. Santos