



Boston Medical Center Department of Public Safety



Friday, August 27, 2021

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

Dear Deputy General Counsel Melander,

I am writing to you today concerning the draft regulations governing the use of force by Commonwealth law enforcement officers. As a law enforcement officer in the Hospital sector, some of our concerns are unique in comparison to other agencies. One particular area that we are unique is that our sworn front-line officers have dual roles/functions where they perform the responsibilities of a Public Safety Officer (Security Officer) while also having the function of being a Police Officer. Some tasks that the officer may have include patient safety searches and patient restraints. This is different from most agencies, to include College, Municipal and State Police. The restraints are a medical procedure that have to be ordered by a physician. To enact that restraint may require the use of non-lethal force on the part of the officer. Currently, the language use of non-lethal force on page 4 includes: "effect the lawful arrest or detention of a person." I believe the "lawful... detention of a person" needs to be defined, particularly when it comes to medical detentions. This will need to include warrants of apprehension, such as MGL 123, Section 12s (Application for an Authorization of Temporary Involuntary Hospitalization).

The officers at both Campus Police and Hospital Police agencies also have a different function as they are also agents of the Institution as opposed to strictly governmental agents in regards to police powers. The Jury Instructions for Self-Defense Cases includes language where "A person may use reasonable force, but not deadly force, to remove a trespasser from his property after the trespasser has been requested to leave and refused to do so." Prior to the suggest CMR, as an agent of the Institution, the Campus Police Officer could use reasonable non-lethal force to remove a trespasser, without having to either arrest the individual or seek court action against the individual. Obviously, this would depend on the level of resistance and actions of the person being removed. The Officer would still have to document the incident and have the use of force reviewed by a superior. With the new proposed CMR, the Campus/Hospital Officer would not have this option, instead once de-escalation tactics have been attempted and failed, the Officer would only have the option to arrest for Trespassing. While not agents of the Institution, Municipal Officers may have previously non-lethal force to remove a trespasser at restaurant/bar/retail establishment without arresting or charging the individual. The current wording of the Non-Lethal force does not allow for this. The officer's only option, after attempts at de-escalation, would be to arrest or charge the individual.

I suggest some additions to the first paragraph in the Xx Use of Non-Deadly force section. The suggestions include:



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- Adding the word “reasonable” or “reasonably” before each use of the word “necessary.” The standard for use of force for self-defense jury instructions uses the term “reasonably necessary” throughout. The CMR for use of force for police officers should not be different.
- Add a 5th reason to the 1st paragraph on page 4. The paragraph should state: “(v) to overcome an impediment to a response to an emergency (e.g. persons obstructing the police from responding to a need for assistance).” An officer may be put in a situation where they would have to move a person out of their immediate path in order to respond to an emergency.
- Moving the phrase/sentence “including issuing a summons instead of executing an arrest where feasible” from the 2nd paragraph on page 4 to the “De-escalation Tactics” definition paragraph on page 2. This should be considered an overall technique for de-escalation and should not be attached solely to passive resistance. I do not believe that telling a person that they will be summoned to court when refusing to leave an establishment will change the direction of the situation.
- Add a paragraph after the 6th paragraph on page 4, which would state the following: “An officer shall not use force to retrieve an object that a suspect has swallowed. If the officer believes that an individual has swallowed a controlled substance, the officer shall notify their dispatch of their belief and request EMS or transport the subject to the Emergency Department.” This would give guidance to officers in situations where they may believe that a suspect swallowed contraband and may try to take an immediate action to force the individual to regurgitate the item. This would turn the situation into a medical incident requiring the assistance of a physician to evaluate the person.

Thank you for your attention to this matter.

Sincerely,

Alexander O'Leary

Lt. Alexander O'Leary
Boston Medical Center Public Safety



"The Only Union for Police Officers and 911 Dispatchers"

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August 27, 2021

Dear Members of the Use of Force Study Commission:

The Massachusetts Coalition of Police has always been dedicated to assisting our members in providing the very best in police service to their communities. We have always advocated for increased training and funding for that training. Since Ferguson, we have tried to be active participants in the police reform movement. We have always stood by the notion that education creates good police officers and that has proven true in that Massachusetts has very few incidents comparable to others around the country. Despite that, we end up with a police reform law that was rushed through the legislature with little to no study of important concepts and people with little to no experience in policing drafting rules of engagement. This lack of experience, training, study, and education on the subject matter has produced law that will result in years of litigation and uncertainty.

This brings us to the proposed CMR's entitled "Use of Force by Law Enforcement Officers". In attempts to comply with unrealistic timeframes outlined in the Police Reform Law, the MPTC has drafted proposed regulations that include ambiguous terms and guidance which will ultimately lead to litigation. The Massachusetts Coalition of Police has been consistent in our call for properly studied reforms, prior to implementation. These regulations, as proposed in the rushed manner that they have been promulgated, will succeed in providing confusing guidance and create not only a dangerous environment for law enforcement, but also for the people we protect. It will lead to under response by many officers, which will further escalate situations, which is the exact opposite of the stated intent of the regulations.

Once again, we call for the MPTC and the POST to slow this process down, take a hard look at the subjects that you are regulating, and create good positive reform that works for all stakeholders. Rushing through this process to meet artificial deadlines will result in municipalities and the state spending large amounts of money to litigate situations caused by these regulations and the faulty policies derived from them. Unfortunately, in the real world, ambiguous regulations and policies will cost people their lives.

Sincerely,

Scott Hovsepian *John Nelson*

Scott A. Hovsepian
President

John Nelson
First Vice President

Robert Murphy

Robert Murphy
Secretary/Treasurer

Tim King

Timothy R. King
In-House Counsel



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Xx CMR xx: USE OF FORCE BY LAW ENFORCEMENT OFFICERS

Section

- xx Purpose and Scope
- xx Authorization
- xx Definitions
- xx Use of Non-Deadly Force
- xx Use of Deadly Force
- xx Duty to Intervene
- xx Use of Force Reporting
- xx Mass Demonstrations, Crowd Control, and Reporting
- xx Investigation when Use of Force Results in a Death or Serious Bodily Injury
- xx Use of Force Training

xx: Purpose and Scope

Purpose. The purpose of xx CMR xx is to establish rules governing the use of force by law enforcement officers.

Scope. xx CMR xx applies to all law enforcement officers as defined in M.G.L. c. 6E, §1.

Xx: Authorization

XX CMR xx is promulgated pursuant to M.G.L. c. 6E, § 15(d) requiring the Peace Officer Standards and Training Commission and the Municipal Police Training Committee to jointly promulgate rules and regulations governing the use of force by law enforcement officers.

Xx: Definitions

Chokehold. The use of a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of a law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow with the intent of or with the result of causing serious bodily injury, unconsciousness, or death.

Commission. The Massachusetts Peace Officer Standards and Training Commission as established in M.G.L. c. 6E, §2.

Committee. The Municipal Police Training Committee as established in M.G.L. c. 6, § 116.

Deadly Force. Physical force that can reasonably be expected to cause death or serious ~~bodily~~ physical injury.

De-escalation Tactics. Proactive actions, ~~and~~ approaches and negotiations used by an officer to stabilize a law enforcement situation so that more time, options and resources are available to gain a person's voluntary compliance and to reduce or eliminate the need to use force including, but not limited to, verbal persuasion, ~~Crisis Intervention Training (CIT) strategies~~, warnings, slowing down the pace of an incident, waiting out a person, and requesting additional resources to resolve the incident, including, but not limited to, calling in medical or licensed mental health professionals, as defined in subsection (a) of section 51½ of chapter 111, to address a potential medical or mental health crisis.

Department/Police Department/Law Enforcement Agency/Agency. (i) A state, county, municipal or district law enforcement agency, including, but not limited to: a city, town or district police department, the office of environmental law enforcement, the University of Massachusetts police department, the department of the state police, the Massachusetts Port Authority police department, also known as the Port of Boston Authority police department, and the Massachusetts Bay Transportation Authority police department; (ii) a ~~S~~heriff's ~~Office~~ department in its performance of police duties and functions; or (iii) a public or private college, university or other educational institution or hospital police department.

Electronic Control Weapon (ECW)/Conducted Energy Devices (CEDs). A portable device or weapon, regardless of whether it passes an electrical shock by means of a dart or projectile via a wire lead, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily by causing neuromuscular incapacitation or pain so that an officer can regain and maintain control of the subject.

Force. The amount of physical effort, however slight, required by law enforcement ~~police~~ to compel compliance by an unwilling individual.

Kettling. Confinement or corralling by law enforcement of a group of demonstrators or protesters in a small area without any means of egress as a method of crowd control, management, or restraint.

Law enforcement officer/officer. Any officer of an agency, including the head of the agency; a special state police officer appointed pursuant to section 58 or section 63 of chapter 22C; a special sheriff appointed pursuant to section 4 of chapter 37 performing police duties and functions; a deputy sheriff appointed pursuant to section 3 of said

chapter 37 performing police duties and functions; a constable executing an arrest for any reason; or any other special, reserve, or intermittent police officer.

Non-deadly force. Any use of force other than that which is considered deadly force that involves physical effort to control, restrain, or overcome the resistance of another.

Officer-involved ~~serious bodily~~ injury or death. Any event during which an officer:

- (i) discharges a weapon, as defined in section 121 of chapter 140, actually or proximately causing ~~serious bodily~~ injury or death to another;
- (ii) discharges any stun gun as defined in said section 121 of said chapter 140, actually or proximately causing ~~serious bodily~~ injury or death to another;
- (iii) uses a chokehold, in violation of M.G.L. c. 6E, §14(c), actually or proximately causing injury or death of another; ~~except where lethal force is needed to prevent a person from causing serious bodily injury or death to the officer and or others.~~
- (iv) discharges tear gas or other chemical weapon, actually or proximately causing ~~serious bodily~~ injury or death of another;
- (v) discharges rubber pellets from a propulsion device, actually or proximately causing ~~serious bodily~~ injury or death of another;
- (vi) deploys a ~~K9 dog~~, actually or proximately causing ~~serious bodily~~ injury or death of another;
- (vii) uses deadly force, actually or proximately causing ~~serious bodily~~ injury or death of another;
- (viii) fails to intervene, as required by M.G.L. c. 6E, §15, to prevent the use of excessive or prohibited force by another officer who actually or proximately causes ~~serious bodily~~ injury or death of another; or
- (ix) engages in a physical altercation with a person who sustains serious bodily injury or requests or receives medical care as a result.

Passive resistance. ~~An individual who is non-compliant with officer commands that is non-violent and does not pose an immediate threat to the officer or the public.~~ ~~Non-violent opposition to authority, a refusal to cooperate with lawful commands or legal requirements.~~

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Commented [CLSH1]: Passive resistance is still a threat. Please see the proposed new language.

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Serious Bodily Injury. Bodily injury that results in: (i) permanent disfigurement; (ii) protracted loss or impairment of a bodily function, limb, or organ; or (iii) a substantial risk of death.

Tear Gas or Other Chemical Weapons ("CW"). Any weapon that contains chemical compounds that temporarily make people unable to function by causing irritation to the eyes, mouth, throat, lungs, and skin, or that otherwise restrain a person by causing pain. This shall not include oleoresin capsicum ("OC") spray.

Xx Use of Non-Deadly Force

A law enforcement officer shall not use force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to: (i) effect the lawful arrest or detention of a person; (ii) prevent the escape from custody; (iii) prevent imminent harm and the amount of force used is proportionate to the threat of imminent harm, while protecting the safety of the officer or others; or (iv) defend against an individual who initiates force against an officer.

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.

Physically escorting or handcuffing an individual ~~who is compliant with minimal or no resistance~~ does not constitute a use of force for purposes of this section. Use of force does include the pointing of a firearm, ECW, ECD, ~~or CW~~ or the use of an impact instrument at-on an individual and the use of OC spray on an individual or directed toward an individual.

Officers shall ~~ensure always provide~~ appropriate medical response ~~to individuals is provided to those~~ who are exhibiting signs of or complaining of injury or illness following a non-deadly use of force when safe and tactically feasible.

All law enforcement officers shall be properly trained and certified in the use of any less-~~than~~ lethal weapons before being authorized to carry or use such force options.

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. A law enforcement officer shall not obstruct the airway or limit the breathing of any individual, nor shall a law enforcement officer restrict oxygen or blood flow to an individual's head or neck. An individual placed on their stomach during restraint should be moved into a recovery position or seated position as soon as practicable.

Commented [CLSH2]: The sentence was reworded to address the intent of the provision without putting officers in a position of providing medical care "shall provide appropriate medical response" beyond their First Responder training.

Xx Use of Deadly Force

A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm, provided:

- (1) The officer uses only the amount of force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others;
- (2) The imminent harm poses an imminent danger of death or serious bodily injury to the officer or another person;
- (3) The officer attempts ~~as many~~ de-escalation tactics that are feasible under the circumstances, including utilizing barriers where feasible.

A law enforcement officer shall not ~~obstruct use of a chokehold or other tactics that restrict or obstruct~~ an individual's breathing, ~~or oxygen or blood flow to an individual's head or neck with the exception where lethal force is needed to prevent a person from causing serious bodily injury or death to the officer and or others.~~ A law enforcement officer shall not be trained to use a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow.

~~An officer may not use deadly force against a person who poses only a danger to themselves.~~

A law enforcement officer shall not discharge any firearm into or at a moving motor vehicle unless, based on the totality of the circumstances, including the risk of safety to other persons in the area, such discharge is objectively reasonable, necessary to prevent imminent harm to a person and the discharge is proportionate to the threat of imminent harm; provided, the following conditions exist:

- 1) (i) A person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle; or ii) the vehicle is operated in a manner deliberately intended to strike an officer or another person, and all other reasonable means of defense have been exhausted or are not present or practical, which includes moving out of the path of the vehicle;
- 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);
- 3) The officer is not firing strictly to disable the vehicle; and
- 4) The circumstances provide a high probability of stopping or striking the intended target.

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Commented [CLSH3]: We cannot criminalize the preservation of or defense of life.

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Commented [CLSH4]: This statement is concerning. If the individual has a weapon (i.e. gun) they could seem to be pointing the weapon at themselves, and then very quickly use it on the officer responding. Or, If an individual is clearly going to kill themselves, should we not use deadly force to save their lives (distinguishing this example from suicide by cop)

A law enforcement officer shall not use deadly force at any point in time when there is no longer an objectively reasonable belief that an individual currently and actively poses an immediate threat of serious bodily harm or death, even if deadly force would have been justified at an earlier point in time.

Where feasible based on the totality of the circumstances, officers shall verbally identify themselves as law enforcement officers (specifying the specific agency)~~police officers~~ and issue some warning before using deadly force.

Officers shall ~~ensure always provide~~ appropriate medical response is provided to an individual following a use of deadly force when safe and tactically feasible.

Xx Duty to Intervene

A law enforcement officer present and observing another officer using or attempting to use physical force, including deadly force, beyond that which is necessary or objectively reasonable based on the totality of the circumstances, shall intervene to prevent the observed officer's use of unnecessary or unreasonable force, regardless of the rank of the officer so observed, unless intervening would result in imminent harm to the officer or another identifiable individual.

The failure of a law enforcement officer to intervene as set forth herein may subject the officer to de-certification by the Commission.

Xx Use of Force Reporting

Law enforcement agencies shall develop and implement a policy and procedure for reporting the use of force. Such policy shall mandate reporting such incidents including but not limited to officer-involved injuries or deaths as described herein, and include the use of a standard use of force reporting form as approved by the Committee and the Commission which shall be completed by any officer who uses force.

Law enforcement agencies shall report to the National Use of Force Data Collection Database when actions by a law enforcement officer resulted in the death or serious bodily injury of an individual, or when a law enforcement officer, in the absence of death or serious bodily injury, discharged a firearm at or in the direction of a person.

Law enforcement agencies are not required to report the discharge of a firearm during training or qualification exercises, or for the purposes of animal destruction/euthanasia where necessary.

An officer who observes another officer using physical force, including deadly force, beyond that which is necessary or objectively reasonable based on the totality of the circumstances shall report the incident to an appropriate supervisor as soon as reasonably possible but not later than the end of the officer's shift. The officer shall

prepare a detailed written statement describing the incident consistent with uniform protocols. The officer's written statement shall be included in the supervisor's report.

An officer who knowingly makes an untruthful statement concerning a material fact or knowingly omits a material fact from a use of force report may be subject to decertification.

Law enforcement agencies shall develop and implement a policy and procedure for law enforcement personnel, including but not limited to law enforcement officers, to report abuse by other law enforcement personnel, including but not limited to law enforcement officers, without fear of retaliation or actual retaliation.

Any harassment, intimidation, or retaliation against any officer who either intervened to prevent or stop an excessive force incident or made, intended to make, or is required to make a report regarding the witnessed excessive force incident shall be reported immediately to an appropriate supervisor and will not be tolerated. Any such actions may result in decertification.

All use of force reports shall be retained and maintained by the law enforcement agency/department/office and are subject to discovery and access through the Massachusetts Public Records Law MGL c. 66.

Xx Mass Demonstrations, Crowd Management, and Reporting

Law Enforcement agencies~~A police department~~ shall establish plans to avoid and to de-escalate potential or actual conflict between officers and mass demonstration participants. When the law enforcement agency~~a police department~~ obtains advance knowledge of a planned mass demonstration within the agency's~~police department's~~ jurisdiction, the law enforcement agency~~police department~~ shall diligently attempt in good faith to: (i) communicate with organizers of the event before the event occurs in an effort to establish reliable channels of communication between officers and event participants, and (ii) discuss and establish logistical plans to avoid or, if necessary, to de-escalate potential or actual conflict between law enforcement officers and mass demonstration participants.

The agency~~department~~ shall designate an officer in charge of de-escalation planning and communication to carry out the above plans within the department.

A law enforcement officer shall not discharge or order the discharge of tear gas or any other chemical weapon, discharge or order the discharge of rubber pellets from a propulsion device or order the release of a K9 dog to control or influence a person's behavior unless: (i) de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances; and (ii) the measures used are necessary to prevent imminent harm and the foreseeable harm inflicted by the tear gas or the chemical weapon, rubber pellets or K9 dog is proportionate to the threat of imminent harm.

If a law enforcement officer utilizes or orders the use of rubber bullets, CEDs, CWs, ECWs, or a ~~K9dog~~ against a crowd, the law enforcement officer's appointing agency shall file a report with the Commission detailing all of the measures that were taken in advance of the event to reduce the probability of disorder and all de-escalation tactics and other measures that were taken at the time of the event to de-escalate tensions and avoid the necessity of using said weapons, including a detailed justification of why use of said weapons was objectively reasonable.

~~K9~~Canines should not be deployed for crowd control, restraint, or management of peaceful demonstrations—but may be deployed for crowd control, restraint, or management of peaceful demonstrations in isolated circumstances related to bomb detection, pursuit of suspects in buildings, and related situations.

The use of Kettling as a means of crowd control, crowd management, or crowd restraint is prohibited.

xx Investigation when Use of Force Results in a Death or Serious Bodily Injury

Law enforcement agencies shall develop and implement a policy and procedure for reporting a use of force that results in a death or serious bodily injury.

Whenever an officer uses force that results in a death or serious bodily injury, the Officer-in-Charge shall immediately notify the agency head or their designee. The agency shall conduct an investigation according to their policies and protocols.

If the use of force involved a weapon, the agency head or their designee shall secure the weapon or weapons used for examination and maintain the appropriate chain of custody protocols.

Xx Use of Force Training

The Committee shall develop and periodically deliver use of force training to law enforcement officers consistent with these Regulations, including, but not limited to: (i) de-escalation tactics; (ii) handling emergencies involving ~~individuals with mentally illness~~ individuals; (iii) responding to mass gatherings; (iv) cultural competency; (v) progression of force; and (vi) lawful use of force techniques and equipment on a schedule to be determined by the Committee.

The Commission and the Committee shall jointly develop a model use of force policy. All law enforcement agencies shall have a written use of force policy consistent with the model policy and the agency's particular mission; provided, however, that an agency's use of force policy shall comply with xx CMR xx and all relevant state and federal laws.

DRAFT



Massachusetts Sheriffs' Association

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August 27th, 2021

Deputy General Counsel John Melander
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Boston, Massachusetts 02108

RE: 550 CMR 6.00: Use of Force by Law Enforcement Officers
555 CMR 6.00: Use of Force by Law Enforcement Officers

Dear Deputy General Counsel Melander,

I am writing in my capacity as the Executive Director of the Massachusetts Sheriffs' Association and do so on behalf of the fourteen Massachusetts Sheriffs.

The Massachusetts Sheriffs and their respective Offices appreciate the opportunity to provide written testimony regarding the proposed MPTC Use of Force Regulations for Law Enforcement Officers, 550 CMR 6 and 555 CMR 6. Please see and consider the attached red-lined recommendations and comments in the Use of Force Regulations as our formal written testimony.

The Massachusetts Sheriffs' Association and the fourteen Sheriffs of the Commonwealth appreciate the collaboration with the Municipal Police Training Committee (MPTC) and the Peace Officer Standards and Training Commission (POSTC). We hope our recommendations will be received favorably and adopted.

We look forward to a continued strong and collaborative working relationship.

On behalf of the Sheriffs of the Commonwealth, I thank you for your time and consideration of our written testimony.

Respectfully,

Carrie Hill
Executive Director

Cc: President Steven Tompkins, Sheriff Suffolk County Sheriff's Office
Vice President Nicholas Cocchi, Sheriff Hampden County Sheriff's Office
Sheriff Chris Donelan, Franklin County Sheriff's Office
Sheriff Kevin Coppinger, Essex County Sheriff's Office



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The Commonwealth of Massachusetts

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CHRISTOPHER S. MASON
COLONEL/SUPERINTENDENT

R. SCOTT WARMINGTON
DEPUTY SUPERINTENDENT

August 27, 2021

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 State Police ("MSP"), I am grateful for the opportunity to offer comments and participate in this process. We look forward to working with you in this most important endeavor.

1. Use of K-9s:

The use of K-9 teams as delineated in the proposed regulations is overly narrow and severely limits the multiple, passive uses of K-9 teams. MSP routinely rolls out K-9 teams with our Public Order Platoon (POP), Special Emergency Response Team (SERT) and Special Tactical Operations (STOP) team. Over a number of years, MSP has successfully conducted routine protection for the State House, Gillette Stadium, and other sensitive areas while supporting peaceful protests and large gatherings with the use of K-9 teams. Incorporating language similar to the following would allow for such important uses of K-9 teams:

"Canine handler teams shall remain in a standby/ready configuration during police operations involving crowd control, restraint or management of peaceful demonstrations. A standby/ready configuration is defined as a configuration in which the canine remains on a short lead in close proximity to the handler AND is well behind the line of contact between police and civilian personnel. Canines shall not be deployed forward of the line of contact unless there are specific, articulable facts that lead to their use, and the use of a canine must be reasonable."

2. Prohibition of force on an individual's chest, neck, and spine:

MSP has a question about the following proposed regulatory language:

"A law enforcement officer shall not 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 control and apply restraints."

It is unclear if the exception (i.e., "except temporarily to regain control and apply restraints") applies to both preceding clauses, or just the second clause (i.e., "shall not force an individual to lie on their stomach"). If the exception applies to both clauses, then this comports with MSP's current practice.

3. Obstructing/limiting an individual's airway or breathing:

MSP notes that the following language could unintentionally prohibit reasonable and safe methods:

"A law enforcement officer shall not obstruct or limit the airway or limit the breathing of any individual, nor shall a law enforcement officer restrict oxygen or blood flow to an individual's head or neck."

The ban on chokeholds already forbids officers from obstructing an individual's airway as well as the oxygen or blood flow to an individual's head or neck. A prohibition against "limiting the breathing of any individual," without more specificity, however, could prohibit virtually any control position that effectively addresses a grounded individual, which necessarily places weight on the individual's torso in a way that could be said to "limit the breathing" of that individual.

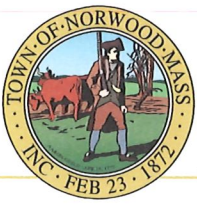
Finally, MSP supports the language "(a)n individual placed on their stomach during restraint should be moved into a recovery position or seated position as soon as possible." That approach is in keeping with current best practices, and our troopers, and officers throughout the Commonwealth, are already trained to place subjects in a seated or recovery position as soon as the subject is under control.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "J M. Staples".

Jennifer M. Staples
Chief Legal Counsel
Massachusetts State Police



The TOWN OF NORWOOD

Commonwealth of Massachusetts

POLICE DEPARTMENT
WILLIAM G. BROOKS III
Chief of Police

TO: Municipal Police Training Committee, and the
Peace Officer Standards and Training Commission

FROM: Chief William G. Brooks III

SUBJECT: Use of Force Regulations

DATE: August 20, 2021

I offer this written testimony regarding the use of force regulations being proposed by MPTC and POST.

First, I want to compliment POST and MPTC for working together on the draft use of force regulations being heard on August 27. The regulations are not only reasonable, but largely reflect what is already in place at police departments across the Commonwealth.

I do, however, have one issue to raise regarding these regulations. In the section on non-deadly force, second paragraph, the proposed regulation currently reads:

"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."

The proposed regulation would require an officer to summons a passively resistant or noncompliant subject rather than arrest him/her "where feasible." In other words, when an officer approaches a subject who refuses to get out of his vehicle, refuses to get up off the curb to be arrested, or refuses to put his hands behind his back, the officer should respond by saying, "never mind, I'll mail you a summons?" This is both unrealistic and unworkable.

At my police department, about half the people we bring to court on criminal charges have never been placed in custody by our officers. We make full use of the summons option in cases such as shoplifting, operating on a suspended license and drug possession. There are, however, factors that warrant an arrest such as the need to interrupt criminal conduct, the need to photograph and fingerprint a subject who is not positively identified, the need to recover evidence of the crime during a search incident to arrest, or the sheer gravity of the offense the person has committed. A defendant should not be allowed to thwart an arrest simply by refusing to cooperate.

I also have concerns about the use of the phrase "where feasible." Unlike the terms probable cause,

proof beyond a reasonable doubt and reasonable suspicion, "where feasible" is overly broad. Feasible is defined as "capable of being done, effected, accomplished." It is feasible that I can drive my car at 100 mph without hitting anything, but it is clearly not wise or recommended.

The proposed regulation would require an officer to let a subject go in favor of a summons if he could do that. This will simply incentivize people to be noncompliant with arresting officers, something we all want to avoid.

Officers across the Commonwealth utilize the summons option every day, but this strategy does not belong in a set of state regulations. Regulations are intended to clearly define what a person may and may not do. There will be many opportunities for MPTC and POST to work together on training, model policy and open discussion forums, and the summons vs. arrest option is a good topic for those. It does not belong in use of force regulations.

If I can be of further assistance to the committee, I may be reached by email at all by telephone at 781-440-5150.

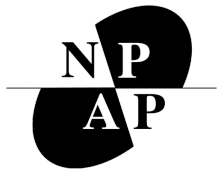
Respectfully submitted,



William G. Brooks III
Chief of Police

WGB/cjk

Misc-Aug2021



National Police Accountability Project

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August 24, 2021

Via Email: 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

Re: 550 C.M.R. 6.00: Use of Force by Law Enforcement Officers

Dear Members of the Municipal Police Training Committee and Peace Officers Standards and Training Commission,

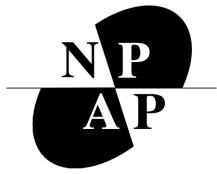
The National Police Accountability Project (“NPAP”) is a nonprofit organization dedicated to holding law enforcement and corrections officers accountable to constitutional and professional standards. NPAP has approximately six hundred attorney members across the United States and twenty members based in Massachusetts. While our members primarily focus on getting justice for victims of police misconduct after the abuse has inflicted, NPAP is equally committed to reforms that will prevent violence before it occurs. We strongly urge the adoption of stricter use of force restrictions and generally support the proposed regulations subject to the following recommended changes.

Use of Deadly Force: Discharge Firearm into Moving Vehicle

The current proposed regulation limiting deadly use of force against individuals in moving vehicles provides that: “A law enforcement officer shall not discharge any firearm into or at a moving motor vehicle unless, based on the totality of the circumstances, such discharge is necessary to prevent imminent harm to a person and is objectively reasonable.”¹

This regulation gives officers broad discretion to use a form of deadly force that creates a high risk of danger to individuals in the vehicle, bystanders, and other drivers. Police policy experts have acknowledged the unique dangers created by an officer when they shoot into a moving vehicle and have accordingly recommended

¹ Proposed Regulations, p. 5



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strict prohibitions on the tactic. The International Association of Chiefs of Police (IACP) explained “the use of firearms under such conditions often presents an unacceptable risk to innocent bystanders... should the driver be wounded or killed by shots fired, the vehicle will almost certainly proceed out of control and could become a serious threat to officers and others in the area.”² The Police Executive Research Forum and Police Foundation echoed concerns that shooting into a vehicle will cause the driver to lose control, creating a hazard for pedestrians, officers, and other vehicles.³ Shooting at vehicles also creates a heightened risk that bullets will ricochet and hit a bystander.⁴ In addition to the risks created to officers and bystanders, shooting into a vehicle is extremely dangerous to the individuals inside as they are not only facing an injury from the shooting but a potential collision as well.

The potential harm is not hypothetical. There are many documented instances of police officers injuring or killing a bystander by shooting into their vehicle.⁵ Court cases provide similar evidence that these shootings result in serious injuries and fatalities to drivers suspected of crimes.⁶

In light of these risks, experts have recommended policies that: (1) ban officers from shooting into a vehicle unless a person in the vehicle is threatening an officer or other person with deadly harm *by a means other than a vehicle*; and (2) require a police officer to remove themselves from the path of an oncoming vehicle.⁷

² *Use of Force, Concepts and Issue Paper*, International Association of Chiefs of Police Law Enforcement Policy Center, February 2006, <https://s3.documentcloud.org/documents/2303827/useofforcepaper.pdf>

³ John P. Gross, *Unguided Missiles: Why the Supreme Court Should Prohibit Police Officers from Shooting at Moving Vehicles*, 163 U. Pa. L. Rev. Online 135, 140 (2016)

⁴ Jon Swaine et al., *Moving Targets*, GUARDIAN (Sept. 1, 2015), <http://www.theguardian.com/us-news/2015/sep/01/moving-targets-police-shootings-vehicles-the-counted>

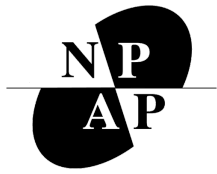
⁵ See *Eg. Family speaks after innocent bystander killed by man fleeing Detroit police*, Jan. 19, 2020, (a man shot while fleeing police lost control of vehicle and struck bystander, killing him)

<https://www.clickondetroit.com/news/local/2020/01/20/family-speaks-after-innocent-bystander-killed-by-man-fleeing-detroit-police/>; Richard Winton and Solomon Moore, *Proposed LAPD Rule Would Limit Firing at Moving Cars*, Feb. 11, 2005,

<https://www.clickondetroit.com/news/local/2020/01/20/family-speaks-after-innocent-bystander-killed-by-man-fleeing-detroit-police/> (police officers shot and killed 13 year old while shooting into vehicle); *Rucker v. Harford County, Md.*, 946 F.2d 278, 280 (4th Cir. 1991)(an officer shot a bystander in an attempt to shoot into a fleeing vehicle driven by a carjacking suspect);

⁶ See *Eg. Mullinex v. Luna*, 577 U.S. 7 (2015)(driver who was fleeing officers after he refused to be arrested on an outstanding warrant died after officer shot into his vehicle from an overpass); *Torres v. Madrid*, 141 S. Ct. 989 (2021); *Stoddard-Nunez v. City of Hayward*, 2020 U.S. App. LEXIS 18351 (9th Cir. 2020)(passenger of vehicle killed while fleeing police).

⁷ See *Eg. IACP Model Policy on Use of Force*, 2006



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Most modern police policies incorporate these requirements, including Boston prior to recent changes.⁸

The current proposed regulation vests officers with too much discretion and tacitly authorizes use of force in a variety of situations where shooting would cause more harm than it would prevent. A fleeing vehicle will often drive over the speed limit, accelerate or stop abruptly, or use maneuvers that violate traffic laws, and therefore conceivably present a risk of harm to other drivers. Thus, the current standard offers law enforcement officers little guidance on when they should discharge their weapon. Moreover, the current standard permits an officer to use force when the risk of harm to themselves could be avoided. Specifically, an officer standing in the path of a vehicle attempting to flee is technically at risk for harm even though that harm could be abated by stepping out of the way. NPAP is aware that this regulation is set to mirror state statute. However, the statute sets a minimum standard and this rulemaking process presents an opportunity to strengthen protections against excessive uses of force.

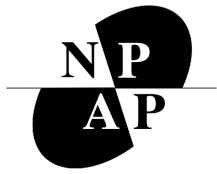
We recommend that the regulation be amended as follows:

A law enforcement officer shall not discharge any firearm into or at a moving motor vehicle unless, ~~based on the totality of the circumstances, such discharge is necessary to prevent imminent harm to a person and is objectively reasonable~~ **a person in the vehicle is immediately threatening the officer or another identifiable person by deadly force by a means other than the vehicle. 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.**

Use of Force Reporting: Mandatory Reporting Policy

The proposed regulations require law enforcement agencies to report use of force incidents on a standard reporting form provided by the Committee and Commission. While NPAP does not have a suggested amendment to the regulation, we strongly urge that the form include a field for the race or perceived race of the individual against whom force was apply. Collecting information about race or perceived race

⁸ David Graham, *Why Do Police Keep Shooting Into Moving Cars*, The Atlantic, May 21, 2021, <https://www.theatlantic.com/ideas/archive/2021/05/andrew-brown-police-shootings-moving-vehicles/618938/>; See also, Boston Police Department Rules and Procedures, Rule 303, § 8 (2003), <https://static1.squarespace.com/static/5086f19ce4b0ad16ff15598d/t/52af5f30e4b0dbce9d22a80d/1387224880253/Rule+303.pdf>



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is critical to identify, understand, and ultimately correct racial disparities in law enforcement use of force incidents.⁹

In sum, NPAP supports the adoption of many the proposed regulations but strongly urges this body to amend the rule on shooting into or at a moving vehicle. The danger created by this tactic is too great for officers to be governed by an unclear standard that is out of step with the majority of police agency policies and best practice guidance. We also appreciate this opportunity to register our support for the creation of a use of force report that requires officers to identify race or perceived race of the individual.

Thank you for your consideration and please do not hesitate to contact us if you seek additional information.

Sincerely,

Lauren Bonds
Legal Director
National Police Accountability Project

⁹ See *Eg.* Civilian Rights Coalition Letter to House and Senate Leadership on Federal Policing, June 1, 2020, https://www.naacpldf.org/wp-content/uploads/Coalition_Letter_to_House_and_Senate_Leadership_on_Federal_Policing_Priorities_Final_6.1.20.pdf



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Xx CMR xx: USE OF FORCE BY LAW ENFORCEMENT OFFICERS

Section

- xx Purpose and Scope
- xx Authorization
- xx Definitions
- xx Use of Non-Deadly Force
- xx Use of Deadly Force
- xx Duty to Intervene
- xx Use of Force Reporting
- xx Mass Demonstrations, Crowd Control, and Reporting
- xx Investigation when Use of Force Results in a Death or Serious Bodily Injury
- xx Use of Force Training

xx: Purpose and Scope

Purpose. The purpose of xx CMR xx is to establish rules governing the use of force by law enforcement officers.

Scope. xx CMR xx applies to all law enforcement officers as defined in M.G.L. c. 6E, §1.

Xx: Authorization

XX CMR xx is promulgated pursuant to M.G.L. c. 6E, § 15(d) requiring the Peace Officer Standards and Training Commission and the Municipal Police Training Committee to jointly promulgate rules and regulations governing the use of force by law enforcement officers.

Xx: Definitions

Chokehold. The use of a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of a law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow with the intent of or with the result of causing bodily injury, unconsciousness, or death.

Commission. The Massachusetts Peace Officer Standards and Training Commission as established in M.G.L. c. 6E, §2.

Committee. The Municipal Police Training Committee as established in M.G.L. c. 6, § 116.

Deadly Force. Physical force that can reasonably be expected to cause death or serious physical injury.

De-escalation Tactics. Proactive actions and approaches used by an officer to stabilize a law enforcement situation so that more time, options and resources are available to gain a person's voluntary compliance and to reduce or eliminate the need to use force including, but not limited to, verbal persuasion, warnings, slowing down the pace of an incident, waiting out a person, and requesting additional resources to resolve the incident, including, but not limited to, calling in medical or licensed mental health professionals, as defined in subsection (a) of section 51½ of chapter 111, to address a potential medical or mental health crisis.

Commented [CB1]: Eliminate from 2nd paragraph under "Use of Non-Deadly Force" and insert here, "issuing a summons instead of executing an arrest where feasible."

Department/Police Department/Law Enforcement Agency/Agency. (i) A state, county, municipal or district law enforcement agency, including, but not limited to: a city, town or district police department, the office of environmental law enforcement, the University of Massachusetts police department, the department of the state police, the Massachusetts Port Authority police department, also known as the Port of Boston Authority police department, and the Massachusetts Bay Transportation Authority police department; (ii) a sheriff's department in its performance of police duties and functions; or (iii) a public or private college, university or other educational institution or hospital police department.

Electronic Control Weapon (ECW)/Conducted Energy Devices (CEDs). A portable device or weapon, regardless of whether it passes an electrical shock by means of a dart or projectile via a wire lead, from which an electrical current, impulse, wave or beam that is designed to incapacitate temporarily by causing neuromuscular incapacitation or pain so that an officer can regain and maintain control of the subject.

Force. The amount of physical effort, however slight, required by police to compel compliance by an unwilling individual.

Kettling. Confinement or corraling by law enforcement of a group of demonstrators or protesters in a small area without any means of egress as a method of crowd control, management, or restraint.

Law enforcement officer/officer. Any officer of an agency, including the head of the agency; a special state police officer appointed pursuant to section 58 or section 63 of chapter 22C; a special sheriff appointed pursuant to section 4 of chapter 37 performing police duties and functions; a deputy sheriff appointed pursuant to section 3 of said

chapter 37 performing police duties and functions; a constable executing an arrest for any reason; or any other special, reserve, or intermittent police officer.

Non-deadly force. Any use of force other than that which is considered deadly force that involves physical effort to control, restrain, or overcome the resistance of another.

Officer-involved injury or death. Any event during which an officer:

- (i) discharges a weapon, or stun gun, as defined in section 121 of chapter 140, actually or proximately causing injury or death to another;
- (ii) discharges any stun gun as defined in said section 121 of said chapter 140, actually or proximately causing injury or death to another;
- (iii) uses a chokehold, in violation of M.G.L. c. 6E, §14(c), actually or proximately causing injury or death of another;
- (iv) discharges tear gas or other chemical weapon, actually or proximately causing injury or death of another;
- (v) discharges rubber pellets from a propulsion device, actually or proximately causing injury or death of another;
- (vi) deploys a dog, actually or proximately causing injury or death of another;
- (vii) uses deadly force, actually or proximately causing injury or death of another;
- (viii) fails to intervene, as required by M.G.L. c. 6E, §15, to prevent the use of excessive or prohibited force by another officer who actually or proximately causes injury or death of another; or
- (ix) engages in a physical altercation with a person who sustains serious bodily injury or requests or receives medical care as a result.

Passive resistance. An individual who is non-compliant with officer commands that is **non-violent and does not pose an immediate threat to the officer or the public.**

Serious Bodily Injury. Bodily injury that results in: (i) permanent disfigurement; (ii) protracted loss or impairment of a bodily function, limb, or organ; or (iii) a substantial risk of death.

Tear Gas or Other Chemical Weapons ("CW"). Any weapon that contains chemical compounds that temporarily make people unable to function by causing irritation to the eyes, mouth, throat, lungs, and skin, or that otherwise restrain a person by causing pain. This shall not include oleoresin capsicum ("OC") spray.

Commented [CB2]: This definition is NOT consistent with MPTC use of Force Continuum – specifically the Perceived Subject Action Category where passive resistance is defined as:

Citizen non-compliance offering no physical or mechanical energy enhancement toward the resistant effort.

This definition, by adding the words "**non-violent and does not pose an immediate threat to the officer or the public,**" encompasses the MPTC definition of Active Resistance as well – MPTC Active resistance is defined as: *non-compliance increased in scope and / or intensity now includes energy enhanced physical or mechanical defiance. **Violence and threats are not a functional part of MPTC definition, therefore providing inclusion of Active Resistance under this definition of Passive Resistance.***

Xx Use of Non-Deadly Force

A law enforcement officer shall not use force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to: (i) effect the lawful arrest or detention of a person; (ii) prevent the escape from custody; (iii) prevent imminent harm and the amount of force used is proportionate to the threat of imminent harm, while protecting the safety of the officer or others; or (iv) defend against an individual who initiates force against an officer.

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.

Physically escorting or handcuffing an individual with minimal or no resistance does not constitute a use of force for purposes of this section. Use of force does include the pointing of a firearm, ECW, CED or CW at an individual and the use of OC spray on an individual or directed toward an individual.

Officers shall always provide appropriate medical response to individuals who are exhibiting signs of or complaining of injury or illness following a non-deadly use of force when safe and tactically feasible.

All law enforcement officers shall be properly trained and certified in the use of any less-lethal weapons before being authorized to carry or use such force options.

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. A law enforcement officer shall not obstruct the airway or limit the breathing of any individual, nor shall a law enforcement officer restrict oxygen or blood flow to an individual's head or neck. An individual placed on their stomach during restraint should be moved into a recovery position or seated position as soon as practicable.

Xx Use of Deadly Force

A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm, provided:

- (1) The officer uses only the amount of force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others;

Commented [CB3]: This should end at use of de-escalation where feasible. The portion relating to issuing a summons instead of arrest should be included under de-escalation tactics definition on page 2. Using it in this location implies that the officer **SHALL** issue a summons instead of arrest IF MET WITH PASSIVE RESISTENCE.

- (2) The imminent harm poses an imminent danger of death or serious bodily injury to the officer or another person;
- (3) The officer attempts as many de-escalation tactics that are feasible under the circumstances, including utilizing barriers where feasible.

A law enforcement officer shall not use a chokehold or other tactics that restrict or obstruct an individual's breathing or oxygen or blood flow to an individual's head or neck. A law enforcement officer shall not be trained to use a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow.

An officer may not use deadly force against a person who poses only a danger to themselves.

A law enforcement officer shall not discharge any firearm into or at a moving motor vehicle unless, based on the totality of the circumstances, including the risk of safety to other persons in the area, such discharge is objectively reasonable, necessary to prevent imminent harm to a person and the discharge is proportionate to the threat of imminent harm; provided, the following conditions exist:

- 1) (i) A person in the vehicle is threatening the officer or another person with deadly force by means other than the vehicle; or ii) the vehicle is operated in a manner deliberately intended to strike an officer or another person, and all other reasonable means of defense have been exhausted or are not present or practical, which includes moving out of the path of the vehicle;
- 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);
- 3) The officer is not firing strictly to disable the vehicle; and
- 4) The circumstances provide a high probability of stopping or striking the intended target.

A law enforcement officer shall not use deadly force at any point in time when there is no longer an objectively reasonable belief that an individual currently and actively poses an immediate threat of serious bodily harm or death, even if deadly force would have been justified at an earlier point in time.

Where feasible based on the totality of the circumstances, officers shall verbally identify themselves as police officers and issue some warning before using deadly force.

Officers shall always provide appropriate medical response to an individual following a use of deadly force when safe and tactically feasible.

Xx Duty to Intervene

A law enforcement officer present and observing another officer using or attempting to use physical force, including deadly force, beyond that which is necessary or objectively reasonable based on the totality of the circumstances, shall intervene to prevent the observed officer's use of unnecessary or unreasonable force, regardless of the rank of the officer so observed, unless intervening would result in imminent harm to the officer or another identifiable individual.

The failure of a law enforcement officer to intervene as set forth herein may subject the officer to de-certification by the Commission.

Xx Use of Force Reporting

Law enforcement agencies shall develop and implement a policy and procedure for reporting the use of force. Such policy shall mandate reporting such incidents including but not limited to officer-involved injuries or deaths as described herein, and include the use of a standard use of force reporting form as approved by the Committee and the Commission which shall be completed by any officer who uses force.

Law enforcement agencies shall report to the National Use of Force Data Collection Database when actions by a law enforcement officer resulted in the death or serious bodily injury of an individual, or when a law enforcement officer, in the absence of death or serious bodily injury, discharged a firearm at or in the direction of a person.

Law enforcement agencies are not required to report the discharge of a firearm during training or qualification exercises, or for the purposes of animal destruction/euthanasia where necessary.

An officer who observes another officer using physical force, including deadly force, beyond that which is necessary or objectively reasonable based on the totality of the circumstances shall report the incident to an appropriate supervisor as soon as reasonably possible but not later than the end of the officer's shift. The officer shall prepare a detailed written statement describing the incident consistent with uniform protocols. The officer's written statement shall be included in the supervisor's report.

An officer who knowingly makes an untruthful statement concerning a material fact or knowingly omits a material fact from a use of force report may be subject to decertification.

Law enforcement agencies shall develop and implement a policy and procedure for law enforcement personnel, including but not limited to law enforcement officers, to report abuse by other law enforcement personnel, including but not limited to law enforcement officers, without fear of retaliation or actual retaliation.

Any harassment, intimidation, or retaliation against any officer who either intervened to prevent or stop an excessive force incident or made, intended to make, or is required to make a report regarding the witnessed excessive force incident shall be reported immediately to an appropriate supervisor and will not be tolerated. Any such actions may result in decertification.

All use of force reports shall be retained and maintained by the law enforcement agency/department and are subject to discovery and access through the Massachusetts Public Records Law MGL c. 66.

Xx Mass Demonstrations, Crowd Management, and Reporting

A police department shall establish plans to avoid and to de-escalate potential or actual conflict between officers and mass demonstration participants. When a police department obtains advance knowledge of a planned mass demonstration within the police department's jurisdiction, the police department shall diligently attempt in good faith to: (i) communicate with organizers of the event before the event occurs in an effort to establish reliable channels of communication between officers and event participants, and (ii) discuss and establish logistical plans to avoid or, if necessary, to de-escalate potential or actual conflict between law enforcement officers and mass demonstration participants.

The department shall designate an officer in charge of de-escalation planning and communication to carry out the above plans within the department.

A law enforcement officer shall not discharge or order the discharge of tear gas or any other chemical weapon, discharge or order the discharge of rubber pellets from a propulsion device or order the release of a dog to control or influence a person's behavior unless: (i) de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances; and (ii) the measures used are necessary to prevent imminent harm and the foreseeable harm inflicted by the tear gas or the chemical weapon, rubber pellets or dog is proportionate to the threat of imminent harm.

If a law enforcement officer utilizes or orders the use of rubber bullets, CEDs, CWs, ECWs, or a dog against a crowd, the law enforcement officer's appointing agency shall file a report with the Commission detailing all of the measures that were taken in advance of the event to reduce the probability of disorder and all de-escalation tactics and other measures that were taken at the time of the event to de-escalate tensions and avoid the necessity of using said weapons, including a detailed justification of why use of said weapons was objectively reasonable.

Canines should not be deployed for crowd control, restraint, or management of peaceful demonstrations—but may be deployed for crowd control, restraint, or management of peaceful demonstrations in isolated circumstances related to bomb detection, pursuit of suspects in buildings, and related situations.

The use of Kettling as a means of crowd control, crowd management, or crowd restraint is prohibited.

xx Investigation when Use of Force Results in a Death or Serious Bodily Injury

Law enforcement agencies shall develop and implement a policy and procedure for reporting a use of force that results in a death or serious bodily injury.

Whenever an officer uses force that results in a death or serious bodily injury, the Officer-in-Charge shall immediately notify the agency head or their designee. The agency shall conduct an investigation according to their policies and protocols.

If the use of force involved a weapon, the agency head or their designee shall secure the weapon or weapons used for examination and maintain the appropriate chain of custody protocols.

Xx Use of Force Training

The Committee shall develop and periodically deliver use of force training to law enforcement officers consistent with these Regulations, including, but not limited to: (i) de-escalation tactics; (ii) handling emergencies involving mentally ill individuals; (iii) responding to mass gatherings; (iv) cultural competency; (v) progression of force; and (vi) lawful use of force techniques and equipment on a schedule to be determined by the Committee.

The Commission and the Committee shall jointly develop a model use of force policy. All law enforcement agencies shall have a written use of force policy consistent with the model policy and the agency's particular mission; provided, however, that an agency's use of force policy shall comply with xx CMR xx and all relevant state and federal laws.

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August 19, 2021

Via email: john.melander@mass.gov
Municipal Police Training Committee &
Peace Officers Standards and Training Commission
c/o John H. Melander, Jr., Deputy General Counsel
Executive Office of Public Safety and Security
One Ashburton Place, Room 2133,
Boston, MA 02108

Re: 550 C.M.R. 6.00: Use of Force by Law Enforcement Officers

Dear Members of the Municipal Police Training Committee and Peace Officers Standards and Training Commission,

I am a Massachusetts civil rights lawyer with over 40 years of experience in police misconduct litigation. I am writing to provide my recommendations regarding the proposed 550 C.M.R. 6.00: Use of Force by Law Enforcement Officers. My comments concern chokeholds, shooting at moving vehicles, guidelines to evaluate a threat of imminent harm, appropriate medical response, and discipline.

A. Chokeholds

M.G.L. ch. 6E (14) (c) says “A law enforcement officer shall not use a chokehold.” The proposed policy is less restrictive than the statute, it does not prohibit chokeholds.

The definition of a chokehold bases the definition in part on the officer’s intent, stating: “The use of a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of a law enforcement officer’s body on or around a person’s neck in a manner that limits the person’s breathing or blood flow with the intent of or with the result of causing bodily injury, unconsciousness, or death.” P.1. By basing the ban on the officer’s intent the definition provides an exception which is likely to be used when an officer uses a chokehold without causing “bodily harm, unconsciousness or death.” Neck restraints should be

banned even if they do not cause injury because there is always the danger they will cause a serious injury without regard to the officer's intent. A policy should not permit conduct that is prohibited by state law.

It states a chokehold may not be used other than for "appropriate medical use." P.5. It is unclear what conduct this permits. It may well be used to allow officers to use a chokehold or stranglehold when the officer suspects a person has swallowed drugs. This has happened in Massachusetts and has caused injuries. It should not be tolerated. Only medical personnel should be permitted to apply pressure to a person's neck.

B. Shooting firearms at moving vehicles

Shooting at moving cars endangers the public. If an officer hits the driver of a vehicle, the vehicle will continue moving, endangering people in the area. Police policies should be drafted to protect the public from this danger.

The provision on discharge of a firearm at a moving vehicle says: "A law enforcement officer shall not discharge any firearm into or at a moving motor vehicle unless, based on the totality of the circumstances, such discharge is necessary to prevent imminent harm to a person and the discharge is proportionate to the threat of imminent harm to a person and is objectively reasonable."

This would allow the dangerous practice of shooting at a moving vehicle because this language leaves room for discretion. Modern police policies, such as the former policy of the Boston Police department, restrict use of firearms at moving vehicles to situations when a person in the vehicle is threatening the officer or others with deadly force by means other than the vehicle. See, Boston Police Department Rules and Procedures Rule 303 Section 8 from April 11, 2003, which is attached. This policy changed as a result of An Act Relative to Justice, Equity and Accountability in Law Enforcement in the Commonwealth and now provides less guidance. The policy should protect the public by recognizing the only time shooting at a moving vehicle is justified is when the occupants are shooting from the vehicle.

C. Definitions and guidelines to evaluate a threat of imminent harm

The proposed regulation states, "A law enforcement officer shall not use force against an individual who is engaged in passive resistance only..." Passive resistance should be defined. I had a defendant police

officer claim that he was permitted to use bone-breaking force on a woman who was passively resisting because “passive resistance is combative.” She resisted an order to sit down by standing up. Seconds later she was on the floor with a broken leg.

Police officers often report using force because a person “took a defensive stance” or was “flailing their arms.” These actions are not indicative of imminent harm. The policy should include definitions and guidelines to help officers determine what is a threat of imminent harm. These guidelines would discourage officers from using force in situations where use of force is not necessary.

D. Appropriate medical response

The policy twice refers to officers’ obligation to provide an appropriate medical response. This should be explained. For example, officers should call for EMTs. Officers should cooperate with EMTs and other medical staff. At times police officers feel they can direct the actions of medical personnel, at times ordering them to stop treatment and at other times ordering them to provide particular treatment. Medical decisions should be left to medical personnel.

E. Discipline

The draft policy states that failure to intervene, failure to be truthful in reports, and harassing an officer who intervened may result in discipline, including but not limited to termination. Similar language should be added regarding officers who are found to have used excessive or unnecessary force.

Thank you for your work on these proposed regulations and for your consideration of my recommendations. Please feel free to contact me if you would like to discuss anything further.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Friedman', with a long horizontal flourish extending to the right.

Howard Friedman

HF:cgk
Encl.



USE OF DEADLY FORCE

INTRODUCTION

This rule is issued to provide guidelines and regulations governing the use of deadly force by members of the Department, to ensure the safety of our police officers and the public, and to establish procedures for the orderly investigation of firearm discharges. Its provisions are effective immediately, superseding all previously issued rules, regulations, orders, bulletins and directives regarding the use of deadly force by Boston police officers.

In the establishing of these regulations it is understood that they will not likely cover every conceivable situation which may arise. In such situations officers are expected to act with intelligence and sound judgment, attending to the spirit of the rule. Any deviations from the provisions of Sections 5, 6, 7, or 8 of this rule shall be examined on a case by case basis.

Note: Weapons and ammunition coming into the custody of Police Department personnel shall be handled in accordance with the provisions of Rule [No. 311, Procedures for the Ballistics Unit](#).

Sec. 1 Definitions: For the purpose of this rule, the following definitions will apply:

Deadly Force is that degree of force likely to result in death or great bodily injury. The discharge of a firearm toward a person constitutes the use of deadly force even if there is no express intent to kill or cause great bodily injury.

Great bodily injury means bodily injury which creates a substantial risk of death or which is likely to cause serious injury, permanent disfigurement or loss, or extended impairment of the function of any bodily member or organ.

Immediate danger of death or great bodily injury includes circumstances under which (1)

such a danger exists in reality, or (2) such a danger is apparent, and the officer is unable to affirm or disaffirm its actual existence.

Prudence means using cautious, discreet or shrewd action and having due regard for the rights of citizens while maintaining an awareness of the responsibilities of acting as a police officer.

Reasonableness is moderate and/or fair action within reason, suitable to the confrontation.

The Investigating Officer in Charge (IOIC) is the Detective Superior Officer of the Firearm Discharge Investigation Team so designated by the Commander of the Homicide Unit and assigned to investigate the facts of the incident and to determine the justification for the use of deadly force.

Sec. 2 General Considerations: The primary purpose for which a sworn member of the Department is issued a firearm and trained in its use is the protection of life and limb, both theirs and that of every other person needing such protection. Although the firearm is a necessary weapon for present-day policing, its potential to inflict death or great bodily injury mandates that it be used with discrimination and within clearly-defined limits. This rule establishes those limits.

In the interests of personal safety, police officers must seek to gain and maintain an advantage over persons known or suspected to be armed. Such an "edge" may take the form of numerical superiority in manpower and firepower or of an officer staying "one jump ahead" of a subject likely to produce a weapon. Officers seeking to maintain the advantage over a subject suspected of being armed are in a difficult position; they must be prepared to use a firearm should it be necessary, yet show the restraint required to ensure the propriety of their actions. The situation demands the utmost ability to think clearly, quickly and decisively and to use the firearm in a safe and effective manner.

The Boston Police Department recognizes its legal duty to protect the rights of all individuals to due process of law and a fair trial. Its members are thereby bound to refrain from any use of force that unnecessarily tends to administer punishment at the hands of a police officer. The responsibility for punishment of criminal offenders rests solely with duly constituted courts of law and penal institutions and is by no means extended to the police.

Sec. 3 Training and Qualification: Police officers in this Department will be held accountable for proficiency as well as compliance with Department policy in the use of firearms. All sworn members of the Department are responsible for maintaining a degree of expertise in the use and handling of all firearms approved for their carrying. Specifically, sworn members authorized to carry a firearm shall qualify with their issued firearm(s) on a course of instruction approved by the Massachusetts Criminal Justice Training Council at least twice each year - once during the period from January 1st - June 30th and once during the period from July 1st - December 31st. A qualifying score of 80% or higher is required. When members of the Department are issued a new weapon, they shall qualify at the Department range in the use of that weapon prior to resuming street duties. This shall not apply to the emergency use of a comparable spare weapon issued on a temporary basis.

In the event an officer fails to qualify, the officer will be temporarily re-assigned to the Department Range. It will be the responsibility of the Commanding Officer of the Department Range to ensure that the officer's firearm is taken from them until such qualification is achieved. Any officer who, after such intensive training as determined by the Commanding Officer of the Department Range, has still failed to qualify will be subject to reevaluation as to their fitness to continue to perform the duties of a police officer. Under no conditions shall an officer who fails to qualify be allowed to perform any street police duties.

Frequently, officers have activated themselves during off-duty situations where there is a need to draw a personal firearm and the possibility exists to use such weapon. On self activation, the officer's actions are guided by all Departmental rules and regulations, hence there is a need to show familiarization with any personal weapon which is carried while off-duty.

Members of the Department who are licensed to carry firearms pursuant to M.G.L. c. [140](#), § [131](#) and who own and carry a personal firearm while off-duty shall fire a familiarization course as designed by the Commanding Officer of the Department Range. This course will be fired during regular qualification times and police officers shall provide their own ammunition.

Officers complying with this portion of the rule will notify their Commanding Officer of their intent to do so and shall be authorized to carry more than one weapon while on duty for the sole purpose of attending the familiarization course at the Department Range. This authorization shall be temporary and will only allow the officer to carry the off-duty weapon to and from the range. The off-duty weapon shall be secured in the District gun locker prior and subsequent to completion of the familiarization course.

Sec. 4 Security and Maintenance of Department Firearms: Members of the force shall take all reasonable precautions to insure that weapons issued to them by the Department are protected from loss, misuse or theft.

Members are responsible for keeping their issued weapons clean and in good working order. A weapon which malfunctions shall be returned to the Boston Police Range forthwith.

Sec. 5 Pointing Firearms: Officers shall not point firearms at persons except when reasonably justified under the circumstances. In situations involving the strong possibility of great danger (e.g. searching a building pursuant to a burglar alarm or approaching a business establishment on a report of a robbery in progress, etc.) officers should carry their weapon in a position that will facilitate its speedy and safe use. While officers should not point a weapon unless they are prepared to use it, the fact that they have done so must not be interpreted as an obligation to fire.

Sec. 6 Discharge of Firearms: The law permits police officers to use reasonable force in the performance of their duties but only to the degree required to overcome unlawful resistance. This doctrine of "reasonable use of force" applies to the use of firearms as well as to non-lethal force. Also, because of their destructive potential, the use of firearms must be further restricted to the purpose for which they are issued, that of protecting life and limb. The discharge of a firearm by a member of the Department is permissible only when:

A. There is no less drastic means available to defend oneself or another from unlawful attack which an officer has reasonable cause to believe could result in death or great bodily injury, or

B. There is no less drastic means available to apprehend a fleeing felon when the officer has probable cause to believe that: (1) the subject has committed a felony during the commission of which they inflicted or threatened to inflict deadly force upon the victim, or (2) that there is substantial risk that the felon in question will cause death or great bodily injury if their apprehension is delayed, or

C. There is no less drastic means available to kill a dangerous animal or one so badly injured that humanity requires its removal from further suffering.

Officers who find it necessary, under the provisions of this rule, to discharge firearms shall exercise due care for the safety of persons and property in the area and shall fire only when reasonably certain that there is no substantial risk to bystanders.

Sec. 7 Warning Shots and Signals: Firearms shall not be used as a signaling device. A firearm shall not be used to summon assistance or to give signals or to warn a fleeing felon to stop. This does not mean that officers may not discharge their firearm without the intent to kill or disable if in their best judgment there is no alternate method of convincing a would-be attacker that they are ready and able to defend themselves or others if the potential threat is not discontinued.

Sec. 8 Moving/Fleeing Vehicles: Firearms shall not be discharged from a moving vehicle. Firearms shall not be discharged at a moving or fleeing vehicle unless the officer or another person is currently being threatened with deadly force by means other than the moving vehicle. For the purposes of this section, the moving vehicle itself shall not constitute the threatened use of deadly force. Therefore, officers shall move out of the path of any oncoming vehicle instead of discharging a firearm at it or any of its occupants. Moving to cover, repositioning and/or waiting for additional responding units to gain and maintain a tactically superior police advantage maximizes officer safety and minimizes the necessity for using deadly force.

The above prohibitions exist for three reasons:

1. Bullets fired at moving motor vehicles are extremely unlikely to stop or disable the motor vehicle,
2. Bullets fired may miss the intended target or ricochet and cause injury to officers or other innocent persons, and
3. The vehicle may crash and cause injury to officers or other innocent persons if the bullets disable the operator.

Sec. 9 Permissible Weapons and Ammunition: Officers shall carry on duty only weapons and ammunition authorized and issued by the Department. Whenever an officer is carrying a currently issued semi-automatic pistol (.40 cal. Glock), the pistol shall be carried with a fully loaded magazine (13 rounds in the large capacity magazine; 9 rounds in the small capacity magazine), in addition to having one round in the chamber. Spare magazines shall be kept fully loaded.

Regardless of whether an officer is on duty or off duty, Department issued weapons may only be carried on one's person in Department issued or Department authorized holsters.

It is the responsibility of a police officer not to accept a Department issued weapon unless the officer has qualified in its use. Prior to issue, the issuing Superior Officer shall inquire

of any officer to whom a Department weapon is to be issued whether or not that officer is qualified in its use.

Other weapons authorized by the Department for special operations may be selectively issued to qualified personnel by a Superior Officer, if they are deemed necessary to ensure the safety and effectiveness of police operations. Officers armed with such weapons shall use those weapons in accordance with the provisions of this rule as well as any additional guidelines issued at the time.

All necessary repairs or modifications to Department issued firearms and other weapons must be performed by a Department armorer or a Department approved gunsmith at the direction of the Commanding Officer of the Boston Police Range.

Sec. 10 Reporting Firearms Discharges: All firearm discharges, except discharges which occur during Department authorized or approved firearms training, while lawfully engaged in target practice or while hunting (unless a discharge occurring during one of these three exceptions results in death, personal injury or property damage), require the submission of an incident report (1.1) which includes information relative to injuries and damage to property.

- An officer who discharges his firearm during the course of his duties shall immediately notify the Operations Division that they have been involved in a "Code 303" and request that a Patrol Supervisor respond to the scene. The officer shall make a verbal report of the discharge to the responding Patrol Supervisor. In the event that someone has been injured, officers will request medical assistance. The supervisor shall request that Operations make all appropriate notifications including the Firearm Discharge Investigation Team. A full written report of the discharge must then be made prior to the termination of the officer's tour of duty, unless medical reasons dictate that the report be made at a later date.
- An off-duty officer discharging a firearm in the City of Boston shall immediately notify an Operations Division Supervisor. The Operations Division shall notify the Officer in Charge of the District in which the discharge took place and the Firearm Discharge Investigation Team. The officer involved in the firearm discharge shall submit the necessary reports without delay to a Superior Officer assigned to the Firearm Discharge Investigation Team. The Officer in Charge of the District in which the discharge took place shall notify the off-duty officer's Commanding Officer.
- An officer who discharges a weapon outside of the City of Boston shall immediately notify and make a report of the discharge to the Police Department

which has jurisdiction where the discharge occurred, identify themselves as being a Boston police officer and notify an Operations Division Supervisor as soon as possible. The Operations Division shall immediately notify the officer's Commanding Officer and the Firearm Discharge Investigation Team. Officers who have discharged a firearm shall complete a BPD Form 2415 (Firearms Discharge Report) in its entirety.

Sec. 11 Investigation of Firearm Discharges: The manner in which police officers use firearms is an extremely critical issue to the Department, one in which the community and the courts allow little margin for error. To insure that proper control in this area is maintained, all reported discharges of firearms by officers of this Department will be thoroughly investigated by the Firearm Discharge Investigation Team.

The Firearm Discharge Investigation Team has sole responsibility for investigating firearm discharges involving a member of the Department. Failure to cooperate with the investigation shall be grounds for disciplinary action. The foregoing does not prevent an officer from exercising their constitutionally protected rights to remain silent or to speak with legal counsel.

The District Commander of the District wherein a police officer discharges a firearm shall be responsible for assigning a Superior Officer to assist the Firearm Discharge Investigation Team in their investigation into the discharge.

In those incidents where the use of deadly force results in death, the District Attorney's Office, pursuant to the terms of M.G.L. c. 38, § 4, will assume control of the investigation. The statute reads, in part, "The District Attorney or his law enforcement representative shall direct and control the investigation of the death and shall coordinate the investigation with the office of the chief medical examiner and the police department within whose jurisdiction the death occurred."

In all instances where a Boston police officer discharges a firearm resulting in injury, the District Attorney's Office will be notified and his designees from the Boston Police Department will conduct an independent investigation to determine the facts of the case.

Responsibilities: Patrol Supervisor

Shall respond immediately to a reported use of deadly force, Code 303, within his District and assume command of the investigation pending the arrival of the District Commander and/or the Firearm Discharge Investigation Team.

Shall notify the Operations Division of the firearm discharge. In turn, the Operations Division shall be responsible for making all necessary notifications.

Shall initiate such preliminary steps as are necessary to conduct a thorough investigation and hold himself in readiness to assist the District Commander and the Firearm Discharge Investigation Team upon their arrival. In this respect, the Patrol Supervisor shall have the authority to order as many units to the scene of the firearms discharge as is deemed necessary or to take any other appropriate action to complete the task.

Shall establish an outside perimeter around the area of the incident.

Shall ensure that the scene is preserved pending the arrival of the Firearm Discharge Investigation Team in a manner pursuant to [Rule 309](#), Procedures for Handling Physical Evidence and Other Property Coming into Police Custody.

Shall take possession of the firearm which has been discharged and ensure that it is turned over to the Department Ballistician as soon as possible. In so doing, the Patrol Supervisor shall preserve all firearms in the condition in which they are found. The Patrol Supervisor must use extraordinary care in this respect as the firearm may still be loaded.

In the event that more than one officer is present at a shooting incident, the Patrol Supervisor, as soon as circumstances allow, shall collect all firearms which belong to the officers who were at the scene and store them until a Department Ballistician can ascertain which have been fired. Firearms determined not to have been discharged will then be returned to the police officers to whom they were issued as soon as possible.

Responsibilities: District Commander

The District Commander will respond to the scene and assume overall command of the situation pending the arrival of the Firearm Discharge Investigation Team. Additionally, the District Commander will:

Assign a Superior Officer to assist the Firearm Discharge Investigation Team and ensure that any and all District resources are made available to complete the investigation. The District Commander will have the flexibility to assign any Superior Officer to fulfill this task.

Ensure that full cooperation is extended to the Firearm Discharge Investigation Team and any designated investigators from the District Attorney's Office.

Responsibilities: Commander, Homicide Unit

Shall be responsible for ensuring that a Firearm Discharge Investigation Team is assigned to investigate all reported firearm discharges by Department personnel except discharges which occur during Department authorized or approved firearms training, while lawfully engaged in target practice or while hunting (unless a discharge occurring during one of these three exceptions results in death, personal injury or property damage).

The Commander, Homicide Unit shall have the flexibility and discretion to assign any investigators deemed appropriate as being members of the Firearm Discharge Investigation Team.

The Commander, Homicide Unit, shall have ultimate responsibility for ensuring the thoroughness of any investigation regarding a firearm discharge or the use of deadly force by Department personnel.

Responsibilities: Firearm Discharge Investigation Team

The Firearm Discharge Investigation Team shall respond to the scene as expeditiously as possible and immediately meet with the Patrol Supervisor and be briefed relative to the known facts surrounding the incident.

Shall notify the Operations Division that they are taking control of the scene and the investigation. Notifications must be done "on-air."

Shall be allowed any resources they deem necessary to conduct a complete investigation.

Shall conduct an investigation to determine the facts of the incident.

Shall ensure that a thorough search is conducted at the scene.

Shall ensure that witnesses are identified, separated and interviewed.

Shall coordinate with any other simultaneous investigations.

Shall submit a preliminary report within five (5) days to the Commander, Homicide Unit, to the Commander of the District or Unit where the officer is assigned and to the Commander of the District or Unit where the discharge occurred, to the Bureau Chief of the appropriate command and to the Superintendent-In-Chief. The Superior Officer in Charge of the Firearm Discharge Investigation Team shall make a recommendation in the preliminary report, based upon an assessment of the facts known, as to the justification for the use of deadly force, whether or not the firearms discharge was accidental and whether or not it involved personal injury, death or damage to personal property.

Pending this report, the Officer involved will be assigned to administrative duties in their unit of assignment. However, if the preliminary investigation indicates that the firearm discharge was justified, the Officer may be restored to regular duties, with the approval of their Commanding Officer, the Bureau Chief of the appropriate command, the

Superintendent-in-Chief and the concurrence of the Police Commissioner.

The Firearm Discharge Investigation Team shall submit a comprehensive, detailed report, with recommendations, within thirty (30) days to the Commander of the Homicide Unit and to the Superintendent-in-Chief. An extension may be granted to the thirty (30) day time frame with the permission of the Superintendent-In-Chief.

Sec. 12 Disposition: Upon receiving a report pertaining to a firearms discharge and investigation by the Firearm Discharge Investigation Team, the Superintendent-in-Chief may accept it or return the report with a request for further information or clarification. In every case, the authority and responsibility for final Departmental disposition of a firearms discharge incident rests solely with the Police Commissioner. Upon accepting a report and making a final disposition in a firearm discharge case, copies of the Police Commissioner's decision shall be sent to the appropriate District, Unit and Bureau Commanders.



State Police Association of Massachusetts

REPRESENTING SERGEANTS AND TROOPERS
OF THE MASSACHUSETTS STATE POLICE

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August 27, 2021

Peace Officer Standards and Training Commission
c/o Deputy General Counsel John H. Melander, Jr.
Executive Office of Public Safety and Security
One Ashburton Place, Room 2133
Boston, MA 02108

Dear Chair Hinkle and Commissioners:

I write today as a partner in public safety and the representative of the troopers and sergeants of the State Police Association of Massachusetts. We recognize the herculean task before you and fully appreciate the challenge of creating clear policies that allow officers to effectively enforce the law while protecting lives, safety, and the rights of the people we encounter.

Use of force is a critical issue. The State Police is the largest law enforcement agency in the Commonwealth, with the most comprehensive geographic jurisdiction, with the most diverse set of law enforcement divisions, specializations, responsibilities, and resources, as the agency that picks up where municipalities leave off. The Association that I lead is the largest single-agency law enforcement union in New England. The legislation that created the POST Commission unfortunately did not include a seat at the table for the State Police Association of Massachusetts. As a consequence, I received the draft regulation governing the use of force by law enforcement officers near the end of the drafting process with short notice to provide the detailed input that is warranted. That is unfortunate.

While we don't pretend to have the magic language that will solve this dilemma, we ask that:

- you work with us and others to **craft language that is unambiguous**, not just about what is forbidden, but about what is permissible
- In the draft regulations, there is abundant mention of what is prohibited and little information beyond the directives to de-escalate about how officers can or should proceed to protect the public and themselves from harm. More affirmative direction is needed here.
- We fully embrace a de-escalation approach wherever possible as a first course of action as the least likely to result in injury to anyone.

A critical component of any new regulation is **training and education**.

- The absence of a well-resourced training and education program staffed by experts with field experience alongside academic expertise is a recipe for disaster.
- While law enforcement theory is essential for the critical thinking skills we need in the field; the knowledge that can only come from experience is the most effective way to deliver learning on the dangerous and unpredictable physical aspects the job.

Our officers have complicated situations coming at them very quickly and have to make split-second decisions about how to protect themselves and others. Vague rules cause hesitation, which costs precious seconds and can cost lives. **In cases where de-escalation is not**



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working or is not an option, officers need to know as clearly as possible what the rules are.

Consider the real-life impact and potential unintended consequences of the rules you create.

- Will confusing rules on personal contact lead to an increased use of weapons?
- Will outright bans on any kind of hold lead to an increase in body blows to gain compliance without breaking rules on use of force?
- Our concern here is that in an effort to minimize harm, we may see that the real-life impact is an increase in harm.
- **It is so important that we get this right.**

To that end, **I propose the formation of a working group** that includes:

- two POST Commission members (at least one from law enforcement) appointed by the chair
- two SPAM designees appointed by the president
- one behavioral health clinician with expertise in crisis management appointed by the secretary of the executive office of health and human services

We also feel it's important to point out that chokeholds are not currently part of our use of force continuum, nor are Massachusetts law enforcement officers trained on them. We are heartened to see this reinforced in the draft regulations, yet we do want to emphasize that this is not currently a permissible use of force by law enforcement in our state.

Please know that **our shared goal is a safe Commonwealth** where everyone returns safely home at the end of the day, including our Troopers. We stand ready to work with you. We are available to offer our experience and expertise and answer questions you may have.

Finally, with all that's going on, I'd like to take a moment to publicly **thank the men and women who go out every day and do the hard work of keeping us all safe** and do it with dignity, integrity, and professionalism. They aren't the ones who make the headlines, but they are out there, performing the daunting job of being law enforcers in today's world, in these extremely trying times, in the face of severe staffing shortages, often working in antiquated facilities. Thank you all for your service.

Thank you for your efforts and we look forward to working together.

Sincerely,

Michael Cherven
President, State Police Association of Massachusetts



Commonwealth of Massachusetts
Massachusetts Environmental Police

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Colonel Shaun T. Santos

August 26, 2021

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

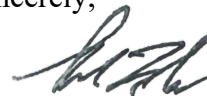
9. Multi-Agency Responses

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