



**REVISED PROCLAMATION  
CALLING A SPECIAL MEETING OF THE  
BERKELEY CITY COUNCIL**

**(Revised to remove Item 2. Item 2 to be heard at a special meeting on July 23, 2020 at 4:30 p.m.)**

In accordance with the authority in me vested, I do hereby call the Berkeley City Council in special session as follows:

**Thursday, July 23, 2020**

**6:00 P.M.**

JESSE ARREGUIN, MAYOR

Councilmembers:

DISTRICT 1 – RASHI KESARWANI  
DISTRICT 2 – CHERYL DAVILA  
DISTRICT 3 – BEN BARTLETT  
DISTRICT 4 – KATE HARRISON

DISTRICT 5 – SOPHIE HAHN  
DISTRICT 6 – SUSAN WENGRAF  
DISTRICT 7 – RIGEL ROBINSON  
DISTRICT 8 – LORI DROSTE

**PUBLIC ADVISORY: THIS MEETING WILL BE CONDUCTED EXCLUSIVELY THROUGH VIDEOCONFERENCE AND TELECONFERENCE**

*Pursuant to Section 3 of Executive Order N-29-20, issued by Governor Newsom on March 17, 2020, this meeting of the City Council will be conducted exclusively through teleconference and Zoom videoconference. Please be advised that pursuant to the Executive Order and the Shelter-in-Place Order, and to ensure the health and safety of the public by limiting human contact that could spread the COVID-19 virus, there will not be a physical meeting location available.*

*Live audio is available on KPFB Radio 89.3. Live captioned broadcasts of Council Meetings are available on Cable B-TV (Channel 33) and via internet accessible video stream at <http://www.cityofberkeley.info/CalendarEventWebcastMain.aspx>.*

*To access the meeting remotely: Join from a PC, Mac, iPad, iPhone, or Android device: Please use this URL <https://us02web.zoom.us/j/81015840931>. If you do not wish for your name to appear on the screen, then use the drop down menu and click on "rename" to rename yourself to be anonymous. To request to speak, use the "raise hand" icon by rolling over the bottom of the screen.*

*To join by phone: Dial 1-669-900-9128 and enter Meeting ID: 810 1584 0931. If you wish to comment during the public comment portion of the agenda, Press \*9 and wait to be recognized by the Chair.*

*To submit an e-mail comment during the meeting to be read aloud during public comment, email [clerk@cityofberkeley.info](mailto:clerk@cityofberkeley.info) with the Subject Line in this format: "PUBLIC COMMENT ITEM ##." Please observe a 150 word limit. Time limits on public comments will apply. Written comments will be entered into the public record.*

*Please be mindful that the teleconference will be recorded as any Council meeting is recorded, and all other rules of procedure and decorum will apply for Council meetings conducted by teleconference or videoconference.*

*This meeting will be conducted in accordance with the Brown Act, Government Code Section 54953. Any member of the public may attend this meeting. Questions regarding this matter may be addressed to Mark Numainville, City Clerk, (510) 981-6900. The City Council may take action related to any subject listed on the Agenda. Meetings will adjourn at 11:00 p.m. - any items outstanding at that time will be carried over to a date/time to be specified.*

## Preliminary Matters

### Roll Call:

**Public Comment - Limited to items on this agenda only**

## Action Calendar

*The public may comment on each item listed on the agenda for action as the item is taken up. For items moved to the Action Calendar from the Consent Calendar or Information Calendar, persons who spoke on the item during the Consent Calendar public comment period may speak again at the time the matter is taken up during the Action Calendar.*

*The Presiding Officer will request that persons wishing to speak use the "raise hand" function to determine the number of persons interested in speaking at that time. Up to ten (10) speakers may speak for two minutes. If there are more than ten persons interested in speaking, the Presiding Officer may limit the public comment for all speakers to one minute per speaker. Speakers are permitted to yield their time to one other speaker, however no one speaker shall have more than four minutes. The Presiding Officer may, with the consent of persons representing both sides of an issue, allocate a block of time to each side to present their issue.*

*Action items may be reordered at the discretion of the Chair with the consent of Council.*

## Action Calendar – Old Business

- 1. Animal Services Contract with the City of Piedmont (Continued from July 14, 2020)**  
**From: City Manager**  
**Recommendation:** Adopt a Resolution authorizing the City Manager to execute a contract, with any amendments, with the City of Piedmont for animal care services for FY2021-FY2025, which increases the existing contract by up to \$180,134, with a total contract amount not to exceed \$441,984.  
**Financial Implications:** See report  
Contact: Erin Steffen, City Manager's Office, (510) 981-7000

## Action Calendar – Public Hearings

- 2. \*\*\*Removed from Agenda – Scheduled for a special meeting on July 23, 2020 at 4:30 p.m.\*\*\* ZAB Appeal: 1533 Beverly Place, Administrative Use Permit #ZP2018-0153 (Continued from July 14, 2020)**  
**From: City Manager**  
Contact: Jordan Klein, Planning and Development, (510) 981-7400

## Action Calendar

- 3. Referral Response: Police Review Commission Recommendation on a Revised Berkeley Police Department Policy 300, Use of Force**  
**From: Police Review Commission**  
**Recommendation:** Approve a revised Use of Force policy for the Berkeley Police Department as recommended by the Police Review Commission.  
**Financial Implications:** See report  
Contact: Katherine Lee, Commission Secretary, (510) 981-4950

## Action Calendar

### 4. **Changes to the Berkeley Municipal Code and City of Berkeley Policies with Respect to Local Emergency Declarations and First Amendment Curfews** *(Continued from June 9, 2020)*

**From: Councilmember Hahn (Author), Councilmember Bartlett (Co-Sponsor), Councilmember Harrison (Co-Sponsor), Mayor Arreguin (Co-Sponsor)**

**Recommendation:**

1. Direct the City Manager to return to the City Council for adoption amendments to the Berkeley Municipal Code and/or policies to approve that clarify and codify the following with respect to the declaration of a Local Emergency:
  - a. A Local Emergency can only be declared by the Director of Emergency Services if a regular or special meeting and session of the City Council cannot be called due to physical impossibility of holding a meeting, because a quorum cannot be established, or because the urgency of the Local Emergency is such that waiting 24 hours for the City Council to convene a session and/or Special Meeting would endanger the community;
  - b. Should the Director declare a Local Emergency without action of the City Council (due to one of the reasons stated at (a), above), Council ratification of such action occurs at the first possible opportunity, even if it requires calling a Special Meeting and/or session of the Council; and
  - c. The applicable statutory and legal standards (Federal, State and Local) for calling a Local Emergency shall be presented to the City Council when seeking declaration or ratification of a Local Emergency, along with facts to support meeting those standards, so that the City Council, likely acting under rushed and exigent circumstances, is able to make a carefully considered and fact-based determination that declaration of such Local Emergency conforms with the legal standards and is supported by facts.
2. Direct the City Manager to return to the City Council for adoption amendments to the Berkeley Municipal Code and/or policies to approve that clarify and codify policies, terms and procedures for the order, scope, terms, duration, and all other elements and conditions of curfews called in response to, or likely to have the effect of limiting or banning, planned, expected or reasonably foreseeable first amendment activity, including rallies, marches, demonstrations and assemblies of all kinds ("First Amendment Curfews"), as enumerated (1-8) under the "Background" section of this item, below.
3. Advise the City Manager and/or Director of Emergency Services that approval of this item represents the will and direction of the City Council with respect to declarations of Local Emergencies and imposition of First Amendment Curfews, and should the occasion to declare a Local Emergency or impose a First Amendment curfew arise prior to formal Council adoption of the requested amendments and policies, the City Manager and/or Director of Emergency Services shall, to the greatest extent possible under existing law, strive to encompass actionable elements, and meet spirit, of this item.

**Financial Implications:** See report

Contact: Sophie Hahn, Councilmember, District 5, (510) 981-7150

## Adjournment

I hereby request that the City Clerk of the City of Berkeley cause personal notice to be given to each member of the Berkeley City Council on the time and place of said meeting, forthwith.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the City of Berkeley to be affixed on this 21<sup>st</sup> day of July, 2020.



Jesse Arreguin, Mayor

Public Notice – this Proclamation serves as the official agenda for this meeting.

ATTEST:



Date: July 21, 2020  
Mark Numainville, City Clerk

**NOTICE CONCERNING YOUR LEGAL RIGHTS:** *If you object to a decision by the City Council to approve or deny an appeal, the following requirements and restrictions apply: 1) Pursuant to Code of Civil Procedure Section 1094.6 and Government Code Section 65009(c)(1)(E), no lawsuit challenging a City decision to deny or approve a Zoning Adjustments Board decision may be filed and served on the City more than 90 days after the date the Notice of Decision of the action of the City Council is mailed. Any lawsuit not filed within that 90-day period will be barred. 2) In any lawsuit that may be filed against a City Council decision to approve or deny a Zoning Adjustments Board decision, the issues and evidence will be limited to those raised by you or someone else, orally or in writing, at a public hearing or prior to the close of the last public hearing on the project.*

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Archived indexed video streams are available at <http://www.cityofberkeley.info/citycouncil>. Channel 33 rebroadcasts the following Wednesday at 9:00 a.m. and Sunday at 9:00 a.m.

Communications to the City Council are public record and will become part of the City's electronic records, which are accessible through the City's website. **Please note: e-mail addresses, names, addresses, and other contact information are not required, but if included in any communication to the City Council, will become part of the public record.** If you do not want your e-mail address or any other contact information to be made public, you may deliver communications via U.S. Postal Service to the City Clerk Department at 2180 Milvia Street. If you do not want your contact information included in the public record, please do not include that information in your communication. Please contact the City Clerk Department for further information.

Any writings or documents provided to a majority of the City Council regarding any item on this agenda will be posted on the City's website at <http://www.cityofberkeley.info>.

Agendas and agenda reports may be accessed via the Internet at <http://www.cityofberkeley.info/citycouncil>

COMMUNICATION ACCESS INFORMATION:

To request a disability-related accommodation(s) to participate in the meeting, including auxiliary aids or services, please contact the Disability Services specialist at (510) 981-6418 (V) or (510) 981-6347 (TDD) at least three business days before the meeting date.



Captioning services are provided at the meeting, on B-TV, and on the Internet.





Office of the City Manager

ACTION CALENDAR  
July 23, 2020  
(Continued from July 14, 2020)

To: Honorable Mayor and Members of the City Council  
 From: Dee Williams Ridley, City Manager  
 Submitted by: Erin Steffen, Assistant to the City Manager  
 Subject: Animal Services Contract with the City of Piedmont

RECOMMENDATION

Adopt a resolution authorizing the City Manager to execute a contract, with any amendments, with the City of Piedmont for animal care services for FY2021-FY2025, which increases the existing contract by up to \$180,134, with a total contract amount not to exceed \$441,984.

FISCAL IMPACTS OF RECOMMENDATION

The City of Berkeley provides animal care services to the City of Piedmont and currently receives \$52,370 annually for these services. Berkeley's cost for providing animal services to Piedmont is currently \$101,062. Berkeley proposes to gradually increase the cost of services each year until the revenue from the City of Piedmont matches the expenses for the City of Piedmont. The City of Piedmont will reimburse the City for these additional estimated costs, and revenues will be deposited into the General Fund. The total contract will not exceed \$441,984.

CURRENT SITUATION AND ITS EFFECTS

The current contract between the City of Berkeley and the City of Piedmont shall expire on June 30, 2020.

Operational costs of sheltering animals has increased significantly. A recent cost analysis conducted by the City of Berkeley revealed an annual operating cost of \$1.6 million not including administrative costs. The City of Berkeley calculated the share of services provided to the City of Piedmont as \$101,062 which is significantly more than the current contracted amount.

Upon request by the City of Piedmont, the City of Berkeley performs the following services:

1. Shelter and feed animals brought to the Berkeley Animal Shelter from Piedmont and Emeryville

2. Euthanize after legal holding and only as necessary, animals brought to the Berkeley Animal Shelter
3. Accept animals brought to the Berkeley Animal Shelter by residents of Piedmont and Emeryville
4. Quarantine animals, as necessary, for rabies observation for and on behalf of the cities of Piedmont and Emeryville
5. Issue pre-prepared citations of claimants of aforementioned animals, which citations have been completed and signed by a Piedmont/Emeryville Animal Control Officer

#### BACKGROUND

The City of Piedmont does not have its own Animal Shelter and therefore requires assistance in providing care and shelter for animals from within the Cities of Piedmont and Emeryville who are in need of care by reason of accident, sickness or being lost, stray or abandoned. In 2019, the City of Berkeley Animal Services handled 1,366 live animals of which 10% came from Piedmont and Emeryville.

#### RATIONALE FOR RECOMMENDATION

The City of Berkeley is well equipped and capable of providing the services outlined above for the City of Piedmont, and should be appropriately compensated for the services.

#### ALTERNATIVE ACTIONS CONSIDERED

If the City were to not engage in the contract with the City of Piedmont, it would still incur the costs associated with building maintenance and staffing for the shelter. There would likely be a small decrease in sheltering costs.

#### ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

#### CONTACT PERSON

Amelia Funghi, Manager, Animal Services, (510) 981-6603

#### Attachments:

- 1: Resolution
2. City of Piedmont FY20 Costs of service



RESOLUTION NO.

-N.S.

AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT AND ANY AMMENDMENTS WITH THE CITY OF PIEDMONT AND CITY OF BERKELEY ANIMAL CARE SERVICES FOR FY2021-FY2025 IN THE AMOUNT NOT TO EXCEED \$441,984

WHEREAS, The City of Piedmont requires assistance in providing care and shelter for small animals within the City who are in need by reason of accident, sickness or being lost, stray or abandoned; and

WHEREAS, The City of Berkeley is able to provide these services to the City of Piedmont.

NOW THEREFORE, BE IT RESOLVED that the Council of the City of Berkeley authorizes the City Manager to execute a contract, with any amendments, with the City of Piedmont for animal care services for FY2021-FY2025, which increases the existing contract by up to \$180,134, with a total contract amount not to exceed \$441,984.

**PIEDMONT/EMERYVILLE FY 19/20 Costs**

10% of live animal  
intake  
15% of DOA intake  
0% field calls

<b>PERSONNEL</b>	<b>Total Cost</b>	<b>% Cost</b>
ASA - 3.5 (10%)	\$384,125	\$38,412
RVT - 1 (10%)	\$116,445	\$11,644
	<b>\$500,570</b>	<b>\$50,056</b>

**BUILDING MAINT & UTILITIES ( based on 10%)**

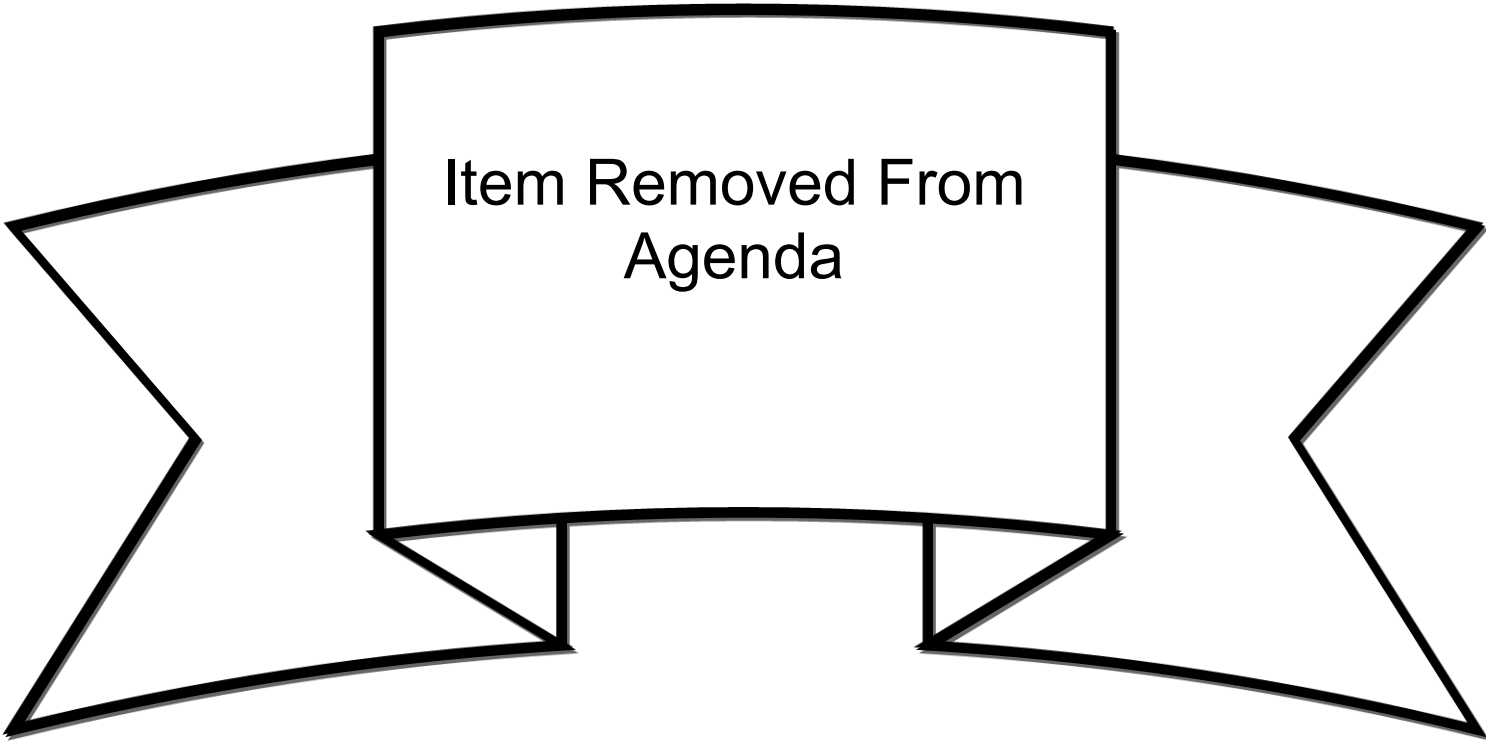
PW-Building maintenance (10%)	\$130,130	\$13,013
Facilities (10%)	\$43,885	\$4,388
Utilities (10%)	\$74,071	\$7,407
Emergency Generator (3.3% per yr over 3 yrs)	\$30,386	\$1,003
Roof Restoration (3.3% per yr over 3 yrs)	\$24,136	\$796
	<b>\$302,608</b>	<b>\$26,607</b>

**SHELTERING COSTS**

Animal Food (10%)	\$17,840	\$1,784
Shelter Supplies (10%)	\$20,365	\$2,036
Medical Supplies (10%)	\$66,170	\$6,617
Veterinary Services (10%)	\$109,020	\$10,902
Deceased animal service (15%)	\$20,400	\$3,060
	<b>\$233,795</b>	<b>\$24,399</b>

**TOTAL ANNUAL COST** **\$101,062**

current contracted  
amount = **\$52,370**



Item Removed From  
Agenda

The following item has been removed from the agenda and scheduled for a special meeting on July 23, 2020 at 4:30 p.m.

**ZAB Appeal: 1533 Beverly Place, Administrative Use Permit #ZP2018-0153**

If you have questions regarding the item, please contact the person noted on the agenda.

**City Clerk Department**  
2180 Milvia Street  
Berkeley, CA 94704  
(510) 981-6900

or from:

**The City of Berkeley, City Council's Web site**  
<http://www.cityofberkeley.info/citycouncil/>





Police Review Commission

ACTION CALENDAR

July 23, 2020

To: Honorable Mayor and Members of the City Council

From: Police Review Commission

Submitted by: Police Review Commission Chairperson Kitty Calavita

Subject: Referral Response: Police Review Commission Recommendation on a Revised Berkeley Police Department Policy 300, Use of Force

RECOMMENDATION

Approve a revised Use of Force policy for the Berkeley Police Department as recommended by the Police Review Commission.

SUMMARY

This recommendation responds to the June 9, 2020 directive of the City Council to the Police Review Commission (PRC) and the City Manager to finalize a use of force policy for the Berkeley Police Department (BPD) for Council review and approval before its 2020 summer recess. (See Attachment 1, Resolution No. 69,438-N.S., for the directive, and Attachment 2, the Urgency Resolution Agenda Material.) This was a follow-up to the Council's original referral of October 31, 2017, to the City Manager to amend the use of force policy, General Order U-2. (See the second attachment to Attachment 2.) That referral (Oct. 31, 2017) specified that the BPD's draft revised policy was to be submitted to the PRC before implementation.

Chief of Police Andy Greenwood submitted a draft of a long-awaited revised use of force policy (now designated Policy 300, in the Lexipol format), to the PRC for review on January 2, 2020 (Attachment 3), followed 4 days later by a memo clarifying that G.O. U-2 would remain in effect pending the PRC's review, supplemented by a Special Order to meet the new use of deadly force standards mandated by Assembly Bill 392 and effective January 1, 2020 (Attachment 4),

In July 2019, the PRC established a Use of Force Policy Subcommittee as a pre-emptive action in order to establish a review process prior to and in anticipation of the BPD's submittal of its policy to the PRC. When Chief Greenwood submitted the revised policy to the PRC for review in January 2020, the subcommittee was ready to proceed,

and met twice to review the policy before all commission meetings, except those for time-critical items, were suspended in mid-March 2020 due to the COVID-19 crisis.

Then, in late May 2020, the nationwide uprising against police brutality and racial inequities triggered by the horrendous killing of George Floyd by a police officer thrust law enforcement agencies' use of force policies to the forefront of public scrutiny everywhere, and the Council's June 9, 2020 directive was one result. In response, the PRC Subcommittee re-started its meetings, working at an accelerated pace, convening seven times over 2-1/2 weeks. The subcommittee worked in active collaboration with Chief Greenwood and several members of his staff; City Attorney Farimah Brown and a Deputy City Attorney were present to provide legal guidance.

The PRC Use of Force Subcommittee unanimously agreed on a proposed use of force policy, and presented it to the full Police Review Commission for consideration at meetings on June 29, 2020 and July 8, 2020. Representatives from the BPD and City Attorney's Office participated in these meetings also. The resulting recommended use of force policy is attached here as Attachments 5 and 6 (in "clean" and track change versions). Significant revisions are described below, and address the specific recommendations that the Council made in its October 31, 2017 referral, and June 9, 2020 urgency resolution. Many policy requirements of Senate Bill 230 were also incorporated.

#### FISCAL IMPACTS OF RECOMMENDATION

Staff costs associated with training of BPD officers on the policy changes.

#### CURRENT SITUATION AND ITS EFFECTS

The Berkeley Police Department's use of force policy, General Order U-2, has not undergone significant revision for more than a decade, and possibly longer. Since then, changes in the law and in best practices, along with community demands for increased transparency of police work, have underscored the need for an updated UOF policy.

The Council's 2017 referral observed that the use of force policy required updating because it: did not require reporting and enhanced review of an officer's use of force except in limited circumstances; lacked broad policy statements about the use of force, such as valuing the protection and sanctity of human life, striving to use the least amount of force necessary, and a requirement to de-escalate; lacked a foundational definition of the use of force; and did not require that all use of force data be made readily available internally in a digitized format, or to the public in an anonymized data report.

The Center for Policing Equity (CPE), an independent, non-profit organization, was engaged by the BPD in 2015 to perform an analysis on its traffic and pedestrian stop data, to measure fairness and improve policing equity. The BPD later asked them to include an analysis of use of force data. Among the recommendations in the CPE's interim draft report, released publicly in July 2017, were to change use of force reporting to capture every use of force by BPD officers, regardless of weapon use, injury or complaint. This recommendation remained intact in its May 2018 final report. The CPE observed, in its final report, that BPD records show relatively few use of force incidents, the use of force incident rate was, per capita, more than 12 times higher than that for Black persons than for White persons in Berkeley. The CPE wrote that "[t]his large unexplained racial disparity warrants further investigation."<sup>1</sup>

The allowable use of deadly force was limited by AB 392, which took effect January 1, 2020. The law redefines when a homicide by a peace officer is justifiable, and thus required an update in the BPD's use of force policy.

In the wake of George Floyd's death, many (including the City Council) have been calling for the enactment of the "8 Can't Wait" policy reforms advocated by Campaign Zero to reduce police violence. According to "8 Can't Wait," the BPD has four of those eight policies in place in G.O. U-2: a ban on chokeholds and strangleholds; requiring a verbal warning before shooting; a duty on officers to intervene when another officer is using excessive force; and employing a use of force continuum (however, the BPD's draft Policy 300 does not include the continuum).

The four remaining "8 Can't Wait" recommendations to be addressed are: requiring de-escalation before using force; exhausting all reasonable alternatives before resorting to deadly force; banning the shooting at people in moving vehicles; and requiring comprehensive reporting of uses of force and threats of force.

## BACKGROUND

Since 2009, only minor changes have been made to G.O. U-2, most of them concerning use of force in crowd control situations. The changes were made in settlement of a lawsuit stemming from the BPD's response to the Black Lives Matters protests in December 2014, and following the series of demonstrations and counter-protests that occurred over several months in 2017.

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<sup>1</sup> The Science of Justice: Berkeley Police Department National Justice Database City Report, Center for Policing Equity, May 2018, p. 43.  
[https://www.cityofberkeley.info/uploadedFiles/Police\\_Review\\_Commission/Commissions/2018/Berkeley%20Report%20-%20May%202018.pdf](https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2018/Berkeley%20Report%20-%20May%202018.pdf)

On October 31, 2017, the City Council called for City staff to revise its use of force policy as follows:

1. *Direct the City Manager to amend Berkeley Police Department (“BPD” or “the Department”) General Order U-2: Use of Force (“General Order U-2”) to:*
  - a. *Enhance BPD’s use of force policy statement; and*
  - b. *Create a definition of use of force; and*
  - c. *Require that all uses of force be reported; and*
  - d. *Categorize uses of force into levels for the purposes of facilitating the appropriate reporting, investigation, documentation and review requirements; and*
  - e. *Require Use of Force Reports to be captured in a manner that allows for analysis; and*
  - f. *Require that the Department prepare an annual analysis report relating to use of force to be submitted to the Chief of Police, Police Review Commission (“PRC”) and Council.*
2. *Direct that the City Manager report to the Council by December 12, 2017 on the progress to date and present to the Council by February 27, 2018 a final version of General Order U-2.*
3. *Prior to implementation, the revised General Order U-2 was to be submitted to the PRC in accordance with BMC 3.32.090(B).*

The draft G.O. U-2 attached to the October 31 referral included these elements:

1. An updated policy statement regarding use of force, including a highlighted commitment to valuing the protection and sanctity of human life, striving to use minimal amount necessary, etc.;
2. The foundational definition of use of force, including use of an officer’s body;
3. The reorganization and enhancement of the use of force reporting section;
4. Making use of force reports available internally, in searchable format.

On December 21, 2017, the City Manager provided a progress report to Council, informing them that the BPD working group had drafted new and revised language to G.O. U-2, including:



- *Formal language regarding the value of human life and dignity, without prejudice to anyone;*
- *Formal language regarding using de-escalation tactics and techniques which seek to minimize the need to use force and increase the likelihood of voluntary compliance;*
- *Re-draft definition of force;*
- *Expand the threshold of reporting force, including sub-categories of physical force;*
- *Consider approaches to categorization of force levels; using plain language to increase transparency;*
- *Posting of use of force statistics on the City's Open Data Portal.*

Additionally, the City Manager reported that staff was drafting a model report to serve as a template for an annual use of force report.

The City Council's 2017 referral made reference to the CPE's Draft Interim Report, which Chief Greenwood released on July 14, 2017.<sup>2</sup> Among its recommendations were:

- *[C]hanging the use of force data capture protocol to register every use of force by BPD officers, regardless of weapon use, injury or complaint.*

This recommendation was reiterated in the CPE report of May 2018.<sup>3</sup> The BPD had engaged the CPE in 2015 to conduct an analysis of vehicle and pedestrian stops; later, Chief Greenwood asked to expand the analysis to include reported use of force incidents. The purpose of the data gathering is to have empirical information to help the BPD identify policy reforms aimed at reducing bias and improving police-community relations.<sup>4</sup>

In 2018, the BPD began a gradual conversion of its General Orders, Training and Information Bulletins, and other orders into the Lexipol policy format. Lexipol furnishes model policies to law enforcement agencies based on current law and best practices, which individual agencies can tailor to their specific communities. This changeover began in 2018 and continues to this day. (The PRC has a separate subcommittee

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<sup>2</sup> The Science of Justice: Draft Berkeley Police Department Interim Report, Center for Policing Equity, Spring 2017. <https://www.cityofberkeley.info/CPEDraftInterimReport.aspx>, p. 7.

<sup>3</sup> The Science of Justice: Berkeley Police Department National Justice Database City Report, Center for Policing Equity, May 2018, p. 9.  
[https://www.cityofberkeley.info/uploadedFiles/Police\\_Review\\_Commission/Commissions/2018/Berkeley%20Report%20-%20May%202018.pdf](https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2018/Berkeley%20Report%20-%20May%202018.pdf)

<sup>4</sup> Ibid, p. 4

reviewing converted policies to ensure adherence to former policies and evaluate any additions to, or deviations from, policies in the old format.) Thus, the new use of force policy will be known as Policy 300, not G.O. U-2.

On August 19, 2019, Assembly Bill 392 was signed into law. AB 392 amended Penal Code sections 196 and 835a by redefining when homicide by a peace officer is deemed justifiable, and by prescribing the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, prevent escape, or overcome resistance. Senate Bill 230 became law on September 8, 2019, and requires law enforcement agencies to implement certain training and policy standards regarding use of force by January 1, 2021.

In December 2019, Chief Greenwood informed the PRC that he might have to issue Policy 300 before it was fully vetted by the PRC, to ensure that his staff understood the mandates of AB 392, to take effect on January 1, 2020. Commissioners expressed their strenuous objection to issuing the policy before the PRC had an opportunity to review it, and agenda'd the matter for discussion at its January 8, 2020 meeting. On January 2, 2020, the Chief sent to the PRC a draft Policy 300 for its review. On January 6, 2020, he clarified that General Order U-2 would remain in effect, supplemented by Special Order 2020-0001, to ensure compliance with the new standards set forth in AB 392 (See Attachments 3 and 4 for his January 2 and January 6 emails to the PRC).

The Use of Force Policy Subcommittee met twice before the COVID-19 health crisis and shelter in place order put all commission meetings on hold, except for those needed to address time-critical or statutory items. Then, police use of force became an urgent national debate, when, on May 25, 2020 George Floyd's killing by a police officer ignited public outrage against the senseless killings of Blacks, too often at the hands of law enforcement. Accordingly, the City Council passed Resolution No. 69,438-N.S. on June 9, 2020, as an urgency item, to ensure that the PRC and the City Manager reviews of the BPD's draft use of force policy were completed before the Council's summer recess.

Resolution No. 69,438-N.S. directs the Police Review Commission and City Manager to:

1. *Finalize revisions to the use of force policy as referred by Council and drafted by the department for PRC review;*
2. *Submit revised Use of Force Policy directly to the full City Council for the Council to review and adopt before the 2020 Summer recess;*

3. *Incorporate revisions included [in] the October 31, 2017 Council referral and all outstanding "8 Can't Wait" use of force policy reforms.*

The City Council further directed the Police Review Commission to *review the use of control holds*, and directed the City Manager to *allow anonymized access to records about use of force to the Police Review Commission to inform deliberation of the use of force general order*.<sup>5</sup>

The PRC's Use of Force Subcommittee consisted of Commissioners George Perezvelez (Subcommittee Chair), Michael Chang, Julie Leftwich and Izzy Ramsey. Comm. Perezvelez is currently the longest-serving member of the PRC and has helped revise other law enforcement agencies' use of force policies; Comm. Chang is an attorney with the U.S. Dept. of Education's Office for Civil Rights; Comm. Leftwich, also a lawyer, has worked as an advocate for gun control legislation and against domestic violence; and Comm. Ramsey is a former federal prosecutor and current criminal defense lawyer.

The Subcommittee restarted its review work two days after the Council issued its directive, and met six more times in the following two weeks, through June 26, 2020, for a total of almost 20 hours. Except for its initial meeting, several members of the BPD, including Chief Greenwood, actively participated in the Subcommittee's review of draft Policy 300. In addition to Chief Greenwood, the Subcommittee had the benefit of the perspectives of senior BPD staff who had worked on the draft Policy 300 and have expertise in training on the current use of force policy, de-escalation tactics, and defensive tactics. The City Attorney and one of her deputies attended the meetings to stay abreast of the discussions and provide legal advice as needed.

To help inform its work, the PRC Subcommittee reviewed use of force policies from the police departments of Boston, MA; Camden, NJ; and Seattle, WA, as well as those from Oakland, San Francisco, BART and Los Angeles. Various subcommittee members reviewed studies and recommendations on use of force policies from: the Police Executive Research Forum (PERF), the President's Task Force on 21<sup>st</sup> Century Policing, the National Association for Civilian Oversight of Law Enforcement (NACOLE), the National Association of Black Law Enforcement Executives (NOBLE), the ACLU, the NAACP, and the National Institute of Justice.

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<sup>5</sup> In light of the tight timeframe in which to complete its work, the PRC did not request access to use of force records.

### **Significant revisions and additions to the BPD's draft policy**

Minimal Use of Force and Minimal Reliance Standard. These concepts are found throughout the policy. Minimal reliance on use of force goes to the core principle of engaging in de-escalation techniques, proportionality, recognition of dignity of life, and a continuous assessment on when any use of force is necessary. It establishes the foundation for legitimacy, transparency, and accountability and builds community trust.

“People are more likely to obey the law when they believe those who are enforcing it have the right—the legitimate authority—to tell them what to do.” (President’s Task Force on 21st Century Policing, March 2015.)

In 1829, Sir Robert Peel established the London Metropolitan Police Force. He became known as the “Father of Modern Policing.” Despite some valid criticisms of Peel, some of his core ideas remain as integral and critical to progressive policing practices today as they were two centuries ago. One of those core ideas was “to use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public cooperation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police object.” Peel continued, “Police earn public support by respecting community principles. Winning public approval requires hard work to build reputation: enforcing the laws impartially, hiring officers who represent and understand the community, and using force only as a last resort.”

Minimizing the use of force is at the center of the Police Executive Research Forum’s (PERF) report on “Re-Engineering Training on Police Use of Force.” This report explains, “We need to rethink how we are training officers to handle use of force, and we must recognize that current training is not providing officers with state-of-the-art techniques to minimize use of force.”<sup>6</sup>

In its January 2016 report, “Use of Force: Taking Policing to a Higher Standard,” PERF identified 30 guiding principles. Following its primary guiding principle, that the sanctity of human life is central to everything law enforcement does, is PERF’s second guiding principle: “Departments should adopt policies that hold themselves to a higher standard

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<sup>6</sup> “Re-Engineering Training on Police Use of Force,” Police Executive Research Forum, August 2015, p. 4.

than the legal requirements of *Graham v. Connor*.<sup>7</sup> The study concluded that agencies should “continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of *Graham v. Connor*.”

The Denver, New Orleans, Las Vegas, Portland, Albuquerque, San Francisco, Seattle, and Bay Area Rapid Transit District (BART) police departments, among others, all have use-of-force policies that require officers to “use the minimum amount of force” and to have “as little reliance on force as practical.” This is a stricter standard than that established by the U.S. Supreme Court in *Graham v. Connor*.

Vanita Gupta, Principal Deputy Assistant Attorney General under President Obama in 2015, testified at a PERF forum: “I think it’s revolutionary and transformative to be talking about going beyond current understanding of what is ‘objectively reasonable’ per *Graham v. Connor*” and the “different ways to go above PERF’s 30 Guiding Principles on Use of Force and what the Supreme Court jurisprudence requires, that ultimately may be much better for officer safety, much better for public safety, and much better for the kind of mutual understanding between the community and law enforcement.”<sup>8</sup>

In an October 1999 study from the U.S. Department of Justice’s Office of Justice Programs, entitled “Use of Force by Police – Overview of National and Local Data,” the DOJ found that “There was a strong relationship between the level of officer force and the chance of officer injury. Increasing levels of officer force, regardless of the level of suspect resistance, corresponded with higher probabilities of officer injury. When no force was used, 2 percent of officers were injured. Minimal force situations resulted in 15 percent of officers being injured, and situations involving officers forcibly subduing suspects with their hands resulted in 69 percent of officers being injured.”

Minimal reliance on use of force combined with an objectively reasonable, objectively necessary and proportionate standard – as proposed by the PRC – will raise the bar for use of force by the police from the bare minimum “objectively reasonable” standard – set forth in *Graham v. Connor* – to a truly comprehensive approach that will ensure the sanctity of life for officers, victims, and suspects. This will undoubtedly lead to a higher level of community trust and confidence.

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<sup>7</sup> “Use of Force: Taking Policing to a Higher Standard, 30 Guiding Principles, Police Executive Research Forum, January 29, 2016, p. 2.

<sup>8</sup> “Re-Engineering Training on Police Use of Force,” Police Executive Research Forum, August 2015, p. 36.

This is not a new concept and its implementation in Berkeley is long overdue. Contrary to the counter narrative, in all instances where a minimal use of force standard has been implemented, higher injuries to officers or the public have not occurred. Officers have not stopped responding to calls. And there has not been significant attrition due to the implementation of the policy. Rather, fewer use of force incidents have been reported, reducing liability for jurisdictions.

On November 15, 2018, the U.S. Commission on Civil Rights released a briefing in Washington, DC, entitled “Report on Police Use of Force: An Examination of Modern Policing Practices.” It noted as a core principle: “The best available evidence reflects high rates of uses of force nationally, with increased likelihood of police use of force against people of color, people with disabilities, LGBT people, people with mental health concerns, people with low incomes, and those at the intersection of these communities.” Further, “use of force is a predictable component of policing and its potential underlies every police citizen interaction; however, avoiding the use of force should be a goal for each interaction.”

#### Objectively Reasonable, Objectively Necessary, and Proportional/Reasonableness.

As discussed above with respect to the proposed use-of-force standard, the PRC has attempted to implement a policy that is more stringent and a higher standard than the minimum Constitutional requirement set forth by the US Supreme Court in *Graham v. Connor*. Several jurisdictions have found that various uses of force, which we believe the people of Berkeley would find objectionable, are permissible under the *Graham v. Connor* standard. For example, prosecutors refused to bring criminal charges against the officer who applied the chokehold to Eric Garner, determining in part that they would be unable to prove that it was objectively unreasonable. Because *Graham v. Connor* is simply the bare minimum, we have attempted to move beyond it in setting forth a policy that is more progressive. We note that the policy we have proposed is actually in line with the training, as described to us by the Department command staff, which emphasizes de-escalation as well as minimum and proportional use of force.

So, in addition to reemphasizing specific prohibitions that Berkeley has imposed regarding the use of chokeholds, the PRC has added to the *Graham v. Connor* “objectively reasonable” standard, including the following provisions: Officers shall use only 1) minimum force that is 2) objectively necessary, and 3) proportional to the situation. Additionally to aid officers in determining what is proportional, we have delineated factors to consider when assessing the totality of the circumstances. It is worth noting that the same factors are described in *Graham v. Connor* to evaluate

whether something is “objectively reasonable.” Because the proposed standard is one viewed from an objective perspective it does not rely purely on the subjective belief of an officer. The officer must be able to articulate the specific facts that will demonstrate that his actions were in fact “reasonable.”

The PRC does not believe that imposing this more strict standard will increase potential municipal liability for use of force by officers. Rather, it should do the opposite -- reduce it. For a municipal liability to attach, a court must find two things -- first, that the officer violated the *Graham v. Connor* “objectively reasonable” standard and, second, that the municipality “caused” the violation. It is worth noting that the fact of a more stringent policy does not change the applicable legal standard for liability under a claim brought under 42 USC 1983. If officers are trained properly on the more strict standard, it should be less likely that their conduct even comes close to the *Graham v. Connor* “objectively reasonable” standard, thus making it less likely that citizens will file lawsuits against the City. Further, the fact of the more strict standard (minimum force/objective necessity/proportional) combined with proper training will serve as evidence that the City of Berkeley did not cause any violation of the *Graham v. Connor* standard, but in fact its actions served to prevent such conduct.

The more stringent standard -- requiring minimal use of force, combined with use only that is objectively reasonable, objectively necessary, and proportions -- reflects the values of Berkeley as a community.

Use of Deadly Force/Serious Bodily Injury. (Section 300.4) The PRC has also attempted to limit the “use of deadly force” to reflect an emphasis on the sanctity of life. In essence, the PRC has limited use of force to situations where danger of death or serious bodily harm is *imminent*. Further, it has defined “serious bodily injury” more narrowly than it is defined in the California Penal Code, thereby further limiting the use of deadly force over that permitted by *Graham v. Connor*.

For the purposes of this policy, we have accepted the definition in BPD’s draft: “A bodily injury that creates a substantial risk of death, causes serious permanent disfigurement or results in a prolonged loss or impairment of the functioning of any bodily member or organ”; however, we have omitted reference to Penal Code section 835a. This definition *excludes* “loss of consciousness,” “concussions,” and “wounds requiring suturing,” which are included in the definition set forth in the Penal Code. Accordingly, an officer would *not* be authorized to use deadly force to prevent such injury.

The PRC also believes that a policy with an imminence requirement and limiting the bounds of serious bodily injury properly balances the need to protect the public and officers, and honoring the sanctity of life when using force on suspects.

Two of the “8 Can’t Wait” policy reforms concern the use of deadly force. One is the requirement to give a verbal warning, when possible, before employing deadly force; this was contained in G.O. U-2 and remains in BPD’s draft Policy 300. The other is to require officers to exhaust all other reasonable alternatives before resorting to using deadly force. Initially, the PRC Subcommittee inserted language that allowed deadly force to be used only as a “last resort.” The BPD objected to that concept, because it means that an officer facing an imminent threat must think through all the alternatives before taking action, thus potentially delaying action until it is too late to prevent harm to themselves or another. The PRC was convinced and, confident that its definition of the allowable use of deadly force was sufficiently narrow, removed the “last resort” language.

Use of Force Continuum. As requested by the City Council, the PRC has added a Use of Force Continuum section (300.3.4) to its proposed policy. This is in line with both the NAACP and “8 Can’t Wait” recommendations. Although a continuum is contained in G.O. U-2, it is omitted from BPD’s draft Policy 300. There is a currently a national debate over whether a use of force continuum is the correct way to establish a process for implementation of force, or whether the ICAT (Integrating Communications, Assessment, and Tactics) process should be implemented as a new way of thinking about use of force training for police officers. The PRC believes that the BPD’s position -- that the continuum is unhelpful -- does not address the critical need to delineate and require that officers assess use of force under the objectively reasonable, objectively necessary, proportional, and minimal prism.

The Police Executive Research Forum (PERF) defines ICAT as “a training program that provides first responding police officers with the tools, skills, and options they need to successfully and safely defuse a range of critical incidents. Developed by PERF with input from hundreds of police professionals from across the United States, ICAT takes the essential building blocks of critical thinking, crisis intervention, communications, and tactics, and puts them together in an integrated approach to training.”

A continuum, on the other hand, will help ensure that any encounter that requires a use of force must start at only the level of force that is necessary to mitigate the threat. This ensures that officers do not escalate a situation themselves, re-evaluate and respond



proportionally, and deploy a higher or lower force option, depending on the totality of the circumstances.

The PRC believes that a use of force continuum that matches resistance with officer response levels, combined with a vigorous training program that reinforces and delineates what level of force is appropriate in any given encounter, will reduce officer and suspect injuries as well as enhance community trust.

Use of Force Reporting. The Council requested that the revised use of force policy require that all uses of force be reported, and uses of force be categorized into levels to facilitate the appropriate reporting, investigation, documentation and review requirements. Also, comprehensive reporting is one of the “8 Can’t Wait” policy recommendations. The PRC revised the BPD’s Section 300.6, on Reporting Requirements, and left Section 300.6.1, on Supervisor Responsibility, substantially intact. The PRC added Section 300.6.2, Use of Force Reporting Levels.

Tracking and delineating the how, when, what, where, and why of officers employing use of force is an invaluable tool for working towards the Department’s and community’s expected and ultimate goal of guaranteeing that, for every use, no other option existed.

The PRC’s proposed Section 300.6.2 defines four levels of force. Each level of force brings with it an appropriate level of review that requires recording the use of force. This oversight also allows for regular review of whether uses of force were justified and within policy. Reporting levels are designed to achieve a set of objectives, mainly in documenting officer conduct so as to enhance accountability. Levels-of-force reporting plays a critical role in accurately evaluating and analyzing uses and policy adherence. There is no proper review without delineated levels and strict supervisory responsibilities.

Finally, you are aware that in September 1997, the Council began requiring that the BPD document each use of pepper spray on a separate “Use of Pepper Spray” report, which is distributed to the Mayor and Councilmembers and the PRC. This reporting requirement was incorporated into G.O. U-2 and now appears at the end of the first paragraph of Section 300.6. Chief Greenwood suggested that, since the revised policy calls for more comprehensive reporting of all types of force used, including pepper spray, the separate reporting mandate be eliminated. The PRC is agreeable to this, as long as the comprehensive use of force reporting requirements provided for in this policy are enacted.

Use of Force Analysis. The BPD's draft policy (Section 300.11) requires regular and publicly released analyses on their officers' use of force, consistent with the Council's request for such analyses. The PRC inserted a mandate to report the types of force in each of the four levels of the reporting described above.

While the BPD's draft policy requires inclusion of demographic information about the individuals subject to a use of force, the PRC added language to specify that such information include race, gender, and age.

The BPD's draft did not specify to whom or how often the analyses should be made available. The Council asked that an annual analysis be submitted to the Council and the PRC. The PRC believes these reports should be published quarterly, at a minimum, and made available through the BPD's website, and agreed to Chief Greenwood's suggestion to use the City's Open Data Portal. The PRC's revision also provides for reporting as part of the BPD's annual crime report. Transparency will serve the Berkeley Police Department well.

Core Principles. The PRC added a new Core Principles section, set forth in Section 300.1.3, to provide the philosophical foundation for the Use of Force policy. The Core Principles are based on provisions in effect in use of force policies nationwide, including those in San Francisco, Seattle and Camden, NJ. The PRC understands that the Berkeley Police Department already operates in accordance with many of the Core Principles. Indeed, Core Principle F., Foster Strong Community Relationships, incorporates language from the Department's "Mission – Vision – Values" statement. The PRC felt it was critically important, however, to codify the Department's practices and to make a public declaration regarding their foundational importance. In addition, the specific core values of impartial policing and vulnerable populations is in compliance with mandatory inclusions under SB 230.

Sanctity of Life. The PRC's draft expands on the BPD's language regarding the value of human life and dignity and moved it to the beginning of the policy (Section 300.1). A sanctity of life statement satisfies one of the Council's request in its October 2017 referral.

Purpose and Scope. In Section 300.1.1, the PRC expanded upon the BPD's language to make clear all officers' responsibility for knowing and complying with the policy and for comporting themselves consistent with the Core Principles in the policy. Potential

discipline for violations of the policy, and the responsibility of supervisors to ensure officers' knowledge of and compliance with the policy, are spelled out.

Definitions. These appear in Section 300.1.4, and most definitions of the BPD's draft are unchanged. As noted above, the PRC added a definition of "minimal amount necessary." With the BPD's help, the PRC revised the concepts of "passive resistance" and "active resistance" and added a category of "combative resistance." The definitions of "control hold" and "pain compliance techniques" appear in Policy 428, on First Amendment Assemblies, and the PRC included them here as well, as they felt the definitions should appear in this policy.

Duty to Intercede and Duty to Report. (Section 300.2.1.) An officer's obligation to intercede when observing another officer using force in violation of policy is one of the "8 Can't Wait" policies. The duty to intercede is longstanding BPD policy, along with the duty to report to a superior a potential violation, whether or not they personally witness it. The duty to report is also an SB 230 requirement. The PRC's proposed language provides more specific direction on how to intervene, and makes clear that the duty to report attaches not just when the officer has personally observed excessive force, but when the officer learns of a potentially unauthorized use of force.

De-escalation Tactics. While the BPD trains its officers on how to use de-escalation tactics in its interactions with civilians, the concept of de-escalation is not expressly set out in G.O. U-2. De-escalation tactics and techniques appear in BPD's draft Policy 300. The PRC revised the BPD's draft slightly (Section 300.3.5), while also adding language about using various techniques and dealing with specific situations and populations. De-escalation is one of the "8 Can't Wait" policy reforms.

Chokehold Prohibition. The chokehold, including the carotid restraint, and the bar-arm hold applied to the neck have been banned by City Council Resolution since 1985. The PRC's revised language in Section 300.3.8 makes clear that any hold or contact with the neck that inhibits breathing, inhibits blood flow to the neck, or applies pressure to any part of the neck is strictly prohibited. A chokehold ban is one of the "8 Can't Wait" policies and the Council gave specific direction to examine this policy in its June 9, 2020 urgency resolution.

Shooting at or From Moving Vehicles. (Section 300.4.2.) A ban on shooting at moving vehicles is one of the "8 Can't Wait" policies Council asked to be included in the use of force policy. The BPD felt very strongly, however, that an absolute prohibition could

endanger officer safety. The PRC modified the BPD's draft language to make clear that a deviation from the Shooting at or From Moving Vehicles policy may be justified where it is "objectively reasonable and objectively necessary depending on the totality of the circumstances."

Also, the BPD's draft Policy 300 did not include a provision restricting shooting *from* moving vehicles. The PRC added a prohibition on shooting from moving vehicles, similar to those in effect in other cities, including San Francisco and Boston, and agreed to include an "exigent circumstances" exception as requested by the BPD.

Pain Compliance Techniques. (Section 300.3.6.) The PRC Subcommittee spent considerable time making sure it understood what these techniques are (hence the inclusion of a definition of such techniques) and in what situations they are used. The BPD proposed some alternative language that was acceptable to the PRC.

Use of Non-Lethal Force; Restraint and Control Devices. The PRC modified the section on Use of Non-Lethal Force (Section 300.3.7) to include the concepts that such force be used only when objectively reasonable, objectively necessary, and proportional.

The subsection on Restraint and Control Devices (Section 300.3.7.1) is necessitated by SB 230, which requires that a use of force policy include "comprehensive and specific guidelines regarding approved methods and devices available for the application of force." The PRC therefore added language that references Policy 302, governing handcuffs, body wraps and spit hoods, and Policy 303, regarding batons, less-lethal projectiles, and chemical agents. Reference is also made to the recent Council action banning tear gas and temporarily banning pepper spray or smoke during the current pandemic.

Directed Fire. The PRC modified this section (300.4.1) slightly, and to comport with an SB 230 requirement that officers consider their surroundings and potential risks to bystanders before discharging a firearm.

Public Records. Section 300.6.4 is an addition to the draft policy necessitated by SB 230 and is straightforward in stating that the maintenance and disclosure of records related to use of force incidents be done in compliance with several applicable laws and policies.

Medical Consideration. Section 300.7 was revised minimally to comport with SB 230.

Training. The BPD's draft contained a brief statement about training in Section 300.10; the PRC changed "will" to "shall" for consistency. The City Attorney advised that the section needs elaboration to comply with SB 230, but the PRC did not have time to work on suggested language.

Civilian Complaints. Section 300.12 meets the requirements of SB 230 to inform the public of the procedures for the filing, investigating, and reporting of civilian complaints of use of force incidents, and refers to both the BPD's Internal Affairs Bureau and the PRC.

Policy Review and Updates. (Sec. 300.13.) Another provision required by SB 230 calls for this policy to be regularly reviewed and updated to reflect developing practices and procedures. The PRC proposes that it meet annually with the BPD to do so.

Due to time constraints, the PRC did not have time to review these sections of the policy:

- Drawing and Pointing Firearms. (300.4.1)
- Use of Vehicles (300.5)
- Reporting to Calif. Dept. of Justice (300.6.3)
- Watch Commander Responsibility (300.8)

At its June 29, 2020 special meeting and July 8, 2020 regular meeting, the PRC took roll call votes on several specific provisions they had debated. At the end of the June 29 meeting, the PRC voted unanimously to approve for recommendation all other provisions discussed that evening. At the end of the July 8, 2020 meeting, the PRC voted unanimously to approve the full draft Policy 300 that it had completed and submit it to the City Council for its approval: M/S/C Moved/Second (Perezvelez/Allamby). Ayes -- Allamby, Calavita, Leftwich, Mikiten, Mizell, Perezvelez, and Ramsey; Noes -- None; Abstain -- None; Absent -- Chang. (Commissioner Chang was unable to attend the July 8 meeting but was a member of the PRC Subcommittee.)

#### ENVIRONMENTAL SUSTAINABILITY

No identifiable environmental effects or opportunities are associated with the subject of this report.

#### RATIONALE FOR RECOMMENDATION

The need for a revised use of policy is driven by the need for a policy that comports with best practices, provides a clear expression to the public about the philosophical

underpinnings of when and what types of force may be used, and reflects the community's standards about allowable uses of force. Many of the values reflected in the BPD's revised policy are not new values, but pre-existing principles finding expression in the use of force policy for the first time.

The use of force policy proposed by the PRC, in certain respects, builds on the BPD's revisions, which had already incorporated many of concepts enumerated in the City Council's October 2017 referral. For example, the BPD's draft Policy 300 contains an enhanced policy statement regarding the use of force (former Sec. 300.2). The PRC's proposal takes those concepts further by beginning with an expanded statement of the sanctity of life (Sec. 300.1) and adding a number of core principles (Sec. 300.1.3). Other sections of the BPD's revised policy that the PRC expanded upon include those on de-escalation tactics (Sec. 300.3.6) and the levels of use of force reporting (300..2).

In some cases, the PRC went further than what the Council asked it to do by drawing upon language from use of force policies of other law enforcement agencies, with the idea of establishing the "gold standard" of use of force policies.

Of the "8 Can't Wait" policy reforms, three were already part of G.O. U-2 and are carried over to BPD's draft Policy 300 (ban on chokeholds, duty to intervene to stop another officer from using excessive force, requiring a verbal warning before using deadly force). The use of force continuum, which was in G.O. U-2 but omitted in BPD's draft, is reinstated in the PRC's proposed policy. Requiring the use of de-escalation is a longstanding but unwritten practice that the BPD included in its draft and the PRC expanded upon. The ban on shooting into moving vehicles includes an exception in cases where the person in the vehicle poses an imminent threat of deadly force, which the PRC approves of. Finally, the BPD's draft does not require an officer to exhaust all reasonable alternatives before using deadly force, but the PRC is satisfied that the use of deadly force is sufficiently circumscribed in its proposed provision on this subject.

The BPD worked cooperatively with the PRC Subcommittee and the full Commission in helping Commissioners understand how policies or directives play out in real life, and in explaining various control devices or techniques. The BPD expressed its support for many of the revisions, and proposed language for some sections. The PRC and the BPD did not always agree, but differences of opinion were always aired respectfully.

Finally, SB 230 mandates use of force policy and training requirements that don't go into effect until 2021. However, the City Attorney thought, and the PRC and BPD agreed, that it makes more sense to include the necessary policy language at this time,

rather than revise the policy again in five months. But because the suggested language and concepts were not provided until later in the process, and given the already enormous task at hand, not all the SB 230 provisions were considered by the PRC Subcommittee or full Commission.

ALTERNATIVE ACTIONS CONSIDERED

None.

CITY MANAGER

See companion report.

CONTACT PERSON

Katherine J. Lee, Police Review Commission Officer, 510-981-4960

Attachments:

1. Resolution No. 69,438-N.S.
2. June 9, 2020, Urgency Resolution Agenda Material, with attachments:
  - (1) Resolution
  - (2) October 31, 2017 Council Direction to the City Manager on Use of Force
  - (3) December 21, 2017 Off-Agenda Memo
  - (4) January 8, 2020 Use of Force Policy Revised Draft
3. January 2, 2020 Email from Chief Greenwood to PRC Officer re Use of Force Policy Draft and Materials
4. January 6, 2020 Email from Chief Greenwood to PRC Officer re Special Order 2020-0001; Changes to 835a
5. PRC's Proposed Policy 300, Use of Force ("clean")
6. PRC's Proposed Policy 300, Use of Force (track changes)
7. July 16, 2020 cover letter from PRC Chairperson

RESOLUTION NO. 69,438-N.S.

DIRECTING THE POLICE REVIEW COMMISSION AND CITY MANAGER TO SUBMIT REVISED BERKELEY POLICE DEPARTMENT USE OF FORCE POLICY FOR COUNCIL REVIEW AND APPROVAL BEFORE THE 2020 SUMMER RECESS

WHEREAS, the recent murders of George Floyd, Breonna Taylor and Ahmaud Arbery have ignited the nation in passionate protest against police brutality and racial injustice, and across the country, citizens have protested for the past week demanding change and calling out the enduring systemic racism, white supremacy and police brutality that has defined the United States for too long; and

WHEREAS, among the more immediate demands are calls for local jurisdictions to use their power to implement reforms that restrict the prevalence of police force and the circumstances in which police can use force; and

WHEREAS, on October 31, 2017 the Council unanimously directed the City Manager to urgently amend the BPD's General Order U-2 governing use of force policy to address deficiencies and to update it consistent with best practices and community concerns; and

WHEREAS, on January 8, 2020, more than two years after the Council passed the referral, and 1 year and 10 months after the deadline Council established for presenting a final updated policy, BPD presented a proposed revised Use of Force Policy to the PRC; and

WHEREAS, the current PRC draft represents a marked improvement from the effective 2017 General Order U-2 Use of Force policy, enhancing the Department's policy statement, including a more expansive definition of force (including physical force), encouraging de-escalation tactics, expanding reporting requirements, increasing transparency and facilitating analysis, and requiring annual Council reporting; and

WHEREAS, the 8 Can't Wait campaign is a project of Campaign Zero, an organization established by Black Lives Matter activists and focused on clear policy solutions to reduce and end police deaths and other forms of police violence; and

WHEREAS, the campaign's studies demonstrate that eight use of force policies are effective at decreasing police violence by up to 72%; and

WHEREAS, according to Campaign Zero, requiring police officers to exhaust less than lethal means before shooting or requiring comprehensive reporting each decreases police killings by 25% for each policy. In addition, prioritizing de-escalation decreases violence by 15%, and banning shooting at moving vehicles reduces police killings by 8%; and

WHEREAS, the Council relied on the campaign when drafting the 2017 referral and the project has enjoyed increased exposure following the deaths of George Floyd and



Breonna Taylor, and the countless others whose lives have been lost at the hands of law enforcement; and

WHEREAS, in a matter of days, hundreds of Berkeley residents have contacted the Mayor’s office and City Council to express their support for this campaign and urging immediate adoption of all outstanding policies.

NOW THEREFORE BE IT RESOLVED that the City Council endorses these essential reforms to ensure harm reduction and alignment with best practices;

BE IT FURTHER RESOLVED that the City Council directs the Police Review Commission and City Manager to:

1. Finalize revisions to the use of force policy as referred by Council and drafted by the department for PRC review.
2. Submit revised Use of Force Policy directly to the full City Council for the Council to review and adopt before the 2020 Summer recess;
3. Incorporate revisions included the October 31, 2017 Council referral and all outstanding “8 Can’t Wait” use of force policy reforms.

BE IT FURTHER RESOLVED that the City Council directs the Police Review Commission to review the use of control holds.

BE IT FURTHER RESOLVED that the City Council directs the City Manager to allow anonymized access to records about use of force to the Police Review Commission to inform deliberation of the use of force general order.


The foregoing Resolution was adopted by the Berkeley City Council on June 9, 2020 by the following vote:

Ayes: Bartlett, Droste, Hahn, Harrison, Kesarwani, Robinson, Wengraf, and Arreguin.

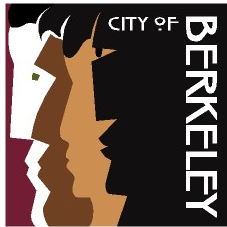
Noes: None.

Abstain: Davila.

Absent: None.

  
 \_\_\_\_\_  
 Jesse Arreguin, Mayor

Attest:   
 \_\_\_\_\_  
 Rose Thomsen, Deputy City Clerk



Councilmember Kate Harrison  
Mayor Jesse Arreguín

Attachment 2

## **URGENCY RESOLUTION AGENDA MATERIAL**

**Meeting Date:** June 9, 2020

**Submitted By:** Councilmember Harrison, Mayor Arreguín,  
Councilmembers Davila and Bartlett

**Item Description:** **Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess**

### **Rationale:**

Pursuant to California Government Code Section 54954.2(b)(2), there is a need to take immediate action which came to the attention of the local agency after posting of the meeting agenda.

The police killing of George Floyd on May 25, 2020 and the deaths of other African Americans have sparked nationwide outrage and protests over police brutality, including demonstrations in the City of Berkeley. Over the past few days over 1,000 residents have contacted the Mayor's Office and City Councilmembers asking that the City adopt the eight reforms put forward by Campaign Zero's 8 Can't Wait campaign. Four of the reforms on police use of force are already in place, but the remaining four are not yet Departmental procedures. These policies have been linked to reduced police violence.

In 2017, the Council directed the City Manager to strengthen Berkeley's use of force policy (General Order U2), based in part on findings from the Center for Policing Equity. Council had requested that this policy return for final adoption by February 27, 2018, some 26 months ago. In January, 2020, the Police Department brought forward and the Police Review Commission was beginning to review a revised BPD Use of Force Policy. This work was most recently put on hold by the City Manager's directive to suspend non-essential Boards and Commissions from meeting.

Given the growing demand for police reform and the Council recess period in late July, it is critical that this item be added to the June 9, 2020 City Council agenda so Council can provide direction to bring back a new Use of Force policy prior to the recess. This item also includes the four outstanding reforms suggested by the 8 Can't Wait campaign. This new policy will govern all BPD use of force and require greater reporting and transparency.

It is incumbent upon the City to continue its efforts towards addressing and remedying ongoing instances of inequity. These issues are of particular urgency given that the City has endowed the police with the responsibility to enforce the law and keep the peace. Most critically, the police are empowered to reasonably employ lethal, less-than-lethal and non-lethal force for the purpose of achieving these ends when justified by law and city protocols and procedures. In short, the City has the means and power to dramatically affect the lives and liberties of the people within its jurisdiction. Therefore, to ensure the public's safety and liberty, the utmost prudence must be demonstrated in internal policies governing the use of force.



Kate Harrison, Jesse Arreguín  
Councilmember District 4, Office of the Mayor

ACTION CALENDAR

June 9, 2020

To: Members of the City Council

From: Councilmember Harrison (Co-Author), Mayor Jesse Arreguín (Co-Author),  
Councilmembers Davila and Bartlett

Subject: Urgency Resolution: Directing the Police Review Commission and City  
Manager to Submit Revised Berkeley Police Department Use of Force  
Policy for Council Review and Approval Before the 2020 Summer Recess

RECOMMENDATION

Adopt an Urgency Resolution directing the Police Review Commission (“PRC”) and City Manager to:

1. Finalize revisions to the use of force policy as referred by Council in 2017 and drafted by the department for PRC review in January, 2020;
2. Submit revised Use of Force Policy directly to the full City Council for the Council to review and adopt before the 2020 Summer recess;
3. Incorporate revisions included the October 31, 2017 Council referral and all outstanding “8 Can’t Wait” use of force policy reforms.

BACKGROUND

**A. Introduction**

The recent murders of George Floyd, Breonna Taylor and Ahmaud Arbery have ignited the nation in passionate protest against police brutality and racial injustice. Across the country, citizens have protested for the past week demanding change and calling out enduring systemic racism and police brutality that has defined the United States for too long. Among the more immediate demands are calls for local jurisdictions to use their power to implement reforms that reduce or restrict the circumstances in which police can use force and expand use of force transparency and accountability.

Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess

Prior to the COVID-19 emergency, the Police Review Commission commenced its review of a revised BPD Use of Force Policy following Council direction in 2017 to strengthen the policy. Council had urgently requested that this policy return for final adoption approximately two years ago. This work was further delayed the COVID-19-related suspension of non-essential Boards and Commissions.

Given the growing interest and demands for police reform, and the upcoming Council recess period in late July, it is critical that this item be added to the June 9, 2020 City Council agenda so Council can provide direction to bring back a new Use of Force policy prior to our summer recess. This item also includes any outstanding reforms suggested by the 8 Can't Wait campaign. This new policy will govern all BPD use of force and require greater reporting and transparency.

It is incumbent upon the City to continue its efforts towards addressing and remedying ongoing instances of inequity. These issues are of particular urgency given that the City has endowed the police with the responsibility to enforce the law and keep the peace. Most critically, the police are empowered to reasonably employ lethal, less-than-lethal and non-lethal force for the purpose of achieving these ends when justified by law and city protocols and procedures. In short, the City has the means and power to dramatically affect the lives and liberties of the people within its jurisdiction. Therefore, to ensure the public's safety and liberty, the utmost prudence must be demonstrated in internal policies governing the use of force.

The BPD has embraced modern policing policies, including de-escalation training, and has not had an officer involved shooting in the last five years. Still, every step must be taken to ensure that the department is using the least amount of force necessary. Broadly supported reforms that were initiated in the last three to five years, including Council actions requesting refinement of the department's use of force protocols, have faced unfortunate delays. It is in the public interest that these initiatives and additional national use of force best practices be adopted as policy before the Council Summer Recess.

**B. October 31, 2017 Council Direction to the City Manager on Use of Force**

A June 27, 2017 draft report commissioned by BPD and authored by the Center for Policing Equity—an independent, non-profit, grant-funded organization—had advised that BPD policy is not comprehensive in tracking use of force by BPD officers:

Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess

“BPD departmental policy does not require the comprehensive tracking of use of force incidents. In particular, BPD policy does not require that an officer’s use of physical force be reported unless the officer used a weapon, the subject was injured, or the subject complains. As a result, incidents of physical force not involving a weapon are not comprehensively reported or tracked by BPD, and are not reflected.”<sup>1</sup>

On October 31, 2017 the Council unanimously directed the City Manager to urgently amend the BPD’s General Order U-2 governing use of force policy to address these deficiencies and to update it consistent with best practices and community concerns and to provide an update by December 2017.<sup>2</sup> The Council item incorporated various use of force best practices adopted by neighboring Bay Area Departments in the wake of the Black Lives Matter movement and police reform campaigns such as Campaign Zero. The primary elements of the item were to:

1. Enhance BPD’s use of force policy statement;
2. Create a definition of use of force;
3. Require that all uses of force be reported;
4. Categorize uses of force into levels to facilitate reporting, investigation, documentation and review requirements;
5. Require Use of Force to be captured in a manner that allows for analysis; and
6. Require that the Department prepare and submit an annual analysis report about use of force to to the Chief of Police, Police Review Commission (“PRC”) and Council.

On December 21, 2017 the Deputy City Manager provided an Off-Agenda Memo<sup>3</sup> to the Council stating that a BPD working group had formed and drafted new and revised

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<sup>1</sup> The Science of Justice: Berkeley Police Department National Justice Database City Report Center for Policing Equity Report, Center for Policing Equity, May 2018, [https://www.google.com/url?client=internal-element-cse&cx=017385055954264103894:kn5xiwd8ubm&q=https://www.cityofberkeley.info/uploadedFiles/Police\\_Review\\_Commission/Commissions/2018/Berkeley%2520Report%2520-%2520May%25202018.pdf&sa=U&ved=2ahUKEwjFveyU4\\_LpAhXKJzQIHSjFDHYQFjAAegQIAxAB&usg=AOvVaw3e931R0uxtMvplCy-AKoeV](https://www.google.com/url?client=internal-element-cse&cx=017385055954264103894:kn5xiwd8ubm&q=https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2018/Berkeley%2520Report%2520-%2520May%25202018.pdf&sa=U&ved=2ahUKEwjFveyU4_LpAhXKJzQIHSjFDHYQFjAAegQIAxAB&usg=AOvVaw3e931R0uxtMvplCy-AKoeV)

<sup>2</sup> “Direct the City Manager and the Berkeley Police Department Regarding the Berkeley Police Department’s Use of Force Policy,” Berkeley City Council, October 31, 2020, [https://www.cityofberkeley.info/Clerk/City\\_Council/2017/10\\_Oct/Documents/2017-10-31\\_Item\\_26\\_Direct\\_the\\_City\\_Manager\\_and\\_BPD\\_-\\_Rev.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2017/10_Oct/Documents/2017-10-31_Item_26_Direct_the_City_Manager_and_BPD_-_Rev.aspx)

<sup>3</sup> Update; Use of Force Policy Development, Berkeley City Manager’s Office, December 21, 2017, Office [https://www.cityofberkeley.info/uploadedFiles/Clerk/Level\\_3\\_-](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-)

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language to U-2, including:

- Language regarding the value of human life and dignity, without prejudice to anyone;
- Language regarding using de-escalation tactics and techniques which seek to minimize the need to use force and increase the likelihood of voluntary compliance;
- A definition of force;  
Expanding the threshold for reporting force, including subcategories of physical force;
- Approaches to categorizing force levels; using plain language to increase transparency;
- Posting use of force statistics on the City's Open Data Portal;
- A model report to serve as a template for an annual use of force report.

The memo also noted that “[e]xternal factors which could affect implementation of the completed policy include: necessary review from the City Attorney’s office, and the need to meet and confer with the Berkeley Police Association. Once finalized, the policy will be provided to the Police Review Commission.”

In addition, Council directed the City Manager on April 24, 2018 to convene a broad task force to create, present and execute a departmental action plan to address racial disparities in policing, including use of force.<sup>4</sup> The task force did not launch. On April 30, 2019 the Chief of Police stated his expectation that the final use of force policy would be ready for Council adoption in June 2019.<sup>5</sup> That same meeting, Council referred the task force idea and related policing disparity referrals to the Council’s Public Safety Policy Committee.<sup>6</sup>

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[\\_General/Use%20of%20Force%20Update%20Memo%20122117.pdf](#)

<sup>4</sup> Accept and Acknowledge Report from the Berkeley Police Review Commission, “To Achieve Fairness and Impartiality,” and Refer Key Recommendations to the City Manager for Policy Development and Consideration in September 2018 Report to City Council, Berkeley City Council, April 24, 2018, [https://www.cityofberkeley.info/Clerk/City\\_Council/2018/04\\_Apr/Documents/2018-04-24\\_Item\\_38b\\_Accept\\_and\\_Acknowledge\\_-\\_Rev.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2018/04_Apr/Documents/2018-04-24_Item_38b_Accept_and_Acknowledge_-_Rev.aspx)

<sup>5</sup> Referral Response: Update on Various Referrals and Recommendations Regarding Stop Data Collection, Data Analysis and Community Engagement, Berkeley City Manager, April 30, 2019, [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/04\\_Apr/Documents/2019-04-30\\_Item\\_29\\_Referral\\_Response\\_Update\\_on\\_Various.aspx](https://www.cityofberkeley.info/Clerk/City_Council/2019/04_Apr/Documents/2019-04-30_Item_29_Referral_Response_Update_on_Various.aspx)

<sup>6</sup> Annotated Agenda: April 30, 2019 Berkeley City Council Meeting, April 30, 2019, [https://www.cityofberkeley.info/Clerk/City\\_Council/2019/04\\_Apr/Documents/04-](https://www.cityofberkeley.info/Clerk/City_Council/2019/04_Apr/Documents/04-)

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On June 3, 2019 the committee recommended that the Mayor convene the task force in lieu of the City Manager.<sup>7</sup> On July 23, 2019, the Mayor announced that he would lead an ad hoc task force.<sup>8</sup> The task force convened in December 2019 and continued to meet until the COVID-19 pandemic in March.

### **C. January 2020 BPD Proposed Use of Force Policy Draft Presented to PRC**

On January 8, 2020, more than two years after the Council passed the referral, and approximately two year after the deadline Council established for presenting a final updated policy, BPD presented a proposed revised Use of Force Policy to the PRC.<sup>9</sup>

The PRC formed a subcommittee to review the updated policy and make recommendations to the Council, but by March, non-judicial PRC meetings were suspended due to the COVID-19 pandemic.

The current PRC draft represents a marked improvement from the 2017 General Order U-2 policy. For example, it enhances the Department's policy statement, includes a more expansive definition of force (including physical force), encourages de-escalation tactics, expands reporting requirements, increasing transparency and facilitating analysis, and requires annual Council reporting.

### **D. Campaign Zero's '8 Can't Wait' Use of Force Reforms**

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30\_Annotated\_Agenda\_pdf.aspx

- <sup>7</sup> Minutes June 3, 2019 Berkeley City Council Public Safety Policy Committee, <https://www.cityofberkeley.info/uploadedFiles/Clerk/2019-6-3%20Annotated%20Agenda%20-%20Public%20Safety.pdf>.
- <sup>8</sup> Referral Response: Update on Various Referrals and Recommendations Regarding Stop Data Collection, Data Analysis and Community Engagement, Berkeley City Council, July 23, 2019, [https://www.google.com/url?client=internal-element-cse&cx=017385055954264103894:kn5xiwd8ubm&q=https://www.cityofberkeley.info/Clerk/City\\_Council/2019/07\\_Jul/Documents/2019-07-23\\_Item\\_40\\_Referral\\_Response\\_Update\\_on\\_Various\\_Referrals.aspx&sa=U&ved=2ahUKEwjf5IO42fLpAhWoHzQIHd-tBfU4ChAWMAZ6BAgBEAI&usg=AOvVaw0Gkjo3kl6eqeltwmbYWinX](https://www.google.com/url?client=internal-element-cse&cx=017385055954264103894:kn5xiwd8ubm&q=https://www.cityofberkeley.info/Clerk/City_Council/2019/07_Jul/Documents/2019-07-23_Item_40_Referral_Response_Update_on_Various_Referrals.aspx&sa=U&ved=2ahUKEwjf5IO42fLpAhWoHzQIHd-tBfU4ChAWMAZ6BAgBEAI&usg=AOvVaw0Gkjo3kl6eqeltwmbYWinX)
- <sup>9</sup> January 8, 2020 Police Review Commission Packet, Berkeley Police Review Commission, January 8, 2020, [https://www.cityofberkeley.info/uploadedFiles/Police\\_Review\\_Commission/Commissions/2020/2020-01-08-prc-handouts.pdf](https://www.cityofberkeley.info/uploadedFiles/Police_Review_Commission/Commissions/2020/2020-01-08-prc-handouts.pdf)



Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess

The 8 Can't Wait campaign is a project of Campaign Zero, an organization established by Black Lives Matter activists and focused on clear policy solutions to reduce and end police deaths and other forms of police violence.<sup>10</sup> Their studies indicate that eight use of force policies are effective at decreasing police violence by up to 72%.

According to the Campaign, requiring police officers to exhaust less than lethal means before shooting or requiring comprehensive reporting each decreases police killings by 25% for each policy. In addition, prioritizing de-escalation decreases violence by 15%, and banning shooting at moving vehicles reduces police killings by 8%.

This project has enjoyed increased exposure following the deaths of George Floyd and Breona Taylor, and others by law enforcement. In a matter of days, hundreds of Berkeley residents have contacted the Mayor's office and City Council to express their support for this campaign and urging immediate adoption. These eight policies are essential reforms and align with best national policing practices.

Over the past decades, Berkeley had already adopted four of the policies:

- Ban on chokeholds and strangleholds
- Requiring a warning before shooting
- A duty to intervene
- Implementing a Use of Force Continuum

The outstanding recommendations from the 8 Can't Wait campaign that Berkeley will implement under this Urgency Resolution are as follows:

- Requiring de-escalation tactics
- Exhausting all alternatives before using lethal force
- Banning the discharge of weapons at moving vehicles
- Requiring officers to report each time they use force or threaten to use force against civilians

## **E. Final Policy**

The January 2020 BPD Revised Draft would achieve at least two additional Campaign Zero objectives, including: requiring de-escalation tactics wherever feasible and prohibiting officers from shooting at moving vehicles in instances where only the vehicle

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<sup>10</sup> 8 Can't Wait, Campaign Zero, <https://8cantwait.org/>.

Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess

itself is perceived as a threat, except for exigent circumstances such as a mass casualty vehicle event.

However, the current draft does not require that officers exhaust alternatives, including non-force and less lethal force options, before using lethal force. For example, the San Francisco Police Department's Policy Language: Section VI.G: states:

"It is the policy of this Department to use deadly force only as a last resort when reasonable alternatives have been exhausted or are not feasible to protect the safety of the public and police officers. The use of firearms and other deadly force is the most serious decision an officer may ever make. When safe and feasible under the totality of circumstances, officers shall consider other objectively reasonable force options before discharging a firearm or using other deadly force."<sup>11</sup>

Although BPD's draft before the PRC incorporates significant improvements to use of force reporting, including a requirement to report all force to include physical force, the draft provides a blanket exemption for reporting use of control holds when no pain or injury is reported. While this exemption may be appropriate when escorting arrestees to custody, it is arguably not appropriate in other situations such as when officers gain control of an alleged suspect.

In addition, the PRC draft eliminates the existing General Order U-2's existing language regarding the use of force continuum. The Council's 2017 referral explicitly highlighted the importance of retaining and further clarifying the force continuum. The continuum concept is also one of the eight Campaign Zero policy objectives: "Force continuums restrict the most severe types of force to the most extreme situations and create clear policy restrictions on the use of each police weapon and tactic."

The 2017 Council referral also requested that any force used be broadly categorized into four categories,<sup>12</sup> as is done by the Oakland and BART Police Departments, so that

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<sup>11</sup> San Francisco Police Department Use of Force Policy, [https://www.sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20\(Rav.%2012-21-16\)\\_0.pdf](https://www.sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20(Rav.%2012-21-16)_0.pdf)

<sup>12</sup> For example, categories could include:

**Level 1 Incident Parameters:**

- (a) No suspect injury or complaint of injury due to interaction with officer.
- (b) No allegation of misconduct against officer, regarding force.

Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess

the degree of force used by the department can be evaluated over time and approaches to reduce the level of force developed.

By implementing the proposed use of force amendments, the BPD would be furthering existing internal, local and national efforts to update its use of force policies, and would be acting to enhance safety of the public and the officers sworn to protect them. It is the public interest to act now to update Berkeley's use of force policy.

### FINANCIAL IMPLICATIONS

Staff time.

### ENVIRONMENTAL SUSTAINABILITY

- (c) Officer body camera was activated in a timely manner, per policy and recorded the use of force.
- (d) Officer used lesser levels of force (e.g. Control holds/pressure point application; Leverage; Grab; Bodyweight; Physical technique or tactic applied to a vulnerable area, excluding strikes [e.g., hair grab, pressure to mastoid or jaw line; and shoulder muscle grab]; Vehicle pursuit with no collision; Firearm drawn/deployed but not fired, suspect contacted)

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report

#### **Level 2 Incident Parameters:**

- (a) Would have otherwise been classified as a Level 1, except one of more of the following apply:  
Suspect injury or complaint of injury due to interaction with officer
  - (1) Suspect injury or complaint of injury due to interaction with officer.
  - (2) Allegation of misconduct against officer, regarding force.
  - (3) Officer body camera was not activated during use of force.
- (b) The use of force is Level 2 if the officer used more severe force (e.g. Takedowns, lifts and leg sweeps; Chemical Agents/Munitions [e.g., Oleoresin Capsicum, CS]; Impact weapon strikes [e.g., baton]; Use of body or body parts; Intentional pointing of a firearm at another person; Use of any other non-lethal or less-than-lethal weapon)

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report. Use of Force involving OC will be documented and reviewed additionally in a Use of Pepper Spray Report.

#### **Level 3 Incident Parameters:**

- (a) Use of firearm, officer involved shooting
- (b) Any intentional firearm discharge at a person, regardless of injury
- (c) Any unintentional firearms discharge
- (d) Any intentional impact weapon strike to the head
- (e) Any use of force investigation that is elevated to a Level 3 approved by a Watch Commander
- (f) Any force likely to cause death or serious bodily injury

An uninvolved supervisor will respond to the scene. The incident will be investigated, documented, and reviewed in adherence to General Order P-12 (See also General Order C-16).

Urgency Resolution: Directing the Police Review Commission and City Manager to Submit Revised Berkeley Police Department Use of Force Policy for Council Review and Approval Before the 2020 Summer Recess

No environmental impact.

**CONTACT**

Councilmember Kate Harrison

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Mayor Jesse Arreguín

mayor@cityofberkeley.info | 510-981-7100

**ATTACHMENTS:**

1. Resolution
2. October 31, 2017 Council Direction to the City Manager on Use of Force
3. December 21, 2017 Off-Agenda Memo
4. January 8, 2020 Use of Force Policy Revised Draft

RESOLUTION NO. ##,#### N.S.

DIRECTING THE POLICE REVIEW COMMISSION AND CITY MANAGER TO  
SUBMIT REVISED BERKELEY POLICE DEPARTMENT USE OF FORCE POLICY  
FOR COUNCIL REVIEW AND APPROVAL BEFORE THE 2020 SUMMER RECESS

WHEREAS, the recent murders of George Floyd, Breonna Taylor and Ahmaud Arbery have ignited the nation in passionate protest against police brutality and racial injustice, and across the country, citizens have protested for the past week demanding change and calling out the enduring systemic racism, white supremacy and police brutality that has defined the United States for too long; and

WHEREAS, among the more immediate demands are calls for local jurisdictions to use their power to implement reforms that restrict the prevalence of police force and the circumstances in which police can use force; and

WHEREAS, on October 31, 2017 the Council unanimously directed the City Manager to urgently amend the BPD's General Order U-2 governing use of force policy to address deficiencies and to update it consistent with best practices and community concerns; and

WHEREAS, on January 8, 2020, more than two years after the Council passed the referral, and 1 year and 10 months after the deadline Council established for presenting a final updated policy, BPD presented a proposed revised Use of Force Policy to the PRC; and

WHEREAS, the current PRC draft represents a marked improvement from the effective 2017 General Order U-2 Use of Force policy, enhancing the Department's policy statement, including a more expansive definition of force (including physical force), encouraging de-escalation tactics, expanding reporting requirements, increasing transparency and facilitating analysis, and requiring annual Council reporting; and

WHEREAS, the 8 Can't Wait campaign is a project of Campaign Zero, an organization established by Black Lives Matter activists and focused on clear policy solutions to reduce and end police deaths and other forms of police violence;

WHEREAS, the campaign's studies demonstrate that eight use of force policies are effective at decreasing police violence by up to 72%; and

WHEREAS, according to Campaign Zero, requiring police officers to exhaust less than lethal means before shooting or requiring comprehensive reporting each decreases police killings by 25% for each policy. In addition, prioritizing de-escalation decreases violence by 15%, and banning shooting at moving vehicles reduces police killings by 8%; and

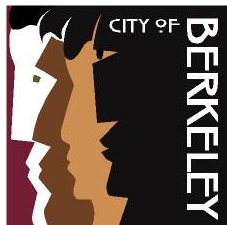
WHEREAS, the Council relied on the campaign when drafting the 2017 referral and the project has enjoyed increased exposure following the deaths of George Floyd and Breonna Taylor, and the countless others whose lives have been lost at the hands of law enforcement; and

WHEREAS, in a matter of days, hundreds of Berkeley residents have contacted the Mayor's office and City Council to express their support for this campaign and urging immediate adoption of all outstanding policies; and

NOW THEREFORE BE IT RESOLVED that the City Council endorses these essential reforms to ensure harm reduction and alignment with best practices;

BE IT FURTHER RESOLVED, that the City Council directs the Police Review Commission and City Manager to:

1. Finalize revisions to the use of force policy as referred by Council and drafted by the department for PRC review.
2. Submit revised Use of Force Policy directly to the full City Council for the Council to review and adopt before the 2020 Summer recess;
3. Incorporate revisions included the October 31, 2017 Council referral and all outstanding "8 Can't Wait" use of force policy reforms.



Kate Harrison  
Councilmember District 4

## REVISED AGENDA MATERIAL

**Meeting Date:** October 31, 2017

**Item Number:** 26

**Item Description:** Direct the City Manager and the Berkeley Police Department Regarding the Berkeley Police Department's Use of Force Policy

**Submitted by:** Councilmember Kate Harrison

1. Clarified that the item directs the City Manager and not the Berkeley Police Department.
2. Clarified that the City Manager shall present to the Council by February 27, 2018 a final version of General Order U-2.
3. Specified that prior to implementation, the revised General Order U-2 shall be submitted to the PRC.
4. Clarified that the item does not require adoption of the proposed amendments to General Order U-2 included in Attachment 1.
5. Simplified Attachment 1.



Kate Harrison  
Councilmember District 4

ACTION CALENDAR  
October 31, 2017

To: Honorable Mayor and Members of the City Council  
From: Councilmember Harrison, Mayor Arreguin, and Councilmembers Bartlett and Worthington  
Subject: Direct the City Manager ~~and the Berkeley Police Department~~ Regarding the Berkeley Police Department's Use of Force Policy

RECOMMENDATION

1. Direct the City Manager ~~and the Berkeley Police Department~~ ("BPD" or "the Department") to amend Berkeley Police Department ("BPD" or "the Department") General Order U-2: Use of Force ("General Order U-2") to:
  - a. Enhance BPD's use of force policy statement; and;
  - b. Create a definition of use of force; and
  - c. Require that all uses of force be reported; and
  - d. Categorize uses of force into levels for the purposes of facilitating the appropriate reporting, investigation, documentation and review requirements; and
  - e. Require Use of Force Reports to be captured in a manner that allows for analysis; and
  - f. Require that the Department prepare an annual analysis report relating to use of force to be submitted to the Chief of Police, Police Review Commission ("PRC") and Council.
2. Direct that the City Manager report to the Council by December 12, 2017 on the progress to date and present to the Council by February 27, 2018 a final version of General Order U-2.
- 2.3. Prior to implementation, the revised General Order U-2 shall be submitted to the PRC in accordance with BMC 3.32.090(B).

BACKGROUND



The BPD has a long record of embracing modern policing policies. A further enhancement would be to clarify the Department's use of force policies.

Specifically, the June 27, 2017 draft report commissioned by BPD and authored by CPE—an independent, non-profit, grant-funded organization—advised that BPD policy is not comprehensive in tracking use of force by BPD officers:

“BPD departmental policy does not require the comprehensive tracking of use of force incidents. In particular, BPD policy does not require that an officer's use of physical force be reported unless the officer used a weapon, the subject was injured, or the subject complains. As a result, incidents of physical force not involving a weapon are not comprehensively reported or tracked by BPD, and are not reflected.”

That same report confirmed that Hispanic and Black people in Berkeley are more likely to be subjected to the use of force by BPD. With respect to the latter group, the report noted that “Black residents of Berkeley were about six times more likely than White residents to be subjected to reported use of force.” This part of the report is not planned for revision in the final report.

Berkeley is not immune to the broader history of racial and ethnic disparities in the United States. It is incumbent upon the City to continue its efforts towards addressing and remedying ongoing instances of inequity. These issues are of particular urgency given that the City has endowed the police with the responsibility to enforce the law and keep the peace. Most critically, the police are empowered to reasonably employ lethal, less-than-lethal and non-lethal force for the purpose of achieving these ends when justified by law and city protocols and procedures. In short, the City has the means and power to dramatically affect the lives and liberties of the people within its jurisdiction. Therefore, to ensure the public's safety and liberty, the utmost prudence must be demonstrated in internal policies governing the use of force. Officers must strive to use the minimal amount of force necessary and use de-escalation techniques whenever feasible and appropriate.

Current BPD policy requires officers to submit an oral report to their supervisor in five situations relating to the use of force:

- (1) An officer discharges a firearm intentionally or unintentionally on duty (other than during training), or off-duty while acting in the capacity of a police officer.
- (2) When an officer or employee uses force that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16).
- (3) When an officer or employee uses a non-lethal weapon (e.g., Oleoresin Capsicum or baton) on a person, whether or not an injury is sustained.
- (4) When an officer or employee uses a force during a crowd situation.

- (5) When any officer or employee observes a potentially unauthorized use of force

Department supervisors are not required to report when other types of force are used.

It is necessary to ensure that the Department and City have a clear understanding of its use of force policies and how force is being used in practice. Current reporting policies are in some cases ambiguous and incomplete. Further review of BPD General Order U-2 has indicated that it could be improved with substantive and organizational amendments relating to use of force. The Council, deferring to the expertise of the BPD, is not requiring that the Department adopt the proposed amendments to General Order U-2 included in Attachment 1 of this item. Instead, Attachment 1 should serve as a template for accomplishing the broader goals of the Council and the recommendations outlined in item 1.

First, the BPD and the community would benefit from an updated policy statement regarding use of force in General Order U-2. The proposed policy statement attached to this item draws from the statements of the Bay Area Rapid Transit Police Department ("BART PD") and the Oakland Police Department ("OPD"). It also seeks to highlight BPD's commitment to valuing the protection and sanctity of human life, striving to use the minimal amount of force necessary, a requirement to de-escalate force when a lesser level of force is reasonable, increased attention to applying force to vulnerable populations and the necessity of transparency, accountability through rigorous reporting and review of all instances of the use of force, and not using force with bias, based upon: race; ethnicity or nationality; religion; sex, sexual orientation; economic status; age; cultural group; disability, or affiliation with any other similar identifiable group. While the policy statement references the importance of de-escalation, a more detailed section relating to de-escalation techniques is beyond the scope of this referral. BPD might consider referring to Section 300.2.2, De-Escalation Techniques, in BART PD's Use of Force policy.

Second, the proposed update adds a foundational definition of "Use of Force" to the definitions section of General Order U-2. The definition of force proposed here explicitly includes physical techniques and tactics, meaning force stemming from the utilization of an officer's body. While complaints about the improper use of officer hands and feet is referenced in General Order P-26 and a checkbox relating to physical force is included in the exemplar Use of Force Report attached to General Order U-2, there is no explicit reference in General Order U-2 to reportable use of an officer's body.

Third, the proposed update reorganizes and enhances the use of force reporting section. Similar to the general orders of BART PD and OPD, the proposed update requires all uses of force to be reported, and categorizes uses of force into levels for the purposes of facilitating the appropriate reporting, investigation, documentation and review, and for illustrating the force continuum. Physical force and the intentional

pointing of a weapon are explicitly referenced as a reportable uses of force. Body cameras are also referenced with the expectation that the body camera implementation will be finalized soon. If the program is not finalized by the time General Order U-2 is updated, the body camera language should be added upon implementation.

Fourth, the proposed update requires that the Use of Force Reports should be digitized and made available internally in a text-searchable format. The purpose of this provision is to encourage Department leadership to have use of force data readily available to them for analysis purposes. Analysis can rapidly inform the implementation of new policies to address disparities and other issues. In addition, the proposed update requires the Department to prepare an annual anonymized analysis report relating to use of force to be submitted to the Chief of Police, ~~Police Review Commission~~PRC and Council.

BART PD and OPD have both categorized and organized use of force into levels of intensity, clarified physical uses of force and enhanced reporting policies for the purpose of analysis. These departments have clear policies about the force continuum available to officers and the responsibility for reporting, investigating, documenting and reviewing uses of force across their respective continua. In addition, the San Francisco Police Department ("SFPD") has begun implementing more than 200 recommendations made by the Department of Justice, including those related to use of force policies. SFPD has reported in 2017 an 11% decrease in use of force incidents and an 8.6% decrease in complaints to the San Francisco Department of Police Accountability as compared to the first six months of 2016. The Council, the City Manager and the BPD would benefit from the examples of neighboring departments in seeking to improve community policing and accountability. By implementing the proposed use of force amendments, the BPD would be furthering existing internal and national efforts to update its use of force polices, and would be acting to enhance safety of the public and the officers sworn to protect them. Officers would face less confusion about the force continuum and police leadership would enjoy improved understanding of how their officers are employing force. By acting now to further update its use of force policies, the City can empower both the BPD and the community to understand how to best address use of force disparities disproportionately affecting certain racial and ethnic groups.

#### FINANCIAL IMPLICATIONS

Staff time is necessary for amending General Order U-2, and additional training will be needed to comply with these updates. The City stands to potentially benefit from fewer instances of costly litigation and personnel investigations due to the increased clarity of General Order U-2.

#### ENVIRONMENTAL SUSTAINABILITY

Direct the City Manager ~~and the Berkeley Police Department~~ Regarding the Berkeley Police Department's Use of Force Policy

CONSENT CALENDAR  
October 31, 2017

No Ecological Impact

CONTACT PERSON

Councilmember Kate Harrison, Council District 4, 510-981-7140

ATTACHMENTS

1. Proposed amendments to General Order U-2
2. Use of Force policies of the BART PD and OPD

BERKELEY POLICE DEPARTMENT

DATE ISSUED: ~~September 20, 2017~~

GENERAL ORDER U-2

SUBJECT: USE OF FORCE

PURPOSE

- 1 - The purpose of this General Order is to provide Departmental standards on the reporting and use of force. This General Order supersedes all other Orders, Regulations, and training information to the extent that they are inconsistent with this Order.

POLICY

- 2 - The Berkeley Police Department values the protection and sanctity of human life. The Department is committed to accomplishing the police objective with respect and minimal reliance on the use of force, and de-escalation tactics before resorting to force, whenever feasible.
- 3 - The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force.
- 4 - Officers must strive to use the minimal amount of force necessary. The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary, with limited information and in circumstances that are tense, uncertain and rapidly evolving.
- 5 - Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.
- 6 - Officers are required to de-escalate the force when the officer reasonably believes a lesser level or no further force is appropriate. Officers shall use de-escalation techniques whenever feasible and appropriate to potentially reduce or eliminate the need to use force; and to prevent injuries to the subject, the public and the officer(s).
- 7 - Officers and employees shall not use force with bias based upon: race; ethnicity or nationality; religion; sex, sexual orientation; economic status; age; cultural group; disability; or affiliation with any other similar identifiable group.
- 8 - Use of force against vulnerable populations (such as children, elderly, pregnant women, people with physical and mental disabilities, and people with limited English proficiency) can undermine public trust and should only be used if no other options appear reasonable or effective.
- 9 - Officers and employees shall intervene and prevent or stop the use of unreasonable force by other members. Officers and employees are prohibited from the use of unreasonable force and using force for interrogation or

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punishment.

10 - The Department recognizes that transparency and accountability in the use of force is essential to preserving the trust of the community and to maintaining professional standards. This policy therefore requires rigorous reporting and review of all instances of the use of force.

211 - Police officers may use reasonable force to (1) make an arrest, (2) prevent an escape of a suspect, (3) overcome resistance, or (4) maintain order.

(a) Under the Fourth Amendment of the United States Constitution, an officer can use reasonable force when doing so is reasonable under the totality of the circumstances as they appear through the eyes of the officer. Circumstances to be considered include the immediacy and severity of a threat to the safety of the officer or others, the severity of the crime involved, and whether a suspect is fleeing or resisting.

312 - In deciding what type of reasonable force to use, officers and employees must use sound judgment and their training to assess the degree of threat in a given situation, and to determine what Departmentally authorized force techniques or weapons will bring the situation under control in a reasonable manner.

(a) The Department uses a “use of force continuum” that refers to the concept that there are reasonable responses for every threat an officer faces in a hostile situation. The “spoked wheel” is one visual concept of the various options that an officer should consider in a threatening situation.

(b) The force utilized need not be sequential (e.g., gradual or preceded by attempts at lower levels of force) if those lower levels are not appropriate to the threat.

DEFINITIONS

13 - Use of Force: The application of physical techniques or tactics, vehicles, chemical agents or weapons to another person.

414 - Lethal Force: Any use of force that creates a substantial risk of causing death or serious bodily injury.

515 - Less-Than-Lethal Force: Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options.

(a) Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.

616 - Non-Lethal Force: Any use of force other than lethal force or less-than-

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lethal force.

~~717~~ - Officer (or) Police Officer: Any sworn peace officer.

~~818~~ - Authorized Employee: Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.

~~919~~ - Employee: Any non-sworn employee of the Berkeley Police Department, including those deemed "authorized employees."

~~4020~~ - Deploy:

(a) With respect to less-than-lethal munitions, removal of a launcher, projectile or other device from its storage container for the purpose of operational use.

(b) With respect to chemical agents and smoke, removal of a canister or delivery device from its storage container for the purpose of operational use.

~~4121~~ - Use:

(a) With respect to less-than-lethal munitions, to discharge a less-than-lethal munition.

(b) With respect to chemical agents and smoke, to discharge the contents of a canister or delivery device.

PROCEDURES

Use of Lethal Force

~~4222~~ - Officers shall not discharge firearms or use other lethal force in connection with police duty, except in the following circumstances:

(a) When the officer reasonably believes that doing so is necessary to protect the officer or others from death or serious bodily injury, and, where feasible, some warning has been given.

(b) To apprehend a suspected fleeing felon:

(1) When necessary to prevent escape, and

(2) When the officer has probable cause to believe that the suspected fleeing felon poses a significant threat of death or serious bodily injury to the officer or others, and

(3) Where feasible, some warning has been given.

(c) During other police duty:

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- (1) In supervised Department training sessions at an approved range, or other site.
- (2) To destroy an animal that represents a threat to public safety, or as a humanitarian measure where the animal is seriously injured. If possible, supervisory approval should be obtained prior to using lethal force to destroy an animal.

1323 - Officers shall not discharge firearms or use other lethal force in connection with police duty, except in the following circumstances:

Use of Vehicles

1424 - Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except in the following circumstances:

- (a) When the officer reasonably believes that doing so is necessary to protect the officer or others from death or serious bodily injury, and, where feasible, some warning has been given.
- (b) To apprehend a suspected fleeing felon:
  - (1) When necessary to prevent escape, and
  - (2) When the officer has probable cause to believe that the suspected fleeing felon poses a significant threat of death or serious bodily injury to the officer or others, and
  - (3) Where feasible, some warning has been given.

Deployment and Use of Less-Than-Lethal Force

1525 - Less-than-lethal munitions shall only be deployed and used by trained officers authorized by the Chief of Police.

1626 - Except during authorized training programs, less-than-lethal force shall be deployed only at the direction of a sergeant or command officer, or the Incident Commander in a crowd situation.

1727 - Less-than-lethal force shall only be used in the following situations, and, where feasible, after some warning has been given:

- (a) When an act of violence is occurring, or is about to occur;
- (b) To overcome the resistance of a physically combative person, or to gain compliance from a non-compliant person reasonably believed to be armed;



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- (c) To deter a person who is reasonably believed to be armed and is threatening to harm him/herself, another person, or an officer; or,
- (d) To resolve a potentially violent incident not otherwise described above, when deemed reasonable by the authorizing sergeant or commander.

1828 - When practical, approval for the deployment and use of less-than-lethal force will be obtained from the Patrol Division Watch Commander. If there is no Watch Commander on duty, deployment authorization will be requested from the Duty Command Officer (DCO).

- (a) Prior to deployment, efforts should be made to ensure an appropriate medical response is available.
- (b) In the event exigent circumstances preclude prior command approval, the supervisor authorizing less-than-lethal force deployment shall notify the Watch Commander, or in his/her absence the DCO, as soon as practical.

1929 - In crowd situations, less-than-lethal force and/or chemical agents shall not be used without the prior approval of the Chief of Police, or his/her designee, unless exigent circumstances prevent the request from being made and the delay would likely risk injury to citizens or police personnel (e.g., rocks, bottles, or other projectiles are being thrown and immediate crowd dispersal is necessary).

- (a) In the event immediate use is necessary, notification to the Chief of Police, or his/her designee, should be made as soon as possible after the deployment.
- (b) In the event a use of force as described in Section 23 of this Order occurs during an unusual occurrence as described in General Order U-4, the officer shall prepare a supplemental report as soon as practical following the incident.
- (c) Each officer shall include in the report, to the extent possible, specific information regarding each use of force, e.g., the reason for the use of force, location, description of the individual(s) upon whom force was used, type of force used, etc.
- (d) Officers deploying pepper spray in a crowd situation shall attempt to limit collateral exposure to non-involved parties. Where there is probable cause to arrest for a crime, officers shall prioritize where practical the arrest of individuals upon whom pepper spray has been deployed.

Use of Non-Lethal Force

2030 - When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use reasonable approved non-lethal force techniques

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and weapons in the following circumstances:

- (a) To protect themselves or another person from physical injury;
- (b) To restrain or subdue a resistant individual; or
- (c) To bring an unlawful situation safely and effectively under control.

Prohibited Uses of Force

2431 - The following uses of force are prohibited:

- (a) Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., dated February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."
  - (1) The term bar-arm refers to a variety of techniques. As defined in the City Council Resolution, "bar-arm hold" refers to *any* use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.
- (b) On Sept. 12, 2017, the Berkeley City Council re-affirmed and further amended the Council's policy regarding the use of pepper spray as such use relates to crowd control, expression of First Amendment speech, and addressing acts of violence by specific individuals within a crowd.
  - (1) Officers shall not use pepper spray as a crowd control technique to disperse or move a crowd. Oleoresin Capsicum (pepper spray) shall not be directed against a person or persons who are engaged in legal speech or other expression that is protected by the First Amendment, nor upon those committing unlawful acts by non-violent or passive resistant means, (e.g. sitting or lying down to block a street or doorway).
- (c) Deployment of less-than-lethal munitions from a shotgun is prohibited.

Provision of Medical Attention

2232 - When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall ensure that the subject receives appropriate medical care. (See also General Order

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A-17).

Unauthorized Use of Force / Intervention and Reporting

2333 - When an officer or employee witnesses any other officer or employee of this Department, or of any other law enforcement agency, use force that he or she believes is unauthorized, he or she shall do the following:

- (a) If the witness employee is a sworn officer, he or she shall immediately take reasonable action to attempt to mitigate such use of force. This may include verbal intervention or, if appropriate, physical intervention.
  - (1) A sworn officer's failure to act may potentially expose him/her to criminal charges and/or civil liability.
- (b) Any officer or employee who observes a potentially unauthorized use of force shall make an oral report to an on-duty sergeant or a command officer at the first opportunity.

USE OF FORCE REPORTING, INVESTIGATION, DOCUMENTATION  
AND REVIEW

Use of Force / Reporting Requirements

34 - Personnel shall notify his/her supervisor immediately or as soon as practical, of any use of force, allegation of a use of force, or an allegation of unreasonable force.

35 - All uses of force must be documented in a police report and reviewed by an on-duty sergeant or command officer who was not directly involved in the incident. The following categories and parameters will explain levels of force and the respective reporting, investigation, documentation, and review requirements. Incidents will be categorized as Level 1, Level 2, or Level 3. Data on each level of use of force shall be entered into the Use of Force Report and the BPD's database.

Use of Force / Level 1

36 - Level 1 Incident Parameters:

- (a) No suspect injury or complaint of injury due to interaction with officer.
- (b) No allegation of misconduct against officer, regarding force.
- (c) Officer body camera was activated in a timely manner, per policy and recorded the use of force.

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(d) Officer used lesser levels of force.<sup>1</sup>

37 - An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report.

Use of Force / Level 2

38 - Level 2 Incident Parameters:

(a) Would have otherwise been classified as a Level 1, except one of more of the following apply:

(1) Suspect injury or complaint of injury due to interaction with officer.

(2) Allegation of misconduct against officer, regarding force.

(3) Officer body camera was not activated during use of force.

(b) The use of force is Level 2 if the officer used more severe force.<sup>2</sup>

39 - An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report. Use of Force involving OC will be documented and reviewed additionally in a Use of Pepper Spray Report.

Use of Force / Level 3

40 - Level 3 Incident Parameters:

(a) Use of firearm, officer involved shooting

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<sup>1</sup> For example, any of the following force options were used:

(1) Control holds/pressure point application

(2) Leverage

(3) Grab

(4) Bodyweight

(5) Physical technique or tactic applied to a vulnerable area, excluding strikes (e.g., hair grab, pressure to mastoid or jaw line; and shoulder muscle grab)

(6) Vehicle pursuit with no collision

(7) Firearm drawn/deployed but not fired, suspect contacted

<sup>2</sup> For example, any of the following force options were used:

(1) Takedowns, lifts and leg sweeps

(2) Chemical Agents/Munitions (e.g., Oleoresin Capsicum, CS)

(3) Impact weapon strikes (e.g., baton)

(4) Use of body or body parts

(5) Intentional pointing of a firearm at another person

(6) Use of any other non-lethal or less-than-lethal weapon

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(b) Any intentional firearm discharge at a person, regardless of injury

(c) Any unintentional firearms discharge

(d) Any intentional impact weapon strike to the head

(e) Any use of force investigation that is elevated to a Level 3 approved by a Watch Commander

(f) Any force likely to cause death or serious bodily injury

41 - An uninvolved supervisor will respond to the scene. The incident will be investigated, documented, and reviewed in adherence to General Order P-12 (See also General Order C-16).

2442 - Any officer or employee who uses force shall, as soon as practical, make an oral report to an on-duty sergeant or command officer in the following four situations:

- (a) When an officer discharges a firearm (intentional or unintentional) while on duty, except during a supervised training session.
- (b) When an officer discharges a firearm while off-duty pursuant to his or her authority as a law enforcement officer.
- (c) When an officer or employee uses force that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16)
- (d) When an officer or employee uses a non-lethal *weapon* (e.g., Oleoresin Capsicum or baton) on a person, whether or not an injury is sustained

2543 - The officer or employee must also complete a police or incident report in any of the above four situations.

2644 - Whenever an officer or employee uses Oleoresin Capsicum (pepper spray), he or she must also complete a "Use of Pepper Spray Report" form. (See Training and Information Bulletin #216 for detailed instructions in completing this form).

Use of Force / Supervisor Responsibilities

45 - A supervisor or commander involved in a use of force incident shall not investigate the incident or review for approval the Use of Force Report.

2746 - A sergeant shall immediately be assigned and shall respond to the scene in the following four situations:

- (a) When an officer discharges a firearm (intentional or unintentional) while on

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duty, except during a supervised training session.

- (b) When an officer discharges a firearm while off-duty pursuant to his or her authority as a law enforcement officer.
- (c) When an officer or employee uses force (including, but not limited to, a non-lethal weapon) that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16)
- (d) When an officer or employee reports a use of force by another officer or employee of the Department, or of any other law enforcement agency, that he or she believes is unauthorized.

2847 - A supervisor shall complete a Use of Force Report in any of the above four situations.

- (a) A supervisor shall complete a Use of Force Report whenever an officer or employee uses a non-lethal weapon on a person, even if no injury results.
- (b) The supervisor shall attach copies of all police reports relating to the incident to the Use of Force Report. (See Use of Force Report form at the end of this General Order)

48 - The supervisor who completes the Use of Force Report shall route the Use of Force Report (with attached police reports) and/or Use of Pepper Spray Report forms to the Division Captain through the chain of command.

Use of Force / Administrative Review

2949 - The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings.

- (a) The Chief of Police may convene a Review Board (as outlined in General Order R-3) instead of utilizing Division Captain Review.

3050 - The Chief of Police will make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.

3151 - Any determination concerning the propriety of force used will be based on facts and the information available to the officer at the time the force was employed, and not upon information gained after the fact.

52 - All Use of Force Reports will be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; and/or, 3) require

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revision or additional training.

53 - Use of Force Reports shall be made available internally in a digital format.

54 - At least annually, the office of the Chief of Police should prepare an analysis report on use of force incidents. The report should be submitted to the Chief of Police, the City Council, and the Police Review Commission. The report should not contain the names of officers, suspects or case numbers, and should include:

(a) An analysis of use of force incidents with details of the race and ethnicity of the individual impacted, location and type of force used.

(b) The identification of any trends in the use of force by members.

(c) Training needs recommendations.

(d) Equipment needs recommendations.

(e) Policy revision recommendations

55 - Officers will receive annual (at a minimum) training on the policy outlined in General Order U-2 and demonstrate their knowledge and understanding.

3256 - Use of Force Reports will be held in file for five (5) years and then purged, unless needed for additional administrative action.

SPECIAL PROCEDURES / DEATHS AND SERIOUS BODILY INJURY

3357 - In addition to the above, the Departmental response to incidents in which an officer uses force that results in death or a serious bodily injury shall be as follows:

(a) The officer shall be placed on administrative leave as outlined in Police Regulation 325: " ... If any person is seriously injured or killed as a result of an officer's actions, including the discharging of a firearm, such officer shall be placed on administrative leave for a period of time, as determined by the Chief of Police, depending upon the circumstances of the situation. The officer(s) shall not return to regular duties until he/she meets with a mental health professional."

(b) The Department shall conduct both an administrative and criminal investigation of the incident as outlined in General Order P-12 (Police-Involved Shootings and Fatal or Serious Injury Incidents); and a Review Board shall be convened as described in General Order R-3.

References: *Tennessee v. Garner* (1986) 471 U.S. 1  
*Graham v. Connor* (1989) 490 U.S. 386

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*Doerle v. Rutherford* (9<sup>th</sup> Cir. 2001) 272 F.3d 1272  
California Penal Code §§196, 197, 835, 835(a), 836, 836.5, and 843  
General Orders A-17, C-16, C-64, F-2, P-12, P-26. R-3 and U-4  
Police Regulations 202, 318, 321, 322, 323, 324, 325 and 332  
Training and Information Bulletin 216  
Lethal and Non-Lethal Force Manual  
Uniform and Equipment Manual  
City of Berkeley Council Resolution No. 52,605 – N.S. (2/14/85),  
“Prohibiting use of ‘chokehold’ for law enforcement  
purposes in the City of Berkeley”  
National Tactical Officers Association, General Policy Statement  
for Less-Than-Lethal Impact Projectiles (11/22/2002)



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EXEMPLAR

BERKELEY POLICE DEPARTMENT  
USE OF FORCE REPORT

This report is to be completed by an on-duty supervisor per General Order U-2 if:  
(1) Use of any force results in injury or death to a person; (2) Non-lethal weapons  
(OC/baton) or less-than-lethal munitions are used on a person; ~~or~~(3) An officer  
discharges a firearm intentionally or unintentionally on duty (other than during  
training), or off-duty while acting in the capacity of a police officer.; or (4) Use of any  
force meeting the parameters of a Level 1, Level 2 or Level 3 use of force.

Date: \_\_\_\_\_

To: Chief of Police via Chain of Command

From: \_\_\_\_\_

Subject: USE OF FORCE REVIEW

Refer to Case Number(s): \_\_\_\_\_

Date / Time of Incident: \_\_\_\_\_

Location of Incident: \_\_\_\_\_

Nature of Incident: \_\_\_\_\_

Officer(s)/Employee(s) Involved: \_\_\_\_\_

Type of Force used:       Physical                       Baton                       O.C.  
    Firearm                       Less-than-lethal       Other

Level of Force used:       Level 1                       Level 2                       Level 3

Was Officer or Police Employee injured?       Yes                       No

If yes, nature of injuries: \_\_\_\_\_

Medical treatment required: BFD Response -  Yes                       No

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Was a citizen(s) injured during this incident?  Yes  No

If "yes," nature of injuries: \_\_\_\_\_

\_\_\_\_\_

Medical treatment required: BFD Response -  Yes  No

\_\_\_\_\_

\_\_\_\_\_

Investigator(s) and Identification Technician who responded, if any:

\_\_\_\_\_

Were photographs taken?  Yes  No

Summary of actions of Officer(s) involved: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Supervisor's Comments:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Division Captain Recommendation:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Chief of Police (*Signature*)

\_\_\_\_\_  
(*Date*)

- Findings:
- Within Policy
  - Referred for Administrative Action/Investigation

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SUBJECT: USE OF FORCE

PURPOSE

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- 2 - The Berkeley Police Department values the protection and sanctity of human life. The Department is committed to accomplishing the police objective with respect and minimal reliance on the use of force, and de-escalation tactics before resorting to force, whenever feasible.
- 3 - The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force.
- 4 - Officers must strive to use the minimal amount of force necessary. The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary, with limited information and in circumstances that are tense, uncertain and rapidly evolving.
- 5 - Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.
- 6 - Officers are required to de-escalate the force when the officer reasonably believes a lesser level or no further force is appropriate. Officers shall use de-escalation techniques whenever feasible and appropriate to potentially reduce or eliminate the need to use force; and to prevent injuries to the subject, the public and the officer(s).
- 7 - Officers and employees shall not use force with bias based upon: race; ethnicity or nationality; religion; sex, sexual orientation; economic status; age; cultural group; disability; or affiliation with any other similar identifiable group.
- 8 - Use of force against vulnerable populations (such as children, elderly, pregnant women, people with physical and mental disabilities, and people with limited English proficiency) can undermine public trust and should only be used if no other options appear reasonable or effective.
- 9 - Officers and employees shall intervene and prevent or stop the use of unreasonable force by other members. Officers and employees are prohibited from the use of unreasonable force and using force for interrogation or

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punishment.

- 10 - The Department recognizes that transparency and accountability in the use of force is essential to preserving the trust of the community and to maintaining professional standards. This policy therefore requires rigorous reporting and review of all instances of the use of force.
- 11 - Police officers may use reasonable force to (1) make an arrest, (2) prevent an escape of a suspect, (3) overcome resistance, or (4) maintain order.
  - (a) Under the Fourth Amendment of the United States Constitution, an officer can use reasonable force when doing so is reasonable under the totality of the circumstances as they appear through the eyes of the officer. Circumstances to be considered include the immediacy and severity of a threat to the safety of the officer or others, the severity of the crime involved, and whether a suspect is fleeing or resisting.
- 12 - In deciding what type of reasonable force to use, officers and employees must use sound judgment and their training to assess the degree of threat in a given situation, and to determine what Departmentally authorized force techniques or weapons will bring the situation under control in a reasonable manner.
  - (a) The Department uses a “use of force continuum” that refers to the concept that there are reasonable responses for every threat an officer faces in a hostile situation. The “spoked wheel” is one visual concept of the various options that an officer should consider in a threatening situation.
  - (b) The force utilized need not be sequential (e.g., gradual or preceded by attempts at lower levels of force) if those lower levels are not appropriate to the threat.

DEFINITIONS

- 13 - Use of Force: The application of physical techniques or tactics, vehicles, chemical agents or weapons to another person.
- 14 - Lethal Force: Any use of force that creates a substantial risk of causing death or serious bodily injury.
- 15 - Less-Than-Lethal Force: Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options.
  - (a) Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.
- 16 - Non-Lethal Force: Any use of force other than lethal force or less-than-lethal force.

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- 17 - Officer (or) Police Officer: Any sworn peace officer.
- 18 - Authorized Employee: Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.
- 19 - Employee: Any non-sworn employee of the Berkeley Police Department, including those deemed "authorized employees."
- 20 - Deploy:
  - (a) With respect to less-than-lethal munitions, removal of a launcher, projectile or other device from its storage container for the purpose of operational use.
  - (b) With respect to chemical agents and smoke, removal of a canister or delivery device from its storage container for the purpose of operational use.
- 21 - Use:
  - (a) With respect to less-than-lethal munitions, to discharge a less-than-lethal munition.
  - (b) With respect to chemical agents and smoke, to discharge the contents of a canister or delivery device.

PROCEDURES

Use of Lethal Force

- 22 - Officers shall not discharge firearms or use other lethal force in connection with police duty, except in the following circumstances:
  - (a) When the officer reasonably believes that doing so is necessary to protect the officer or others from death or serious bodily injury, and, where feasible, some warning has been given.
  - (b) To apprehend a suspected fleeing felon:
    - (1) When necessary to prevent escape, and
    - (2) When the officer has probable cause to believe that the suspected fleeing felon poses a significant threat of death or serious bodily injury to the officer or others, and
    - (3) Where feasible, some warning has been given.
  - (c) During other police duty:
    - (1) In supervised Department training sessions at an approved range,

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or other site.

- (2) To destroy an animal that represents a threat to public safety, or as a humanitarian measure where the animal is seriously injured. If possible, supervisory approval should be obtained prior to using lethal force to destroy an animal.

- 23 - Officers shall not discharge firearms or use other lethal force in connection with police duty, except in the following circumstances:

Use of Vehicles

- 24 - Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except in the following circumstances:

- (a) When the officer reasonably believes that doing so is necessary to protect the officer or others from death or serious bodily injury, and, where feasible, some warning has been given.

- (b) To apprehend a suspected fleeing felon:

- (1) When necessary to prevent escape, and
- (2) When the officer has probable cause to believe that the suspected fleeing felon poses a significant threat of death or serious bodily injury to the officer or others, and
- (3) Where feasible, some warning has been given.

Deployment and Use of Less-Than-Lethal Force

- 25 - Less-than-lethal munitions shall only be deployed and used by trained officers authorized by the Chief of Police.

- 26 - Except during authorized training programs, less-than-lethal force shall be deployed only at the direction of a sergeant or command officer, or the Incident Commander in a crowd situation.

- 27 - Less-than-lethal force shall only be used in the following situations, and, where feasible, after some warning has been given:

- (a) When an act of violence is occurring, or is about to occur;
- (b) To overcome the resistance of a physically combative person, or to gain compliance from a non-compliant person reasonably believed to be armed;
- (c) To deter a person who is reasonably believed to be armed and is

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threatening to harm him/herself, another person, or an officer; or,

- (d) To resolve a potentially violent incident not otherwise described above, when deemed reasonable by the authorizing sergeant or commander.
- 28 - When practical, approval for the deployment and use of less-than-lethal force will be obtained from the Patrol Division Watch Commander. If there is no Watch Commander on duty, deployment authorization will be requested from the Duty Command Officer (DCO).
- (a) Prior to deployment, efforts should be made to ensure an appropriate medical response is available.
  - (b) In the event exigent circumstances preclude prior command approval, the supervisor authorizing less-than-lethal force deployment shall notify the Watch Commander, or in his/her absence the DCO, as soon as practical.
- 29 - In crowd situations, less-than-lethal force and/or chemical agents shall not be used without the prior approval of the Chief of Police, or his/her designee, unless exigent circumstances prevent the request from being made and the delay would likely risk injury to citizens or police personnel (e.g., rocks, bottles, or other projectiles are being thrown and immediate crowd dispersal is necessary).
- (a) In the event immediate use is necessary, notification to the Chief of Police, or his/her designee, should be made as soon as possible after the deployment.
  - (b) In the event a use of force as described in Section 23 of this Order occurs during an unusual occurrence as described in General Order U-4, the officer shall prepare a supplemental report as soon as practical following the incident.
  - (c) Each officer shall include in the report, to the extent possible, specific information regarding each use of force, e.g., the reason for the use of force, location, description of the individual(s) upon whom force was used, type of force used, etc.
  - (d) Officers deploying pepper spray in a crowd situation shall attempt to limit collateral exposure to non-involved parties. Where there is probable cause to arrest for a crime, officers shall prioritize where practical the arrest of individuals upon whom pepper spray has been deployed.

Use of Non-Lethal Force

- 30 - When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use reasonable approved non-lethal force techniques and weapons in the following circumstances:

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- (a) To protect themselves or another person from physical injury;
- (b) To restrain or subdue a resistant individual; or
- (c) To bring an unlawful situation safely and effectively under control.

Prohibited Uses of Force

31 - The following uses of force are prohibited:

- (a) Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., dated February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."
  - (1) The term bar-arm refers to a variety of techniques. As defined in the City Council Resolution, "bar-arm hold" refers to *any* use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.
- (b) On Sept. 12, 2017, the Berkeley City Council re-affirmed and further amended the Council's policy regarding the use of pepper spray as such use relates to crowd control, expression of First Amendment speech, and addressing acts of violence by specific individuals within a crowd.
  - (1) Officers shall not use pepper spray as a crowd control technique to disperse or move a crowd. Oleoresin Capsicum (pepper spray) shall not be directed against a person or persons who are engaged in legal speech or other expression that is protected by the First Amendment, nor upon those committing unlawful acts by non-violent or passive resistant means, (e.g. sitting or lying down to block a street or doorway).
- (c) Deployment of less-than-lethal munitions from a shotgun is prohibited.

Provision of Medical Attention

32 - When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall ensure that the subject receives appropriate medical care. (See also General Order A-17).

Unauthorized Use of Force / Intervention and Reporting



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- 33 - When an officer or employee witnesses any other officer or employee of this Department, or of any other law enforcement agency, use force that he or she believes is unauthorized, he or she shall do the following:
- (a) If the witness employee is a sworn officer, he or she shall immediately take reasonable action to attempt to mitigate such use of force. This may include verbal intervention or, if appropriate, physical intervention.
    - (1) A sworn officer's failure to act may potentially expose him/her to criminal charges and/or civil liability.
  - (b) Any officer or employee who observes a potentially unauthorized use of force shall make an oral report to an on-duty sergeant or a command officer at the first opportunity.

USE OF FORCE REPORTING, INVESTIGATION, DOCUMENTATION  
AND REVIEW

Use of Force / Reporting Requirements

- 34 - Personnel shall notify his/her supervisor immediately or as soon as practical, of any use of force, allegation of a use of force, or an allegation of unreasonable force.
- 35 - All uses of force must be documented in a police report and reviewed by an on-duty sergeant or command officer who was not directly involved in the incident. The following categories and parameters will explain levels of force and the respective reporting, investigation, documentation, and review requirements. Incidents will be categorized as Level 1, Level 2, or Level 3. Data on each level of use of force shall be entered into the Use of Force Report and the BPD's database.

Use of Force / Level 1

- 36 - Level 1 Incident Parameters:
- (a) No suspect injury or complaint of injury due to interaction with officer.
  - (b) No allegation of misconduct against officer, regarding force.
  - (c) Officer body camera was activated in a timely manner, per policy and recorded the use of force.
  - (d) Officer used lesser levels of force.<sup>1</sup>

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<sup>1</sup> For example, any of the following force options were used:

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37 - An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report.

Use of Force / Level 2

38 - Level 2 Incident Parameters:

(a) Would have otherwise been classified as a Level 1, except one of more of the following apply:

- (1) Suspect injury or complaint of injury due to interaction with officer.
- (2) Allegation of misconduct against officer, regarding force.
- (3) Officer body camera was not activated during use of force.

(b) The use of force is Level 2 if the officer used more severe force.<sup>2</sup>

39 - An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation and Report. Use of Force involving OC will be documented and reviewed additionally in a Use of Pepper Spray Report.

Use of Force / Level 3

40 - Level 3 Incident Parameters:

- (a) Use of firearm, officer involved shooting
- (b) Any intentional firearm discharge at a person, regardless of injury
- (c) Any unintentional firearms discharge

- 
- (1) Control holds/pressure point application
  - (2) Leverage
  - (3) Grab
  - (4) Bodyweight
  - (5) Physical technique or tactic applied to a vulnerable area, excluding strikes (e.g., hair grab, pressure to mastoid or jaw line; and shoulder muscle grab)
  - (6) Vehicle pursuit with no collision
  - (7) Firearm drawn/deployed but not fired, suspect contacted

<sup>2</sup> For example, any of the following force options were used:

- (1) Takedowns, lifts and leg sweeps
- (2) Chemical Agents/Munitions (e.g., Oleoresin Capsicum, CS)
- (3) Impact weapon strikes (e.g., baton)
- (4) Use of body or body parts
- (5) Intentional pointing of a firearm at another person
- (6) Use of any other non-lethal or less-than-lethal weapon

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- (d) Any intentional impact weapon strike to the head
  - (e) Any use of force investigation that is elevated to a Level 3 approved by a Watch Commander
  - (f) Any force likely to cause death or serious bodily injury
- 41 - An uninvolved supervisor will respond to the scene. The incident will be investigated, documented, and reviewed in adherence to General Order P-12 (See also General Order C-16).
- 42 - Any officer or employee who uses force shall, as soon as practical, make an oral report to an on-duty sergeant or command officer in the following four situations:
- (a) When an officer discharges a firearm (intentional or unintentional) while on duty, except during a supervised training session.
  - (b) When an officer discharges a firearm while off-duty pursuant to his or her authority as a law enforcement officer.
  - (c) When an officer or employee uses force that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16)
  - (d) When an officer or employee uses a non-lethal *weapon* (e.g., Oleoresin Capsicum or baton) on a person, whether or not an injury is sustained
- 43 - The officer or employee must also complete a police or incident report in any of the above four situations.
- 44 - Whenever an officer or employee uses Oleoresin Capsicum (pepper spray), he or she must also complete a "Use of Pepper Spray Report" form. (See Training and Information Bulletin #216 for detailed instructions in completing this form).

Use of Force / Supervisor Responsibilities

- 45 - A supervisor or commander involved in a use of force incident shall not investigate the incident or review for approval the Use of Force Report.
- 46 - A sergeant shall immediately be assigned and shall respond to the scene in the following four situations:
- (a) When an officer discharges a firearm (intentional or unintentional) while on duty, except during a supervised training session.
  - (b) When an officer discharges a firearm while off-duty pursuant to his or her authority as a law enforcement officer.

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- (c) When an officer or employee uses force (including, but not limited to, a non-lethal weapon) that results in death or injury, or when a subject complains that an injury has been inflicted. (See also General Order C-16)
  - (d) When an officer or employee reports a use of force by another officer or employee of the Department, or of any other law enforcement agency, that he or she believes is unauthorized.
- 47 - A supervisor shall complete a Use of Force Report in any of the above four situations.
- (a) A supervisor shall complete a Use of Force Report whenever an officer or employee uses a non-lethal weapon on a person, even if no injury results.
  - (b) The supervisor shall attach copies of all police reports relating to the incident to the Use of Force Report. (See Use of Force Report form at the end of this General Order)
- 48 - The supervisor who completes the Use of Force Report shall route the Use of Force Report (with attached police reports) and/or Use of Pepper Spray Report forms to the Division Captain through the chain of command.

Use of Force / Administrative Review

- 49 - The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings.
- (a) The Chief of Police may convene a Review Board (as outlined in General Order R-3) instead of utilizing Division Captain Review.
- 50 - The Chief of Police will make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.
- 51 - Any determination concerning the propriety of force used will be based on facts and the information available to the officer at the time the force was employed, and not upon information gained after the fact.
- 52 - All Use of Force Reports will be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; and/or, 3) require revision or additional training.
- 53 - Use of Force Reports shall be made available internally in a digital format.
- 54 - At least annually, the office of the Chief of Police should prepare an analysis

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report on use of force incidents. The report should be submitted to the Chief of Police, the City Council, and the Police Review Commission. The report should not contain the names of officers, suspects or case numbers, and should include:

- (a) An analysis of use of force incidents with details of the race and ethnicity of the individual impacted, location and type of force used.
  - (b) The identification of any trends in the use of force by members.
  - (c) Training needs recommendations.
  - (d) Equipment needs recommendations.
  - (e) Policy revision recommendations
- 55 - Officers will receive annual (at a minimum) training on the policy outlined in General Order U-2 and demonstrate their knowledge and understanding.
- 56 - Use of Force Reports will be held in file for five (5) years and then purged, unless needed for additional administrative action.

SPECIAL PROCEDURES / DEATHS AND SERIOUS BODILY INJURY

- 57 - In addition to the above, the Departmental response to incidents in which an officer uses force that results in death or a serious bodily injury shall be as follows:
- (a) The officer shall be placed on administrative leave as outlined in Police Regulation 325: " ... If any person is seriously injured or killed as a result of an officer's actions, including the discharging of a firearm, such officer shall be placed on administrative leave for a period of time, as determined by the Chief of Police, depending upon the circumstances of the situation. The officer(s) shall not return to regular duties until he/she meets with a mental health professional."
  - (b) The Department shall conduct both an administrative and criminal investigation of the incident as outlined in General Order P-12 (Police-Involved Shootings and Fatal or Serious Injury Incidents); and a Review Board shall be convened as described in General Order R-3.

References: *Tennessee v. Garner* (1986) 471 U.S. 1  
*Graham v. Connor* (1989) 490 U.S. 386  
*Doerle v. Rutherford* (9<sup>th</sup> Cir. 2001) 272 F.3d 1272  
California Penal Code §§196, 197, 835, 835(a), 836, 836.5, and 843  
General Orders A-17, C-16, C-64, F-2, P-12, P-26. R-3 and U-4  
Police Regulations 202, 318, 321, 322, 323, 324, 325 and 332

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Training and Information Bulletin 216  
Lethal and Non-Lethal Force Manual  
Uniform and Equipment Manual  
City of Berkeley Council Resolution No. 52,605 – N.S. (2/14/85),  
“Prohibiting use of ‘chokehold’ for law enforcement  
purposes in the City of Berkeley”  
National Tactical Officers Association, General Policy Statement  
for Less-Than-Lethal Impact Projectiles (11/22/2002)

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EXEMPLAR

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USE OF FORCE REPORT

This report is to be completed by an on-duty supervisor per General Order U-2 if: (1) Use of any force results in injury or death to a person; (2) Non-lethal weapons (OC/baton) or less-than-lethal munitions are used on a person; (3) An officer discharges a firearm intentionally or unintentionally on duty (other than during training), or off-duty while acting in the capacity of a police officer; or (4) Use of any force meeting the parameters of a Level 1, Level 2 or Level 3 use of force.

Date: \_\_\_\_\_

To: Chief of Police via Chain of Command

From: \_\_\_\_\_

Subject: USE OF FORCE REVIEW

Refer to Case Number(s): \_\_\_\_\_

Date / Time of Incident: \_\_\_\_\_

Location of Incident: \_\_\_\_\_

Nature of Incident: \_\_\_\_\_

Officer(s)/Employee(s) Involved: \_\_\_\_\_

Type of Force used:     Physical                     Baton                     O.C.  
                                   Firearm                     Less-than-lethal     Other

Level of Force used:     Level 1                     Level 2                     Level 3

Was Officer or Police Employee injured?     Yes                     No

If yes, nature of injuries: \_\_\_\_\_

Medical treatment required: BFD Response -  Yes                     No

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Was a citizen(s) injured during this incident?  Yes  No

If "yes," nature of injuries: \_\_\_\_\_

\_\_\_\_\_

Medical treatment required: BFD Response -  Yes  No

\_\_\_\_\_

\_\_\_\_\_

Investigator(s) and Identification Technician who responded, if any:

\_\_\_\_\_

Were photographs taken?  Yes  No

Summary of actions of Officer(s) involved: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Supervisor's Comments:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Division Captain Recommendation:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Chief of Police (*Signature*)

\_\_\_\_\_  
(*Date*)

Findings:

- Within Policy
- Referred for Administrative Action/Investigation



## Use of Force

### 300.1 PURPOSE AND SCOPE

The BART Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to protect and serve. The Department is committed to accomplishing this mission with respect and minimal reliance on the use of force by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force, whenever feasible. This Department policy builds upon the Supreme Court's broad principles in *Graham v. Connor* (1989) 490 U.S. 386 and is more restrictive than the constitutional standard and state law. The Law Enforcement Code of Ethics requires all sworn law enforcement officers to carry out their duties with courtesy, respect, professionalism, and to never employ unnecessary force. These are key factors in maintaining legitimacy with the community and safeguarding the public's trust.

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial, non-biased, and reasonable manner.

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers must strive to use the minimal amount of force necessary.

#### 300.1.1 DEFINITIONS

Definitions related to this policy include:

**Deadly force** - Force reasonably anticipated and intended to create a substantial likelihood of causing death or very serious injury.

**Feasible** - Capable of being done or carried out to successfully achieve a legitimate law enforcement objective without increasing the risk to the officer or bystander(s).

**Force** - The application of physical techniques or tactics, chemical agents or weapons to another person.

**Legitimate law enforcement objective** - Effect a lawful arrest, detention, or search; overcome resistance or prevent escape; prevent the commission of a public offense; in defense of others or in self-defense; gain compliance with a lawful order; to prevent a person from injuring himself/herself.

**Minimal amount of force necessary** - The lowest level of force within the range of objectively reasonable force that is necessary to effect an arrest or achieve a lawful objective without increasing the risk to others.

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**Non-deadly Force** - Any application of force that is not reasonably anticipated and intended to create a substantial likelihood of death or very serious bodily injury shall be considered non-deadly force.

**Personal Body Weapons** - An officer's use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of high velocity kinetic energy transfer (impact) to gain control of a subject.

**Proportionality** - Considers whether a particular use of force is proportionate and appropriate to the totality of the circumstances, and requires officers to consider whether alternative lesser or non-force options are feasible and likely to be effective. Proportional force does not imply equal force; officers may use superior force, consistent with this policy.

**Reasonable Belief** - An objective belief determined by the facts and circumstances reasonably available to the officer at the time (on-scene and without hindsight) and viewed from the perspective of a reasonable peace officer in the same situation, guided by the principles set forth in this policy.

**Reasonable Force** - An objective standard of force viewed from the perspective of a reasonable officer, without the benefit of 20/20 hindsight, and based on the totality of the circumstances known to or perceived by the officer at the time.

**Serious Bodily Injury** - A bodily injury that creates a substantial risk of death; causes serious, permanent disfigurement; or results in long-term loss or impairment of the functioning of any bodily member or organ.

### **300.2 POLICY**

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers must strive to use the minimal amount of force necessary.

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably

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appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force. Retreating for a tactical advantage should be considered and utilized, when feasible and appropriate.

Officers shall not use force with bias, based upon: race; ethnicity or nationality; religion; sex, sexual orientation; economic status; age; cultural group; disability; or affiliation with any other similar identifiable group.

Use of force against vulnerable populations (such as, without limitation, children, elderly, pregnant women, people with physical and mental disabilities, and people with limited English proficiency) can undermine public trust and should only be used if no other options appear reasonable or effective. It is recognized that the above may not be readily apparent or known to the officer. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

The Department recognizes that transparency and accountability in the use of force is essential to preserving the trust of the community and to maintaining professional standards. This policy therefore requires rigorous reporting and review of all instances of the use of force.

### 300.2.1 DUTY TO INTERCEDE

A use of excessive force by law enforcement personnel is a matter of serious concern to the community, and even a single instance of excessive force may critically undermine public trust in the Department. Accordingly, any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when feasible, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law shall promptly report these observations to a supervisor.

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**300.2.2 DE-ESCALATION TECHNIQUES**

Officers shall use de-escalation techniques whenever feasible and appropriate: to potentially reduce or eliminate the need to use force; and to prevent injuries to the subject, the public and the officer(s). Use of de-escalation techniques must allow for the fact that officers are often forced to make split-second decisions, with limited information, and in circumstances that are tense, uncertain and rapidly evolving.

- (a) Officers shall, when feasible, continually assess the dynamics of a situation, and modulate their response and actions appropriately. Officers may be justified in using force at one moment, but not justified in using force the next moment due to a change in dynamics.
- (b) De-escalation techniques may include verbal persuasion, warnings and tactical de-escalation techniques, such as: slowing down the pace of an incident; “waiting out” subjects; creating distance (and thus the reactionary gap) between the officer and the threat; and requesting additional resources (e.g., specialized units, mental health care providers, negotiators, etc.) to resolve the incident.
  - 1. Officers should recognize that they may withdraw to a position that is tactically advantageous or allows them greater distance to de-escalate a situation.
  - 2. Officers should consider a variety of options, including lesser force or no force options.
  - 3. Officers should perform their work in a manner that avoids unduly jeopardizing their own safety or the safety of others.
  - 4. Officers shall not intentionally and unnecessarily escalate and/or create a need to use force.
  - 5. Officers should attempt to understand and consider possible reasons why a subject may be noncompliant or resisting arrest. A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject’s situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public and officer safety.
  - 6. Officers should continue de-escalation techniques, when feasible and appropriate, and take as much time as reasonably necessary to resolve the incident, in effort to avoid and/or minimize the use force.
- (c) When an officer recognizes that mental illness, post-traumatic stress disorder, alcohol and/or drug addictions, or other health issues are causing an individual to behave erratically, the officer shall, when feasible and appropriate, try to de-escalate the situation using de-escalation and/or Crisis Intervention techniques.

Establishing Communication - Communication with non-compliant subjects is often most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.

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Supervisors conducting a use of force investigation will indicate de-escalation as a force option in BlueTeam whenever de-escalation was attempted or used in an incident.

### 300.3 FACTORS TO DETERMINE THE REASONABLENESS OF FORCE

The United States Supreme Court in *Graham v. Connor* (1989) 490 U.S. 386 held that an officer's use of force must be objectively reasonable under the totality of circumstances known to the officer at the time. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than 20/20 hindsight, and without regard to the officer's underlying intent or motivation.

There are circumstances in which a force option may be legally justified under the principles set forth in *Graham v. Connor*, but the use of that force option may not be appropriate, warranted, and/or necessary.

This policy builds upon the broad principles in *Graham v. Connor* by adding additional, more restrictive factors upon which an officer's use of force shall be evaluated. These factors should be considered when determining whether to apply force (as time and circumstances permit), and in evaluating whether an officer has used reasonable force.

Factors from *Graham v. Connor*:

- (a) The severity of the crime at issue.
- (b) Whether the suspect poses an immediate threat to the safety of the officer and others.
- (c) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

Factors from the California Penal Code:

- (a) Any peace officer may use reasonable force to effect an arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape or to overcome resistance (Penal Code § 835a).
- (b) An officer may not, under color of authority, without lawful necessity, assault or beat any person (Penal Code § 149).

Additional factors set forth by case law and by this Policy:

- (a) Immediacy and severity of the threat to officers or others.
- (b) The feasibility, efficacy, and safety of alternative lesser or non-force options, including the availability of de-escalation techniques that might reduce or eliminate the need to use force, or prevent injuries to the subject, the public and the officer(s).
- (c) Whether the force option is proportionate and appropriate to the totality of the circumstances, and whether alternative lesser or non-force options are feasible and likely to be effective. Proportional force does not imply equal force; officers may use superior force, consistent with this policy.

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- (d) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (e) The conduct of the officer prior to the use of force. Specifically, did the officer violate policy and unnecessarily escalate the situation to a use of force.
- (f) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (g) The effects of drugs or alcohol.
- (h) Subject's mental state or capacity, including any apparent/known mental health issues.
- (i) Proximity of weapons or dangerous improvised devices.
- (j) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (k) The availability of other options and their possible effectiveness.
- (l) Seriousness of the suspected offense or reason for contact with the individual.
- (m) Training and experience of the officer.
- (n) Potential for injury to officers, suspects and others.
- (o) Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the officer.
- (p) The risk and reasonably foreseeable consequences of escape.
- (q) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (r) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (s) Prior contacts with the subject or awareness of any propensity for violence.
- (t) Any other exigent circumstances.
- (u) Officers must strive to use the minimal amount of force necessary.

**300.3.1 PAIN COMPLIANCE TECHNIQUES**

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer
- (c) Whether the person has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

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### 300.3.2 PERSONAL BODY WEAPONS

Personal body weapon strikes, punches, lifts or kicks for which the officer has received department-approved training, may be used when the officer reasonably believes that the use of such force appears necessary to further a legitimate law enforcement purpose.

Personal body weapon strikes, punches, or kicks to the rear of the head, neck or spine are prohibited. The only exception to this prohibition would be under exigent circumstances when deadly force is justified and reasonable.

### 300.3.3 CAROTID CONTROL HOLD

The use of the carotid restraint is prohibited. The only exception to this prohibition would be under exigent circumstances when deadly force is justified and reasonable.

### 300.3.4 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. However, officers are discouraged from using force solely to prevent a person from swallowing evidence or contraband. In the instance when force is used, officers should not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the Department for this specific purpose.

### 300.3.5 DRAWING/DEPLOYING A FIREARM

Whenever an officer draws/deploys a firearm during the performance of his/her duties to defend, detain or take any person into custody (the suspect is contacted or arrested, the officer is present and is within potential sight of the suspect), it is considered a use of force and an account of the incident must be made in a police report. The officer should include in the narrative of the report how the weapon was used in the incident, as well as the justification for such action. The documentation of how the weapon was used should include information on how the weapon was presented. The officer must notify a supervisor as soon as practical, and the supervisor will complete a Use of Force Investigation with accompanying documentation as outlined in this policy.

Whenever an officer draws/deploys a firearm during the performance of his/her duties in the presence of others, but does not use the firearm to defend, detain or take any person into custody (the suspect is not contacted or arrested), it is not considered a use of force and an account of the incident must be made in a police report.

Whenever an officer draws/deploys a firearm during the performance of his/her duties in the not presence of others, it is not considered a use of force and no documentation is required. An example of that type of incident would include, but is not limited to, the search of an empty building or car where no person is contacted during the search.

## **300.4 DEADLY FORCE APPLICATIONS**

Use of deadly force is justified in the following circumstances:

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- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes would be an imminent threat of death or serious bodily injury.
- (b) An officer may use deadly force to stop a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the subject is not immediately apprehended. Under such circumstances, a verbal warning should precede the use of deadly force, where feasible.

Imminent does not mean immediate or instantaneous. An imminent danger may exist even if the suspect is not at that very moment pointing a weapon at someone. For example, an imminent danger may exist if an officer reasonably believes any of the following:

- (a) The person has a weapon or is attempting to access one and it is reasonable to believe the person intends to use it against the officer or another.
- (b) The person is capable of causing serious bodily injury or death without a weapon and it is reasonable to believe the person intends to do so.

Strikes, punches, or kicks to the rear of the head, neck or spine are prohibited, unless exigent circumstances exist and use of deadly force is justified.

Choke holds are also prohibited, unless exigent circumstances exist and use of deadly force is justified.

The use of deadly force against a person who presents only a danger to himself/herself is prohibited.

When feasible, officers should immediately attempt to administer or obtain medical aid for a person who has been subject to injury resulting from the use of deadly force.

#### 300.4.1 SHOOTING AT OR FROM MOVING VEHICLES

Shots fired at or from a moving vehicle are rarely effective. It is also noted that in many circumstances, disabling the driver of a vehicle may increase the potential for harm to bystanders and/or the officer.

- Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants.
- Officers shall not intentionally and unnecessarily move into the path of an approaching vehicle to create their own exigent circumstance.
- Officers should not shoot at any part of a moving vehicle in an attempt to disable the vehicle.
- Officers shall not discharge a firearm at a moving vehicle or its occupants when there are other reasonable means available to avert the threat.
- Officers shall not discharge a firearm from a moving vehicle when there are other reasonable means available to avert the present threat.



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- Officers may only shoot at a moving vehicle under exigent circumstances, when the driver and/or occupants are targeting others with the intent to cause great bodily injury or death and there are no other reasonable means available to avert the threat.

**300.4.2 WARNING SHOTS**

Discharging a firearm for the purpose of a “warning shot” is prohibited.

**300.5 REPORTING THE USE OF FORCE**

Any use of force by a member of this department shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances.

Supplemental reports will be completed by personnel who are present when force is used by another officer. Officers have a duty to report all pertinent facts known to them.

All police reports, inclusive of any supplemental reports, involving the documentation of a use of force must be reviewed and approved by a supervisor prior to the employee going off duty.

**300.5.1 NOTIFICATION TO SUPERVISORS**

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain.
- (d) The individual indicates intent to pursue litigation.
- (e) Any application of a control device as defined in Policies 308 and 309:
  1. Batons and other impact weapons
  2. Chemical agents (OC Spray)
  3. SIMS Projectile
  4. Conducted Electrical Weapon (any activation whether effective or not)
- (f) Any application of a restraint device other than handcuffs or the WRAP.
- (g) The individual subjected to the force was rendered unconscious.
- (h) An individual was struck or kicked.
- (i) An officer draws/deploys a firearm during the performance of his/her duties to defend, detain or take any person into custody (the suspect is contacted or arrested, the officer is within potential sight of the suspect).
- (j) An individual alleges any of the above has occurred.

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### 300.5.2 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

The Records Manager or the authorized designee shall ensure that data required by the Department of Justice (DOJ) regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is collected and forwarded to the DOJ as required by Government Code § 12525.2.

### 300.5.3 EMPLOYEES WHO USE FORCE WHILE ON A SPECIAL ASSIGNMENT

When a BART Police employee has a use of force as defined in this policy, the use of force must be reported to a BART Police supervisor and investigated in accordance with this policy.

When two or more BART Police officers are temporarily assigned to assist an outside agency or multi-agency task force in the performance of law enforcement activities, a BART police supervisor should also be present.

## **300.6 MEDICAL CONSIDERATION FOLLOWING A USE OF FORCE**

Prior to booking or release, and as soon as possible under the circumstances, medical assistance shall be obtained for any person who exhibits signs of physical distress, who has sustained visible injury, expresses a complaint of injury or continuing pain, or who was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until he/she can be medically assessed.

Based upon the officer's initial assessment of the nature and extent of the subject's injuries, medical assistance may consist of examination by fire personnel, paramedics, hospital staff or medical staff at the jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another officer and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the officer reasonably believes would be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage nearby if appropriate.

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**300.7 SUPERVISOR RESPONSIBILITY**

An uninvolved supervisor should respond to the scene of a reported use of force. The supervisor is expected to do the following:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) When possible, separately obtain a recorded interview with the subject upon whom force was applied. This interview should not be conducted in the presence of officers who were involved in using force. If this interview is conducted without the person having voluntarily waived his/ her Miranda rights, the following shall apply:
  1. The content of the interview should not be summarized or included in any related criminal charges.
  2. The recording should be saved and attached in the BlueTeam entry for the use of force investigation.
  3. The recording of the interview should be distinctly marked for retention until all potential for civil litigation has expired.
- (d) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (e) Identify any witnesses to the use of force. Interview and record witness statements for inclusion in the use of force investigation.
- (f) Review the portion(s) of the Axon Flex video pertaining to the use of force and/or allegation of misconduct.
- (g) Review and approve all related reports.

In the event that an uninvolved supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit. The investigation will be documented in a Use of Force Investigation checklist and narrative as warranted.

When practical, supervisors who use force or witness the use of force by another officer in a given situation should not obtain statements from other officers as part of a report on the use of force, as such is the responsibility of an uninvolved supervisor. Furthermore, involved supervisors and officers shall not attempt to influence other officers' or civilian witnesses' accounts of what occurred during the incident or otherwise compromise the integrity of the use of force investigation.

Use of Force Investigation Reports will be forwarded and reviewed through the chain of command. Each reviewer in the process will make a determination as to whether the use of force was justifiable or non-justifiable.

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**300.7.1 USE OF FORCE INVESTIGATION, DOCUMENTATION, AND REVIEW**

Use of force must be documented in a police report and reviewed by a supervisor who was not directly involved in the incident.

The following categories and parameters will explain levels of force and the respective reporting, investigation, documentation, and review requirements. Incidents will be categorized as Level 1, Level 2, Level 3, or Level 4.

**Level 1: Not a Reportable Use of Force:**

Level 1 Incident Parameters:

- (a) Subject allowed him/herself to be searched, escorted, and/or handcuffed. The suspect offered no resistance, and the officer did not use force to overcome resistance. The officer did not use force in the absence of resistance.
- (b) No suspect injury or complaint of injury due to interaction with officer.
- (c) No allegation of misconduct against officer, regarding force.
- (d) Officer body camera was activated in a timely manner, per policy.
- (e) Officer used any of following:
  - 1. Professional presence and/or verbalization
  - 2. TASER/LLIMs Deployed (no activation)
  - 3. Drawn/deployed firearm, but no suspect contacted or arrested

Level 1 Incidents should be documented by an officer in an appropriate police report, citation, Field Interview, and/or CADS entry. Supervisors will review police report narratives for approval.

**Level 2: Use of Force**

Level 2 Incident Parameters:

- (a) No suspect injury or complaint of injury due to interaction with officer.
- (b) No allegation of misconduct against officer, regarding force.
- (c) Officer body camera was activated in a timely manner, per policy.
- (d) Officer used any of the following force options:
  - (a) Control holds/pressure point application
  - (b) Leverage
  - (c) Grab
  - (d) Bodyweight
  - (e) Takedown that is non-dynamic (no forceful impact)
  - (f) Vehicle pursuit with no collision

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- (g) Firearm drawn/deployed but not fired, suspect contacted

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation, including taking statements from the suspect and witnesses, and taking photos of the involved parties. If the incident fits the parameters for a Level 2 incident, the supervisor will enter all applicable data into BlueTeam and attach a completed Use of Force Investigation Checklist.

Supervisors do not need to take witness statements from fire and medical personnel under the following circumstance: an officer assists medical personnel to restrain and/or secure a subject to a gurney for medical transport in a non-criminal detention (i.e. 5150 or 5170 detention), and all of the following conditions are met:

- (a) The officer only used force options limited to the following: grab, hold, leverage, and/or bodyweight.
- (b) No subject injury or complaint of injury due to interaction with officer.
- (c) No allegation of misconduct against officer, regarding force.
- (d) Officer body camera recorded the use of force.
- (e) The unit number for the fire and medical personnel is obtained.

**Level 3: Use of Force**

Level 3 Incident Parameters:

- (a) Would have otherwise been classified as a Level 2, except one of more of the following apply:
  - 1. Suspect injury or complaint of injury due to interaction with officer.
  - 2. Allegation of misconduct against officer, regarding force.
  - 3. Officer body camera was not activated during use of force.
- (b) The use of force is Level 3 if the officer used any of the following force options:
  - 1. Dynamic/forcible takedown
  - 2. TASER Activation/LLIMS Activation
  - 3. Chemical Agents/Munitions
  - 4. Impact Weapon Strikes Personal
  - 5. Body Weapons
  - 6. Police canine deployment resulting in injury

An uninvolved supervisor will respond to the scene and conduct a Use of Force Investigation, including taking statements from the suspect and witnesses. If the incident fits the parameters for a Level 3 incident, the supervisor will enter all applicable data into BlueTeam and attach a completed Use of Force Investigation Checklist. The supervisor will also complete a Use of Force

## *Use of Force*

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Investigation Report narrative for review through the Use of Force Review process. Use of Force involving police canines will be documented and reviewed additionally per Policy 318.

### **Level 4: Use of Deadly Force**

Level 4 Incident Parameters:

- (a) Use of firearm, officer involved shooting
- (b) Or any force likely to cause death or serious bodily injury

An uninvolved supervisor will respond to the scene. The incident will be investigated, documented, and reviewed in adherence to Policy 310.

#### **300.7.2 WATCH COMMANDER RESPONSIBILITY**

A watch commander will review the Use of Force Investigation Report to ensure compliance with this policy and that any training issues are addressed.

Nothing in the policy precludes the watch commander from requiring that a supervisor complete a Use of Force Investigation Report for any incident involving force.

### **300.8 TRAINING**

Officers will receive annual training on this policy (at a minimum) and demonstrate their knowledge and understanding.

### **300.9 USE OF FORCE ANALYSIS**

At least annually, the Operations Bureau Deputy Chief should prepare an analysis report on use of force incidents. The report should be submitted to the Chief of Police, the Office of the Independent Police Auditor, and the BART Police Citizen Review Board. The report should not contain the names of officers, suspects or case numbers, and should include:

- (a) The identification of any trends in the use of force by members.
- (b) Training needs recommendations.
- (c) Equipment needs recommendations.
- (d) Policy revision recommendations.

## Use of Force Review Boards

### 302.1 PURPOSE AND SCOPE

The purpose of this policy is to establish a process to review the use of force by employees of this department.

### 302.2 POLICY

The Department is charged with the important responsibility of objectively evaluating the use of force. Any use of force by a member of this department which is subject to a Supervisor's Use of Force Report as required by Policy Manual §300.4 will be subject to review by the Use of Force Review Board.

The board will also investigate and review the circumstances surrounding every intentional or unintentional discharge of a firearm, whether the employee is on or off duty, excluding range training or recreational use.

The board will convene as often as deemed necessary by the chairperson or as directed by the Chief of Police.

#### 302.2.1 COMPOSITION OF THE BOARD

The Use of Force Review Board shall be comprised of the following persons:

- A chairperson from a command-level rank, selected by the Chief of Police.
- One sergeant and one peer member (from the involved employee's bargaining unit) who are current P.O.S.T. certified defensive tactics, baton, or TASER instructors or certified firearms instructors, selected by the chairperson.

The Use of Force Review Board may call other employees of the Department in an advisory capacity as deemed necessary by the chairperson. In every case involving serious injury to a person or significant liability to the District, the board may convene an advisory panel composed of subject matter experts, from within and/or outside the Department, to assist the board in its review of the incident. A representative of the District's General Counsel may join the advisory panel at the discretion of the Chief of Police.

#### 302.2.2 RESPONSIBILITIES OF THE BOARD

The Use of Force Review Board is empowered to conduct an administrative investigation into the circumstances of an incident. The board members may request further investigation, call persons to present information, and may request that the involved employee appear before the board. The involved employee may be represented by legal counsel and/or other representation if called to appear before the board.

Absent an express waiver from the employee, no more than two members of the board may ask questions of the involved employee (Government Code §3303).

### *Use of Force Review Boards*

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The review shall be based on those facts which were reasonably believed by the employee at the time of the incident, applying legal requirement, department policy and procedures, and approved training to those facts. Facts later discovered but unknown to the employee at the time, can neither justify nor call into question an employee's decision regarding use of force.

If it appears that the actions of the employee may result in criminal charges or disciplinary action by the Department, the board will conduct the interviews in accordance with department disciplinary procedures. The board does not have the authority to recommend discipline. The board shall make a finding and such finding will be limited to one of the following:

- (a) The employee's actions were within department policy and procedures.
- (b) The employee's actions were in violation of department policy and procedures.

A finding will represent the consensus of the board. After the board has concluded, the board chairperson will submit the board's findings via Blue Team to the Operations Bureau Deputy Chief of Police. After review by the Operations Bureau Deputy Chief of Police, the completed report findings will be forwarded to the Chief of Police for review and appropriate action.

At the conclusion of the review process, the completed Supervisor's Use of Force Report will be filed with the Internal Affairs Section.

Once the board has reached its specific finding, the Training Sergeant may convene a separate training committee to address specific training needs and to make recommendations for this department without specific reference to the facts of the incident considered by the board.



OFFICE OF CHIEF OF POLICE  
OAKLAND POLICE DEPARTMENT

MEMORANDUM

TO: All Personnel

DATE: 16 Dec 13

SUBJECT: Revision of Departmental General Order K-3,  
USE OF FORCE (Rev. 01 Aug 07)

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The purpose of the revision to this order is to update Departmental policy and procedures regarding Use of Force.

Special Order 9051 (20 Oct 10) has been incorporated in to the policy revision and is hereby cancelled.

Special Order 8970 (10 Dec 08) is still in effect regarding DGO K-4 and DGO K-4.1. The provisions specific to DGO K-3 in SO 8970 have been incorporated in to the policy revision and are hereby cancelled.

The Evaluation Coordinator for this order shall be the BFO Commander, who, without further notice, shall forward the required report to the Chief of Police on or by 16 Jun 14. The Evaluation Coordinator shall receive, review and document the acceptance or rejection of all comments and/or recommendations received prior to submitting his/her six-month evaluation report.

The Evaluation Coordinator shall forward a copy of the six-month evaluation report, along with the comments/recommendations received, without further notice, to the Bureau of Risk Management, who shall maintain the appropriate Departmental General Order archive folder.

Personnel shall acknowledge receipt, review, and understanding of this directive in accordance with the provisions of DGO A-1, DEPARTMENTAL PUBLICATIONS.

By order of



Sean Whent  
Interim Chief of Police

Date Signed: 12-16-13



DEPARTMENTAL  
GENERAL  
ORDER

Effective Date  
16 Dec 13

K-3

Evaluation Coordinator:  
BFO Commander

Index as:

Evaluation Due Date:  
16 Jun 14

Use of Force Policy

Automatic Revision Cycle:  
3 Years

**USE OF FORCE**

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OAKLAND POLICE DEPARTMENT

K-3

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BFO Commander

Index as:

Evaluation Due Date:  
16 Jun 14

Use of Force Policy

Automatic Revision Cycle:  
3 Years

## USE OF FORCE

The purpose of this order is to set forth Departmental policy and procedures for the use of force by members.

### I. POLICY STATEMENT

- A. The Oakland Police Department values the protection and sanctity of human life. The Department is committed to accomplishing the police mission with respect and minimal reliance on the use of physical force.
- B. This policy provides guidelines and procedures for using force in order to protect the safety of both themselves and the public in accomplishing the police mission
- C. Members are allowed to **use a reasonable amount of force** based on a totality of the circumstances. Members are required to **de-escalate** the force when the member reasonably believes a lesser level or no further force is appropriate. Members shall **intervene and prevent or stop** the use of unreasonable force by other members.
- D. Members are prohibited from the use of unreasonable force and using force for interrogation or punishment.
- E. Although the use of force is primarily intended for sworn officers, various non-sworn employee job classifications include Departmental training in specific force options normally reserved for sworn officers. Employees are held to the same standard as members for the application of these authorized force options. All employees shall maintain their right to self-defense by any objectively reasonable means.
- F. A member or employee who uses force or directs a use of force shall be considered as "Involved Personnel."

**II. FORCE CONSIDERATIONS****A. Reasonable Force**

Reasonable force is that amount of force that is objectively reasonable to affect a lawful police purpose and protect the safety of members or others based upon the totality of the circumstances.

1. Force must be analyzed under the Fourth Amendment's objective reasonableness test.<sup>1</sup> The application of this test requires an analysis of the totality of circumstances, including these factors to determine if the seizure is reasonable:
  - a. The severity of the crime at issue;
  - b. Whether the suspect poses an immediate threat to the safety of law enforcement officers or others; and
  - c. Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

The determination of reasonableness is not based on the 20/20 vision of hindsight.

2. Factors when determining if force is reasonable include, but are not limited to:
  - a. Physical differences (e.g., age, size, relative strength, skill level, injuries, exhaustion, number of members/employees verses subjects);
  - b. Influence of drugs or alcohol on the subject;
  - c. Proximity of weapons to the subject;
  - d. Training and experience level of the member or employee; and
  - e. Other exigent circumstances.

**B. Immediate Threat**

An Immediate Threat is considered to exist if a suspect has demonstrated actions that would lead one to reasonably believe that the suspect will continue to pose a threat of death or serious bodily injury if not apprehended without delay.

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<sup>1</sup> Graham v. Connor, 490 U.S. 386 (1989).

A person is an immediate threat if the person is reasonably perceived by a member or employee to have the present intent, means, opportunity and ability to complete the threat, regardless of whether the threatened action has been initiated.

1. Intent: The subject's apparent desire, which can be indicated by words, body language or actions.
2. Means: The instrument, mechanical or physical, that may be used to cause injury.
3. Opportunity: The time and/or place which allows the subject to use the means to cause injury.
4. Ability: The subject has the capability to carry out the action or threat.

C. Use of Force

Any physical or mechanical intervention used by a member or employee to defend, control, overpower, restrain or overcome the resistance of an individual

D. Less-Lethal Force

Any use of force, other than lethal force, which by design and application is less likely to cause serious bodily injury or death. However, the possibility of an unintended lethal outcome, although very rare, exists.

Less-Lethal Force options include, but are not limited to; those specified in Part III, FORCE OPTIONS THAT DO NOT INCLUDE FIREARMS.

E. Lethal Force

Lethal force is any force that creates a substantial risk of causing death or serious bodily injury. A member may use lethal force to protect themselves or others when the member objectively and reasonably believes that his/her life, or the life of another, is in immediate danger of death or serious bodily injury, based upon the totality of the facts known to the member at the time.

Lethal Force includes, but is not limited to:

1. Discharge of a firearm with lethal ammunition;
  - a. Lethal ammunition is ammunition that, by design and application, is intended to cause serious bodily injury or death.

2. Carotid restraint; and
3. Intentional impact weapon strike to the head.

F. Serious Bodily Injury

A serious impairment of physical condition, including but not limited to:

1. Loss of consciousness;
2. Concussion;
3. Bone fracture;
4. Protracted loss, impairment, serious disfigurement, or function of any bodily member or organ;
5. Wound requiring extensive suturing; and
6. Serious disfigurement

**III. FORCE OPTIONS THAT DO NOT INCLUDE FIREARMS**

A. Verbal Persuasion

Verbal commands are the minimum means of halting an offense, gaining compliance or overcoming resistance. A member, announcing his or her identity as a peace officer, presence and intentions, may result in the peaceful resolution of the situation. Verbal commands shall be courteous and clearly relay the police objective.

To the extent possible and without ever compromising safety, members are required to use verbal commands to accomplish the police objective before resorting to physical force. Members shall consider the possibility of any language barriers, noise, other distractions, or disabilities which may impair or frustrate the member's effort to courteously and clearly communicate with the person.

B. Use of Physical Force or Defensive Tactics and Techniques

At times it may be necessary for a member to use force or defensive tactics and techniques to accomplish the police objective, such as taking a subject into custody, preventing the commission of a crime or in response to a suspect's resistance.

The defensive tactics and techniques that may be used include, but are not limited to: hand/palm/elbow strikes, kicks, take-downs, leg sweeps, arm-bar takedown and control holds, such as escort (elbow), bent wrist, twist lock and arm-bar hammerlock.

Absent exigent circumstances, all defensive, arrest and control techniques shall be compliant with Oakland Police Department policy and training. Refer to TB III-I.1, WEAPONLESS DEFENSE.

C. Use of Canines

The use of Police Canines is considered an intermediate force level that may inflict serious injury.

The primary purpose of Patrol Canine deployments is to search for and locate criminal suspects. Canine handlers typically deploy their canines to alert (by barking) when they have found the suspect. Canine handlers may also deploy their canines as a use of force (by biting). Refer to DGO K-9, DEPARTMENT CANINE PROGRAM.

D. Batons and Impact Weapons (other than intentional strikes to the head)

The use of an impact weapon is an intermediate use of force.<sup>2</sup> The following are considered impact weapons:

1. Long baton;
2. Short baton;
3. Crowd control baton;
4. Asp®;
5. Specialty impact munitions (12-gauge Drag Stabilized Flexible Baton munitions, 37/40mm foam munitions, hand deployed SIM); and
6. Any other object used as an impact weapon other than vehicle.

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

Absent exigent circumstances, members shall only utilize Oakland Police Department authorized impact weapons and munitions.

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<sup>2</sup> Young v. LA County, 655 F.3d 1156 (9<sup>th</sup> Cir. 2011)



Use shall be compliant with Oakland Police Department policies and training. Refer to TB III-H.2, HAND-HELD IMPACT WEAPONS and TB III-H, SPECIALTY IMPACT WEAPONS

E. Electronic Control Weapon (ECW)

The ECW is an intermediate use of force.<sup>3</sup> ECW's provide a force option that may be used to control dangerous and violent subjects. The goal of every ECW deployment is a safe restraint of the subject using the minimum amount of electrical stimulation that is reasonable to obtain control. When used properly, members can stay beyond the reach and immediate striking distance of a subject who may attack them, thereby reducing the risk of injury to the member and the subject.

Using the ECW may greatly reduce the need for other types of physical force by members, which could otherwise result in serious injuries or death to the member and/or offender. Absent exigent circumstances, members shall only utilize Oakland Police Department authorized ECW's. Use shall be compliant with Oakland Police Department policies and training. Refer to TB III-H.1, USE OF AN ELECTRONIC CONTROL WEAPON.

F. Chemical Agents and Oleoresin Capsicum (OC)

The use of OC and Chemical Agents are an intermediate use of force.<sup>4</sup> Refer to TB V-F.2, CHEMICAL AGENTS and DGO C-8, OLEORESIN CAPSICUM

#### IV. USE OF FIREARMS AND OTHER LETHAL FORCE

A. Drawing, Exhibiting and Pointing Firearms

1. The intentional pointing of a firearm at another person is a use of force.<sup>5</sup>
2. The drawing, exhibiting and intentionally pointing of a firearm at another person is threatening and intimidating and when unwarranted may cast a negative impression on members. A member may intentionally point a firearm only when the member has reasonable cause to believe it may be reasonable for his/her safety or for the safety of others.
3. The pointing of a firearm at a person is a seizure and requires legal justification. No member shall draw and point a firearm at or in the direction of a person unless there is a reasonable perception of a substantial risk that the situation may escalate to the point where lethal

<sup>3</sup> Bryan v. MacPherson, 630 F. 3d 805 (9<sup>th</sup> Cir. 2010)

<sup>4</sup> Young v. LA County, 655 F.3d 1156 (9<sup>th</sup> Cir. 2011)

<sup>5</sup> Robinson v. Solano County, 278 F. 3d 1007 (9<sup>th</sup> Cir. 2002)

force would be permitted. When it is determined that the use of lethal force is not necessary, as soon as practicable, firearms shall be secured or holstered.

B. Firearms Discharge

The act of discharging a firearm loaded with lethal ammunition. Firearm discharges are classified as follows:

1. Lethal – An intentional firearm discharge at a person, regardless of injury.
2. Discharge at an Animal – A firearm discharge for the purpose of dispatching an injured or vicious animal.
3. Unintentional – A firearm discharge that occurred as a result of an unintentional trigger pull or other unexpected external cause.

The discharge of firearms as a warning is prohibited at any time on or off-duty.

C. Other Firearm Discharges

No use of force investigation is required for any of the following:

1. An intentional discharge for purposes related to training, demonstration, practice, certification or testing while at an authorized range facility, unless the discharge results in injury or death;
2. A discharge while engaged in a lawful and policy-compliant recreational activity, such as hunting or target practice;
3. A discharge by Criminalistics Division personnel for the purpose of scientific examination; and
4. A discharge at an object (e.g., street light, alarm box, door lock or vehicle tire) to accomplish a tactical police purpose that does not result in injury.

D. Discharging a Firearm at a Person

The discharge of a firearm at a person constitutes lethal force and is authorized only when there is reasonable cause to believe there is an immediate threat of death or serious bodily harm.<sup>6</sup>

A member is authorized to discharge his or her firearm only in the following circumstances:

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<sup>6</sup> Tennessee v. Garner, 471 U.S. 1 (1985)

1. In self-defense when the member has reasonable cause to believe that he or she is in immediate danger of death or serious bodily injury.
2. In defense of another person when the member has reasonable cause to believe that the person is in immediate danger of death or serious bodily injury.
3. To apprehend or arrest a person when the following three conditions are met:
  - a. The member has reasonable cause to believe that the person is involved in the commission of a violent felony that includes the use or threatened use of deadly force; and
  - b. The member has reasonable cause to believe that the person poses an immediate threat of death or serious bodily injury to the member or a third person if not immediately apprehended; and
  - c. Other reasonably known and available means of apprehending the person have failed, are inadequate or are immediately unavailable.

E. Moving Vehicles

The use of lethal force against the occupant of a motor vehicle is only authorized when it is reasonably necessary to:

1. Defend the member or another person against the vehicle occupant's immediate threat of death or serious bodily injury, by means other than the vehicle; or
2. Defend the member or another person against the vehicle operator's use of the vehicle to cause death or serious bodily injury and the member or other person has no reasonable avenue of protection or escape.
  - a. Members are prohibited from intentionally positioning themselves in a location vulnerable to vehicular attack;
  - b. Whenever possible, members shall move out of the way of the vehicle, instead of discharging his or her firearm at the operator;
  - c. Members shall not discharge a firearm at the operator of the vehicle when the vehicle has passed and is attempting to escape.

3. Members shall consider whether the threat to the member or other persons (including all occupants of the vehicle) is increased by incapacitating the operator with lethal force, considering that if the operator is incapacitated, the vehicle may still be a threat to anyone in the vehicle's path. This threat shall be weighed against the threat posed by the suspect continuing in control of the vehicle.
4. Members shall also consider what risk the use of lethal force would pose to other vehicle occupants when weighed against the threat.
5. Absent exigent circumstances, the discharge of firearms from a moving vehicle is prohibited.

F. Other Lethal Force

Any force that poses a substantial risk of causing death or serious bodily injury is considered lethal force. This includes the use of the carotid restraint, an intentional strike to the head with an impact weapon or an impromptu impact weapon. Lethal force, regardless of the weapon used, is justified only in life-threatening situations where a member has reasonable cause to believe that a person poses an immediate threat of death or serious bodily harm to the member or to another person.

Lethal force is prohibited when its sole purpose is to affect an arrest, overcome resistance or prevent a subject from escaping when the subject does not present an immediate danger of death or serious bodily injury.

**V. OTHER REQUIREMENTS**

A. Use and Care of Equipment, Control Devices and Firearms

1. While on-duty members shall carry only firearms, safety equipment and control devices that are approved in an official Departmental Order and on which they have successfully completed training. For care of safety equipment, refer to DGO C-4, SAFETY EQUIPMENT.
2. Members shall handle and manipulate a firearm in accordance with Department approved firearms training.

B. Administrative Leave

Members involved in a lethal force incident shall be placed on paid administrative leave for not less than three days, unless otherwise directed by the Chief of Police. The Incident Commander may recommend other personnel be placed on paid administrative leave to the Chief of Police. The assignment to administrative leave shall not be interpreted to imply or indicate that a member acted improperly.

While on administrative leave, members shall remain available at all times for official Departmental business, including interviews and statements regarding the incident.

C. Counseling Services

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

D. Providing First Aid or Medical Treatment

To the extent possible and without ever compromising safety, members shall ensure that they, when necessary or upon complaint of injury, provide medical first aid and/or emergency medical treatment as soon as practical congruent with their available equipment, resources and first aid training and certification.

In addition, if necessary, professional medical assistance shall be summoned as soon as practical. Refer to TB III-K, FIRST AID.

1. First Aid

First aid includes, but is not limited to, the mere cleaning of a scrape or cut, applying a bandage, flushing of the eyes with water or providing an ice pack. First aid shall be administered by OPD personnel when practical and safe to do so. First aid may be administered by a medical professional including the following: physicians, physician assistants, nurses (RN and LVN), paramedics, emergency medical technicians (EMT) and Fire Department Personnel.

2. Emergency Medical Treatment

Any treatment beyond first aid, including Cardio-Pulmonary Resuscitation (CPR) and rescue breathing, shall be administered by OPD personnel when practical and safe to do so. Emergency medical treatment may be administered by a medical professional including the following: physicians, physician assistants, nurses (RN and LVN), paramedics, emergency medical technicians (EMT) and Fire Department Personnel.

## 3. Hospital Admittance

Admittance to a hospital for the treatment of injuries as a result of any use of force. For the purposes of this order, evaluation or treatment by a medical professional not beyond first aid, as a result of any use of force, shall not be considered hospital admittance.

## VI. USE OF SPECIALTY IMPACT MUNITIONS (SIM) DURING CROWD CONTROL

The Department places additional restrictions on the use of SIM during incidents involving Crowd Control and Crowd Management as specified in TB III-G, CROWD CONTROL AND CROWD MANAGEMENT and TB III-H, SPECIALTY IMPACT MUNITIONS.

### A. Skip Fired Specialty Impact Less-Lethal Munitions (Wooden Dowels and Stinger Grenades) **are prohibited**.

1. Any and all less-lethal specialty impact weapons designed to be skip fired or otherwise deployed in a non-directional non-target specific manner, including but not limited to the Multiple Wood Baton Shell (264W) manufactured by Armor Holdings, Inc. shall not be used at all by OPD during demonstrations or crowd events.
2. The use of the Stinger Grenade containing rubber pellets designed to be deployed in a non-directional non-target specific manner is also **prohibited** for all crowd control use.

### B. Uses of Direct Fired Specialty Impact Less-Lethal Munitions (SIM)

Direct Fired SIM are less-lethal specialty impact weapons that are designed to be direct fired at a specific target, including but not limited to Drag Stabilized Flexible Batons (DSFB), often referred to as "bean bags", and **shall not be used** for crowd management, crowd control or crowd dispersal during demonstrations or crowd events. Direct Fired SIM may never be used indiscriminately against a crowd or group of persons even if some members of the crowd or group are violent or disruptive.

1. Direct Fired SIM may be used against a specific individual who is engaging in conduct that poses an immediate threat of loss of life or serious bodily injury to him or herself, members or the general public, or who is engaging in substantial destruction of property which creates an immediate risk to the lives or safety of other persons.

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In such instances, Direct Fired SIM shall be used only when other means of arrest are unsafe and when the individual can be targeted without endangering other crowd members or bystanders.

2. The use of Direct Fired SIM shall cease when the violent or destructive actions cease. These weapons shall not be used for the purpose of apprehension or to otherwise prevent escape unless escape would present a substantial risk of continued immediate threat to loss of life or serious bodily injury.
3. Members shall only deploy Direct Fired SIM during a demonstration or crowd event under the direction of a supervisor.
4. When circumstances permit, the supervisor on the incident scene shall make an attempt to accomplish the policing goal without the use of Direct Fired SIM as described above, and, if practical, an audible warning shall be given to the subject before deployment of the weapon.
5. Any person struck by a round shall be transported to a hospital for observation and any necessary treatment. Ambulance service, if required, shall be ordered per Department General Order I-4, AMBULANCE SERVICE. First aid, when necessary, shall be administered per Training Bulletin III-K, FIRST AID.
6. No member shall use Direct Fired SIM without formal training and certification.
7. Direct Fired SIM shall not be used against a person who is under restraint.
8. Members shall not discharge a Direct Fired SIM at a person's head, neck, throat, face, left armpit, spine, kidneys, or groin unless deadly force would be justified.

By Order of



Sean Whent  
Interim Chief of Police

Date Signed: 12-16-13

**REVISION RECORD**

The page numbering format has been revised to facilitate updating and tracking revisions to publications contained in this Handbook.

When a minor revision is made to a publication, the ‘Revision Number’ will be indicated on the Special Order and shall be accompanied by the updated page(s). The ‘Revision Date’ and ‘Reference Page Number(s) shall be recorded in the appropriate box on the same line as the indicated ‘Revision Number’. Ensure that all pages that are provided are replaced since reformatting may occur to accommodate revision(s)

When it is necessary to make major policy or content revision, the publication shall be rewritten in its entirety. The ‘Revision Number’ and ‘Revision Date’ shall be indicated on the new order. The ‘Revision Date’ shall be recorded in the appropriate box on the same line as the indicated ‘Revision Number’. The term ‘NEW’ shall be recorded in the ‘Reference Page Number(s)’ box to indicate the promulgation of a new order.

Revision Number	Revision Date	Reference Page Number(s)	Revision Number	Revision Date	Reference Page Number(s)
1	1 Aug 07	NEW	16		
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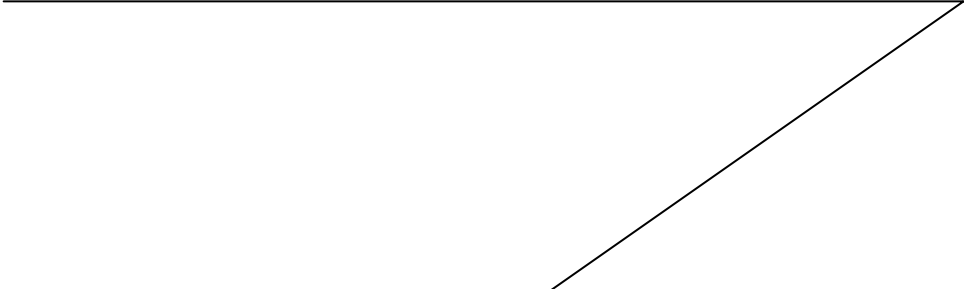
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## REPORTING AND INVESTIGATING THE USE OF FORCE

The purpose of this order is to set forth Departmental policy and procedures for reporting, investigating, reviewing, and managing use of force incidents involving Departmental personnel.

### I. POLICY

- A. Commanders, investigators and supervisors shall complete a Department approved training course for the Departmental use of force policy (DGO K-3) and reporting and investigating use of force incidents (DGO K-4) prior to conducting any use of force investigation. The training course shall include provisions of the Public Safety Officers' Procedural Bill of Rights (POBR), Departmental General Order (DGO) M-3, RECEIVING AND PROCESSING COMPLAINTS AGAINST DEPARTMENT PERSONNEL OR PROCEDURES and DGO M-4.1, CRIMINAL INVESTIGATIONS INVOLVING ACTIVE LAW ENFORCEMENT, OR A MEMBER OR EMPLOYEE OF THE DEPARTMENT.
- B. Personnel shall notify his/her supervisor immediately or as soon as practical, of any use of force, allegation of a use of force, or an allegation of unreasonable force.
  1. When notified of a Level 1, 2, or 3 use of force, the supervisor or commander shall respond to the scene and conduct the appropriate force investigation.
  2. When notified of an allegation of a use of force and the member/employee denies using force, the supervisor or commander shall respond to the scene and conduct a preliminary investigation into the use of force allegation.
  3. When a subject who has incurred an injury requiring more than basic first-aid **and** the injury did not occur as a result of a member's use of force **and** there is no allegation of force by the subject; or

4. When there is a discharge at an object (e.g., street light, alarm box, door lock or vehicle tire) by a member to accomplish a tactical police purpose that does not result in injury.
- C. If any force investigation indicates misconduct, the supervisor or commander shall conduct, at a minimum, a Level 2 force investigation and additionally initiate an internal investigation in accordance with the provisions of DGO M-3. Document the date the IAD was notified in the Use of Force Report (TF-967).
- D. If any force investigation indicates criminal misconduct, the supervisor or commander shall conduct, at a minimum, a Level 2 force investigation and additionally make the proper notifications in accordance with the provisions of DGO M-4.1. Document the date the CID was notified in the Use of Force Report.
- E. Personnel shall request medical service without delay when a subject has visible injuries or the subject has a complaint of injury.
- F. Supervisors and commanders shall be held accountable for the timely, accurate, and thorough documentation of all use of force incidents.
- G. Reports shall not contain “boilerplate” or “pat” language (e.g., “furtive movement” or “fighting stance,” etc.) without descriptive or explanatory details of the action.”
- H. Supervisors and commanders have the discretion to elevate any level of force investigation in order to conduct a more thorough investigation of the incident. The Watch Commander shall approve elevating a force investigation to a Level 1.
- I. A supervisor or commander involved in a use of force shall not investigate the incident or review for approval the Use of Force Report.
  1. In the event personnel working a tour of duty in the Patrol Division, of the rank of sergeant or above, are involved in a Level 2 or 3 use of force incident, the Watch Commander shall assign an investigator to conduct the investigation.

2. In the event personnel working a tour of duty in any division other than Patrol, of the rank of sergeant or above is involved in a Level 2 or 3 use of force incident, the unit commander shall assign an investigator to conduct the investigation with the approval of the division commander and, if unavailable, the Watch Commander<sup>1</sup>.
  3. The Watch Commander may approve a supervisor or commander to investigate, a Level 2 or 3 use of force with their own self-reported Level 4 use of force when they occur in the same incident.
- J. In the event multiple members use the same level of force in a single incident, the reporting member shall prepare only one Use of Force Report listing all involved personnel.
- In the event multiple members use different levels of force in a single incident, the reporting member shall prepare only one Use of Force Report listing all involved personnel. An investigation shall be conducted at the highest level when multiple force options are used.
- K. Supervisors and commanders shall identify Department or individual training and tactical issues and make recommendations for corrective action, when appropriate and document the recommendations in the Use of Force Report.
- L. Supervisors and commanders shall ensure the provisions of POBR are properly applied.
- M. Personnel may delay compliance with the provisions of this order if the scene is unstable, there is community unrest, or other conditions make immediate compliance impracticable. The protection of Department personnel and the public, and the maintenance of public safety shall remain the priority. The approving supervisor or commander shall ensure the reason for the delay is documented in the Use of Force Report. Such compliance delays are subject to review by the appropriate review board.
- N. Injured or killed animals shall be handled and/or properly disposed of in accordance with the provisions of DGO A-5, ANIMAL CONTROL PROCEDURES.

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<sup>1</sup> When a member is assigned to investigate a use of force incident involving another member of equal rank and an arrest is made requiring approval, the provisions of DGO M-18, ARREST APPROVAL shall be followed.



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## II. FORCE LEVELS

Force options enumerated in DGO K-3 are grouped in the following force levels for reporting and investigating purposes only.

### A. Level 1

1. Any use of force resulting in death;
2. Any intentional firearm discharge at a person, regardless of injury;
3. Any force which creates a substantial risk of causing death;
4. Serious bodily injuries, to include:
  - a. Any use of force resulting in the loss of consciousness; and
  - b. Protracted loss, impairment, serious disfigurement, or function of any bodily member or organ (includes paralysis).
5. Any unintentional firearms discharge:
  - a. If a person is injured as a result of the discharge; or
  - b. As directed by the BOI Deputy Chief.
6. Any intentional impact weapon strike to the head.
7. Any use of force investigation that is elevated to a Level 1 approved by a Watch Commander.

### B. Level 2

1. Any strike to the head (except for an intentional strike with an impact weapon);
2. Carotid restraint is applied that does not result in the loss of consciousness;
3. Use of impact weapons, including specialty impact munitions or any other object, to strike a subject and **contact is made**, regardless of injury.
4. Any unintentional firearms discharge that does not result in injury;



5. A police canine bites the clothing or the skin of a subject, or otherwise injures a subject.
6. Any use of force which results in injuries to the subject requiring emergency medical treatment (beyond first-aid) or hospital admittance.

**Note:** For the purposes of this order, an evaluation by a medical professional to assess a complaint of injury is not emergency medical treatment.

C. Level 3

1. Oleoresin Capsicum (OC/Pepper Spray) or other chemical agent is applied to a person;
2. The use of a Taser<sup>®</sup> involving any of the following circumstances;
  - a. When one or more probes impacts or penetrates the subject's clothing or skin;
  - b. When the push stun arc touches the subject's clothing or skin;  
or
  - c. A Taser<sup>®</sup> is fired at a person, but misses.
3. Any impact weapon, including specialty impact munitions, or any other instrument is used in an attempt to strike another person but **no contact is made**; or
4. The baton is used for a non-striking purpose (e.g., prying limbs, moving or controlling a person);
5. A Weaponless Defense Technique other than control holds, excluding strikes to the head. Examples include;
  - a. Hand/palm/elbow strikes;
  - b. Kicks;
  - c. Leg sweeps; and
  - d. Takedowns.
6. An on-duty firearm discharge at an animal other than to dispatch an injured animal.

D. Level 4

1. A firearm is intentionally pointed at a person;
2. A Weaponless Defense Technique is applied to a Vulnerable Area, excluding strikes (e.g., Hair grab, pressure to mastoid or jaw line; and shoulder muscle grab).
3. An on-duty firearm discharge to dispatch an injured animal; or
4. A Weaponless Defense Technique Control Hold is applied:
  - a. Escort (elbow);
  - b. Twist lock;
  - c. Arm-bar; or
  - d. Bent-wrist.

A Weaponless Defense Technique Control Hold applied for the purpose of handcuffing or escorts that do not result in injury or a complaint of injury are **NOT** reportable uses of force.



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**III. LEVEL 1 FORCE OR IN-CUSTODY DEATH INCIDENTS**

These incidents require concurrent investigations conducted by the Homicide Section and the Internal Affairs Division.

- A. Involved personnel and personnel witnessing the use of force responsibilities:
1. Notify and brief their supervisor immediately, or as soon as practical. If the immediate supervisor is unavailable, another field supervisor or commander shall be notified.
  2. Every member or employee who uses or is a witness to a Level 1 use of force shall not discuss the incident with others and limit any discussion of the incident to information required:
    - a. For a Public Safety Statement;
    - b. To assist in the investigations; or
    - c. To lead to the apprehension of the suspect.
- B. Uninvolved personnel who did not witness the use of force shall perform the following, as directed by a supervisor or commander:
1. Conduct a reasonable canvas in an effort to identify and obtain statements from witnesses in the proximity of the use of force incident.
  2. Witnesses to a use of force shall be identified to the extent that it is reasonable and listed in a Supplemental Report (536-937) or Victim/Witness Report (536-935). Statements shall be taken, when practical, and included in the Use of Force or In-Custody Death Report packet. The following criteria shall be used when listing witnesses:
    - a. Outside Agency Personnel  
  
Outside agency personnel at the scene of a use of force incident, whether they witnessed the use of force or not, shall be identified as follows:
      - 1) Name;
      - 2) Rank/Title;
      - 3) Serial number; and
      - 4) Agency affiliation.

b. Private Person Witnesses

Private persons at the scene of a use of force incident, whether they witnessed the use of force or not, shall be identified, when possible, as follows:

- 1) Name;
  - 2) Sex, Race, DOB;
  - 3) Contact number(s); and
  - 4) Home address.
3. Document, in the appropriate report, why witness information was not obtained in situations where it was unsafe or impractical to obtain, (e.g., hostile crowd, public safety concerns, insufficient police resources), when the witness refused to remain at the scene, or is uncooperative.
  4. Members shall not detain or delay a witness who refuses to remain at the scene; however the witness' physical description, license plate, comments, or other identifiers shall be obtained when available and documented in the appropriate report.
  5. Members shall summon a supervisor to the scene in the event a witness refuses to give a statement or provide identification information.
  6. Offense/Supplemental Reports shall be prepared independently without discussing the details of the incident with other personnel on scene. Group reporting is prohibited.
  7. Personnel on scene at the time of the use of force incident, but not involved in or a witness to the use of force, shall be separately interviewed by the investigating supervisor, prior to clearing from the incident. Any relevant information revealed in the interview shall be included in the member or employee's Supplemental Report. Group interviewing is prohibited.

C. Supervisor Responsibilities

1. Respond to the location of the incident unless community unrest or other conditions make such response impracticable. In such instances, an alternate safe location shall be arranged.

2. Scene security:
  - a. Ensure a Crime Scene Security Log is maintained to record the time and identifying information of all persons entering and exiting the scene, to include:
    - 1) Department personnel;
    - 2) Medical personnel;
    - 3) Fire Department unit number and personnel; and
    - 4) Other persons.
  - b. Ensure the Crime Scene Security Log is delivered to the Homicide Section investigator for inclusion in the investigative case file.
3. Manage the scene, until relieved by the Incident Commander.
4. Ensure the Watch Commander has been notified and briefed of the incident.
5. Manage the scene, until relieved by the Incident Commander.
6. Attempt to obtain and document a Public Safety Statement, to include:
  - a. A verbal account from involved personnel to help determine the general circumstances of the incident;;
  - b. Assess the need for resources and notifications;
  - c. Help set the perimeter;
  - d. Locate injured persons;
  - e. Determine the nature of the evidence to seek;
  - f. Identify the number of suspects involved;
  - g. Identify the number of suspects outstanding; and
  - h. The number and direction of shots fired, if any.

The supervisor shall not ask the involved personnel to provide a step-by-step narrative of the Level 1 (lethal force) incident or to provide a motive for their actions.

7. Coordinate the apprehension of the suspect, if still outstanding.
8. Coordinate the preliminary investigation with the IAD and Homicide investigators, to include but not limited to:
  - a. Identifying involved and witness personnel;
  - b. Designating a reporting officer;
  - c. Ensuring the preservation of evidence;
  - d. Identifying other witnesses in accordance with the provisions of Part III, B; and
  - e. Assisting investigators to ensure statements are taken.
9. Respond to the location of a witness who has declined to give a statement or has refused to give witness identification information when requested by a member or employee. The outcome shall be documented in the member's Supplemental Report after the supervisor has talked to the witness.
10. Separate and prohibit communication between involved personnel and witnesses.
11. Ensure involved personnel limit any discussion of the incident to information necessary:
  - a. For a Public Safety Statement;
  - b. Required to assist in the investigations; or
  - c. Leading to the apprehension of the suspect.
12. Ensure personnel complete a Supplemental Report who were on scene at the time of the incident (not including involved or witness personnel) or were assigned to assist at the scene.

Offense/Supplemental Reports shall be prepared independently without discussing the details of the incident with other personnel on scene. Group reporting and interviewing is prohibited.
13. Document the reason in a Supplemental Report when personnel are directed not to complete a required report.

14. Contact and provide the IAD investigator with the complaint information if notified of an allegation of unreasonable force.

D. Follow-up Investigators Responsibilities

1. Homicide Section

The Homicide Section shall conduct a follow-up investigation and prepare and forward a Follow-up Investigation Report (336-201) to the IAD for review in accordance with the provisions of Homicide Section Policy and Procedure 01, LEVEL 1/IN-CUSTODY DEATH INVESTIGATIONS **within 45 calendar days**, unless extended by the BOI Deputy Chief.

2. District Attorney's (DA) Office Standby Team

- a. The DA's Office will respond with their on-call shooting team to all fatal officer-involved shootings and other incidents as they deem necessary.
- b. In the event of an officer-involved shooting in which a person is struck, and when a conflict of interest exists, the Bureau of Investigation Deputy Chief shall confer with the DA's Office to determine the most appropriate agency or investigative body to conduct the investigation.

3. Internal Affairs Division

The IAD shall conduct a concurrent but independent use of force investigation and prepare a Use of Force/In-Custody Death Report in accordance with the provisions of RWM Insert U-1 and IAD Policy and Procedure 05-04 **within 60 calendar days**, unless extended by the COP.

E. The Watch Commander or Designee Responsibilities

1. Respond to the scene and take command of the incident.
2. Monitor the incident to ensure good scene management and ensure the assigned supervisor coordinates and assists with a thorough and proper preliminary investigation.



3. Ensure the following notifications are made as soon as possible unless conditions at the scene make such notification impractical:
  - a. The Homicide Section Commander and Homicide Call-Out Team;
  - b. Internal Affairs Division Investigative Section Commander and IAD Call-Out Team;
  - c. Chief of Staff (OCOP);
  - d. Chief of Police (COP);
  - e. Alameda County District Attorney's Office Standby Team for force incidents resulting in death or injury likely to result in death;
  - f. Office of the City Attorney (OCA);
  - g. Office of Inspector General (OIG);
  - h. City Administrator;
  - i. Bureau of Field Operations (BFO) and Bureau of Investigations (BOI) Deputy Chiefs;
  - j. Division commander of the involved member or employee.



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**IV. LEVEL 2 FORCE INCIDENTS**

A use of force investigation conducted by a supervisor or commander.

**Responsibilities**

- A. Involved or witness personnel to the use of force shall:
1. Notify and brief their supervisor immediately or as soon as practical. If the immediate supervisor is unavailable, another field supervisor or commander shall be notified.
  2. Complete and submit for review the appropriate Offense/ Supplemental Report **prior to the end of tour of duty**, unless extended by the Watch Commander. The member or employee who uses force shall include the following minimum information regarding the use of force incident in their Offense or Supplemental Report:
    - a. The original reason for police presence on the scene;
    - b. The circumstances that resulted in the use of force; and
    - c. A detailed description of the force used.
  3. Ensure the subject is transported to a medical facility for medical evaluation if a carotid restraint is applied. Document a refusal for medical treatment.
- B. Uninvolved personnel who did not witness the use of force shall perform the following, when directed by a supervisor or commander:
1. Conduct a reasonable canvas in an effort to identify and obtain statements from other witnesses in the proximity of the use of force incident, commensurate with the availability of resources and the conditions of the event.
  2. Witnesses to a use of force shall be identified to the extent that it is reasonable and listed in a Supplemental Report (536-937) or Victim/Witness Report (536-935). Statements shall be taken from outside agency personnel or private person witnesses, when practical. The following criteria shall be used when listing witnesses:

a. Outside Agency Personnel

Outside agency personnel at the scene of a use of force incident, whether they witnessed the use of force or not, shall be identified as follows:

- 1) Name;
- 2) Rank/Title;
- 3) Serial number; and
- 4) Department affiliation.

b. Private Person Witnesses

Private persons at the scene of a use of force incident whether they witnessed the use of force or not, shall be identified, when possible, as follows:

- 1) Name;
- 2) Sex, Race, DOB;
- 3) Contact number(s); and
- 4) Home address.

3. Document in the appropriate report why witness information was not obtained in situations where it was unsafe or impractical to obtain, (e.g., hostile crowd, insufficient police resources), the witness refused to remain at the scene, or is uncooperative.
4. Members shall not detain or delay a witness who refuses to remain at the scene; however the witness' physical description, license plate, comments, or other identifiers shall be obtained when available and documented in the appropriate report.
5. Members shall summon a supervisor to the scene in the event a witness refuses to give a statement or provide identification information.
6. Complete a Supplemental Report without discussing the details of the incident with other personnel on scene. Group reporting is prohibited.

7. Personnel on scene at the time of the use of force incident, but not involved in or a witness to the use of force, shall be separately interviewed by the investigating supervisor, prior to clearing from the incident. Any relevant information revealed in the interview shall be included in the member or employee's Supplemental Report.

C. Supervisor Responsibilities

1. Respond to the location of the incident unless community unrest or other conditions make such response impracticable. In such instances, an alternate safe location shall be arranged;

In the event the Watch Commander is involved in the use of force incident, he/she shall contact his/her immediate superior officer. The superior officer has the discretion to respond to the scene to conduct the investigation or assign another investigator.

2. Secure and manage the scene.
3. Coordinate the apprehension of the suspect, if still outstanding.
4. Ensure the subject is transported to a medical facility for medical evaluation when a carotid restraint is applied.
5. Contact the Communications Division before the end of tour of duty and advise the Communications Division Shift Supervisor to enter the use of force incident into the Daily IAD Incident Log.
6. When the situation has been stabilized and it can be accomplished safely:
  - a. Advise the Watch Commander or commander of the operation of the incident;
  - b. Ensure involved personnel and witnesses, outside agency personnel, and private person witnesses are identified in accordance with the provisions of RWM Insert U-1.
  - c. Ensure involved personnel and witnesses have been separated and advised that communication regarding the incident is prohibited.

7. Conduct an investigation in a timely manner to include, but not limited to, the following:
  - a. A separate, personal interview with involved and witness personnel including, if necessary, a written or recorded statement.
  - b. Personnel on scene at the time of the use of force incident, but not involved in or a witness to the use of force, shall be separately interviewed by the investigating supervisor, prior to clearing from the incident. Any relevant information revealed in the interview shall be included in the member or employee's Supplemental Report. Group interviewing is prohibited.
  - c. A personal interview with the subject(s) upon whom the use of force was used to include a written or recorded statement, when possible.
  - d. Contact medical personnel, when practical, who evaluated and/or provided treatment to the subject for available information on the subject's injuries and condition.
  - e. Ensure photographs are taken of:
    - 1) The physical condition of the subject and involved personnel, to record the presence or lack of injuries;
    - 2) The location of the use of force incident; and
    - 3) Other relevant evidence.

Document the reason why photographs were not taken.
  - f. Ensure digital photographs or film are submitted and processed utilizing one of the following procedures:
    - 1) Digital – Copy digital files to a compact disk, handle and submit as evidence, and list as evidence in the Use of Force Report; or

- 2) Film – Submit film for processing utilizing a Photo Evidence Card (536-317). Complete the appropriate boxes on the card. Additionally, ensure the following information is on the card:
  - a) **Comments** box – Indicate “Use of Force” & RD No. & “Put on CD”;
  - b) **Send To** box – “To IAD Administrative Supervisor.”
  
8. Respond to the location of a witness who has declined to give a statement or has refused to give witness identification information when requested by a member or employee. The outcome shall be documented in the member’s Supplemental Report after the supervisor has talked to the witness.
  
9. Ensure personnel who were on scene at the time of the incident or were assigned to assist at the scene complete the appropriate report.
  
10. Offense/Supplemental Reports shall be prepared independently without discussing the details of the incident with other personnel on scene. Group reporting is prohibited.
  
11. When a supervisor, commander or investigator directs personnel not to complete a required report, the reason shall be documented in the Use of Force Report.
  
12. Conduct a thorough review of all documents to be included in the Use of Force Report packet to ensure completeness, accuracy, and quality.
  
13. Ensure the appropriate Offense or Supplemental Report contains the following minimum information regarding the use of force incident:
  - a. The original reason for police presence on the scene;
  - b. The circumstances that resulted in the use of force; and
  - c. A detailed description of the force used.
  
14. Incomplete or inadequate reports shall be returned for additional details or clarification.

15. Prepare a Use of Force Report (TF-967) in accordance with the provisions of RWM Insert U-1, USE OF FORCE REPORT, unless otherwise directed by a commander or investigator.
16. Ensure the Use of Force Report packet contains:
  - a. The **original** Use of Force Report to include a Chronological Activity Log and Use of Force Checklist;;
  - b. A **copy** of the appropriate report (e.g., Offense Report or field contact card); and
  - c. **Copies** of ancillary documents, if necessary (e.g., statements (if any), Supplemental Reports, Technician Reports, Detail, CAD purge, available medical information obtained, and photographs, if available).
17. Email only the Use of Force Report face sheet (page 1) to the following, **prior to the end of tour of duty**:
  - a. opdiad@oaklandnet.com;
  - b. bfoadmin@oaklandnet.com;
  - c. Involved member or employee's Division Commander; and
  - d. Involved member or employee's Bureau Deputy Chief/Director.
18. Ensure the **original** Offense Report **and** ancillary documents are deposited in the Report Writing Receptacle in an In-Custody or Case Envelope.
19. Retain an electronic **copy** of the Use of Force Report until documented in the member/employee's annual performance appraisal.
20. Complete and forward the Use of Force Report packet, **within seven (7) calendar days**, through the appropriate chain-of-review<sup>2</sup>. The due date may be extended with the approval of the reviewing Division Commander and shall be documented in the Chronological Activity Log.

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<sup>2</sup> For the purpose of this order, the appropriate chain-of-review refers to the chain-of-command under which the involved member was working during that tour of duty when the force incident occurred.

- D. Watch Commander or Commander of the Operation Incident Scene Responsibilities
1. Respond to the scene and take Incident Command when advised the incident involves significant Department resources or is likely to generate unusual public interest.
  2. Monitor and ensure the use of force investigation is conducted in a thorough, methodical, and efficient manner.



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**V. LEVEL 3 FORCE INCIDENTS**

A review of a Level 3 force incident conducted by a supervisor or commander to assess the appropriate reporting level.

A. Involved or witness personnel to the use of force shall:

1. Notify and brief their supervisor immediately or as soon as practical. If the immediate supervisor is unavailable, another field supervisor or commander shall be notified.
2. Every member or employee who uses or witnesses a level of force requiring a Level 3 investigation shall independently complete the appropriate Offense or Supplemental Report;

The member or employee who uses force shall include the following minimum information regarding the use of force incident in their Offense or Supplemental Report:

- a. The original reason for police presence on the scene;
  - b. The circumstances that resulted in the use of force; and
  - c. A detailed description of the force used.
3. Personnel who are assigned to assist at the scene shall complete a Supplemental Report if directed by a supervisor, commander or investigator.

B. Supervisor/Commander Responsibilities

Respond to the location of the incident unless community unrest or other conditions make such response impracticable. In such instances, an alternate safe location shall be arranged; and

1. Secure the scene, if necessary;
2. Coordinate the apprehension of the suspect, if still outstanding;
3. Discuss the general circumstances of the incident with the involved personnel and witnesses to assess the appropriate reporting level, the need for resources, and to assess whether injuries, if present, are consistent with the force applied;

4. Conduct a personal interview with the subject(s) upon whom the use of force was used to include a written or recorded statement, when possible.
5. The responding on-scene supervisor or commander may authorize a Level 3 use of force incidents to be reported as a Level 4 when there is no injury to the subject requiring emergency medical treatment (beyond first-aid) or hospital admittance, allegation of misconduct, **and** no indication the use of force was out of policy. Affirmative approval shall be made by signing the approval box on the Use of Force Report - Part 3a. The following Level 3 use of force incidents may be considered:
  - a. A Taser® is fired at a person, but misses;
  - b. Oleoresin Capsicum (OC/Pepper Spray) or other chemical agent applied to a person;
  - c. Any impact weapon, including specialty impact munitions, or any other instrument is used in an attempt to strike another person but **no contact is made**;
  - d. A baton used for a non-striking purpose (e.g., prying limbs, moving or controlling a person); or
  - e. A Weaponless Defense Technique other than control holds, excluding strikes to the head, to include:
    - 1) Hand/palm/elbow strikes;
    - 2) Kicks;
    - 3) Leg sweeps; and
    - 4) Takedowns.

In the event the Watch Commander is involved in a Level 3 use of force incident enumerated above in Part V, B, 5, a-e, he/she shall contact his/her immediate superior officer to determine the appropriate level of reporting. If a Level 3 investigation is determined, the superior officer has the discretion to respond to the scene to conduct the investigation or assign another investigator.

6. Level 3 reporting shall include documentation of the following:
  - a. The absence of injuries to the subject;
  - b. A description of the injury not requiring emergency medical treatment or hospital admittance; or
  - c. Any injury to OPD personnel and any medical care or treatment provided.
7. Assess any complaint of injury and consider it as a factor toward elevating the Level 3 force to a Level 2 force investigation.
8. Ensure photographs are taken of the subject and involved member/employee to record the presence or absence of injuries, the location of the incident, and other relevant evidence. Document the reason why photographs were not taken.
9. Ensure digital photographs or film are submitted and processed utilizing one of the following procedures:
  - a. Digital – Copy digital files to a compact disk, handle and submit as evidence, and list as evidence in the Use of Force Report; or
  - b. Film – Submit film for processing utilizing a Photo Evidence Card (536-317). Complete the appropriate boxes on the card. Additionally, ensure the following information is on the card:
    - 1) **Comments** box – Indicate “Use of Force” & RD No. & “Put on CD”;
    - 2) **Send To** box – “To IAD Administrative Supervisor.”
10. Interview available witnesses at the scene.

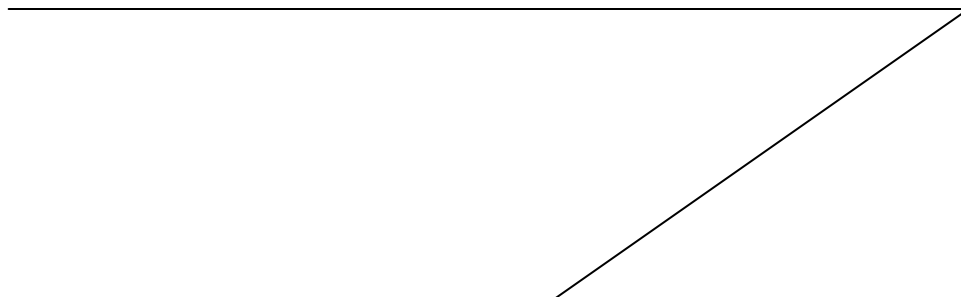
**NOTE:** Written/recorded statements are not required for a Level 3 force incident.
11. Contact Communications Division and advise the Communications Supervisor, or in his/her absence, the on-duty Police Communications Supervisor, to enter the use of force into the Daily IAD Incident Log.

12. Ensure personnel complete a Supplemental Report who were witnesses to a Level 3 force incident or were assigned to assist at the scene.
13. When a supervisor, commander or investigator directs personnel not to complete a required report, the reason shall be documented in the Use of Force Report.
14. Conduct a thorough review of all documents to be included in the Use of Force Report packet to ensure completeness, accuracy, and quality.
15. Ensure the appropriate Offense or Supplemental Report contains the following minimum information regarding the use of force incident:
  - a. The original reason for police presence on the scene;
  - b. The circumstances that resulted in the use of force;
  - c. A detailed description of the force used; and
  - d. Document the number of bursts, duration of each burst, the approximate distance from the subject, and the location of spray contact, when OC is used.
16. Incomplete or inadequate reports shall be returned for additional details or clarification.
17. Prepare a Use of Force Report (TF-967) in accordance with the provisions of RWM Insert U-1, USE OF FORCE REPORT, unless otherwise directed by a commander or investigator.
18. Ensure the Use of Force Report packet contains:
  - a. The **original** Use of Force Report to include a Chronological Activity Log and Use of Force Checklist;
  - b. A **copy** of the appropriate report (e.g., Offense Report or field contact card); and
  - c. **Copies** of ancillary documents, if necessary (e.g., statements (if any), Supplemental Reports, Technician Reports, Detail, CAD purge, available medical information obtained, and photographs, if available).

19. Email only the face sheet of the Use of Force Report to the following, **prior to the end of tour of duty**:
  - a. opdiad@oaklandnet.com;
  - b. bfoadmin@oaklandnet.com;
  - c. Involved member or employee's Division Commander; and
  - d. Involved member or employee's Bureau Deputy Chief/Director.
20. Ensure the **original** Offense Report **and** ancillary documents are deposited in the Report Writing Receptacle in an In-Custody or Case Envelope.
21. If notified of an allegation of unreasonable force, the supervisor shall conduct a preliminary investigation.
  - a. If there is corroborating evidence that unreasonable use of force occurred, the supervisor shall conduct a **Level 2** force investigation and initiate an internal investigation.
  - b. If there is no corroborating evidence that unreasonable use of force occurred, the supervisor shall document the results of the preliminary complaint investigation in the narrative of the Use of Force Report.
22. Retain an electronic **copy** of the Use of Force Report until documented in the member/employee's annual performance appraisal.
23. Complete and forward the Use of Force Report packet, **within seven (7) calendar days**, through the appropriate chain-of-review<sup>3</sup>. The due date may be extended with the approval of the reviewing Division Commander and shall be documented in the Chronological Activity Log.

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<sup>3</sup> For the purpose of this order, the appropriate chain-of-review refers to the chain-of-command under which the involved member was working during that tour of duty when the force incident occurred.



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**VI. LEVEL 4 FORCE INCIDENTS**

A self-reported use of force.

**A. Involved Personnel Responsibilities**

1. Notify and brief their supervisor immediately or as soon as practical. If the immediate supervisor is unavailable, another field supervisor or commander shall be notified.
2. Complete a Use of Force Report (TF-967) in accordance with the provisions of RWM Insert U-1, USE OF FORCE REPORT or when authorized by a supervisor or commander.

A narrative shall be included in the Use of Force Report if no other required Offense or Supplemental Report is completed.

3. The member or employee who uses force shall include the following minimum information regarding the use of force incident in their Offense, Supplemental, or Use of Force Report:
  - a. The original reason for police presence on the scene;
  - b. The circumstances that resulted in the use of force; and
  - c. A detailed description of the force used.
4. Place the **original** Use of Force Report and, if applicable, the appropriate Offense Report and ancillary documents in an In-Custody/Case Envelope and deliver to his/her immediate supervisor or, if unavailable, to an on-duty supervisor for review **prior to the end of tour of duty**.

**B. Supervisor/Commander Responsibilities**

1. When contacted by involved personnel, supervisors shall review the general circumstances of the incident with the involved personnel as necessary, and ensure the facts are consistent with the reporting level. Supervisors are not required to respond to the incident.



2. Prior to reducing a Level 3 use of force incident to a Level 4, the approving supervisor shall ensure there is no injury to the subject requiring emergency medical treatment (beyond first-aid) or hospital admittance, allegation of misconduct, **and** there is no indication the use of force was out of policy. Affirmative approval shall be made by the supervisor by signing the appropriate box on the Use of Force Report - Part 3a.
3. If notified of an allegation of unreasonable force, the supervisor shall conduct a preliminary investigation.
  - a. If there is corroborating evidence that unreasonable use of force occurred, the supervisor shall conduct a **Level 2** force investigation and initiate an internal investigation.
  - b. If there is no corroborating evidence that unreasonable use of force occurred, the supervisor shall document the results of the preliminary complaint investigation in a Risk Management Memorandum if no Use of Force Report is completed.
4. **Level 4** incidents do not require witness identification.



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**VII. LEVEL 1 FORCE INCIDENTS INVOLVING AN OUTSIDE AGENCY**

- A. A Level 1 force incident occurring outside the City of Oakland
1. Upon notification, the Watch Commander shall:
    - a. Send an on-duty supervisor to the jurisdiction in which the incident occurred unless the distance makes it impractical. The supervisor shall remain with the member(s) during the investigation by the outside agency;
    - b. Notify the BOI Deputy Chief who shall determine if Homicide investigators are to be called-out; and
    - c. Notify the IAD Commander who shall determine if IAD investigators are to be called-out.
  2. The law enforcement agency which has jurisdiction, in which the incident occurred, shall have incident command and primary criminal investigation responsibility. The Homicide Section shall only assume primary criminal investigation responsibility upon the request of the outside agency.
  3. Homicide Section investigators shall request to attend the interview of OPD personnel, unless the distance involved makes this impractical.
  4. IAD investigators shall request to monitor the interview of OPD personnel, unless the distance involved makes this impractical.
- B. A Level 1 force incident involving outside agency personnel within the City of Oakland
1. The Homicide Section shall conduct the criminal investigation for the following incidents:
    - a. Any use of force resulting in death;
    - b. Any intentional firearm discharge at a person regardless of injury;
    - c. Any force which creates a substantial risk of causing death;

- d. Any unintentional firearms discharge if a person is injured as a result of the discharge; or
  - e. Any use of force incident referred by a Watch Commander.
2. The outside agency may assist at the discretion of the BOI Deputy Chief.



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**VIII. COMMAND REVIEW AND ENDORSEMENT**

## A. All reviewers shall:

1. Review the Use of Force Report packet and evaluate the Use of Force Report and ancillary documents for completeness, accuracy, and quality and ensure reports do not contain “Boilerplate” or “Pat” language without descriptive or explanatory details of the action. Return any reports that are incomplete or inadequate and ensure corrections are made;
2. Order further investigation or additional investigative resources when necessary;
3. Evaluate and document whether the use of force was in compliance with Departmental policy and comment on any training and tactical issues, when appropriate; and
4. Document extension approvals by the reviewing Division Commander on the Use of Force Chronological Activity Log. The Division Commander shall ensure the IAD and BFO Administrative Unit are notified of any approved extensions.
5. Complete, endorse, and sign a Use of Force Report Signature Page (TF-967c) and forward the Use of Force Report packet within four (4) calendar days.

## B. Level 1 Force Review Responsibilities

1. The Homicide Section Commander shall:
  - a. Ensure a follow-up investigation is conducted and the assigned Homicide investigator prepares a Follow-up Investigation Report (336-201) in accordance with the provisions of Homicide Section Policy and Procedure 01, LEVEL 1/IN-CUSTODY DEATH INVESTIGATIONS.
  - b. Review and forward the approved Follow-up Investigation Report to the IAD **within 45 calendar days of the incident**, unless extended by the BOI Deputy Chief in accordance with the provisions of Homicide Section Policy and Procedure 01.

2. The IAD Commander shall:
  - a. Ensure IAD investigators have conducted a concurrent use of force investigation and prepared a Use of Force or In-Custody Death Report in accordance with the provisions of RWM Insert U-1 and IAD Policy and Procedure 05-04 **within 60 calendar days of the incident**, unless extended by the Chief of Police.
  - b. Review and forward the approved Use of Force or In-Custody Death Report packet to the BOS Deputy Chief and Chief of Staff, **within 15 calendar days from receipt**, unless extended by the COP in accordance with the provisions of IAD Policy and Procedure 05-04.
  - c. Provide an oral report to the COP within 24 hours of the incident.
3. Chief of Staff (COS)
  - a. Enter data from the Use of Force/In-Custody Death Report face sheet into a log upon receipt;
  - b. Track the Use of Force/In-Custody Death Report due date to ensure the timeliness of the investigation, and ensure the BOS Deputy Chief has received the Use of Force Report packet and information necessary to conduct the EFRB. Contact the IAD Commander and ascertain the delay if not received **within 76 calendar days of the incident** and notify the COP of the delay.

C. Level 2 and 3 Force Review Responsibilities

1. Reviewing Commanders shall:
  - a. Review and forward all approved Use of Force Report packets through the Division Commander to BFO Administration Unit.

**NOTE:** BFO Administration Unit shall receive and track **ALL** Use of Force Report packets, regardless of originating unit.

- b. If a training issue arises from a Level 3 incident, the Division Commander shall ensure training is conducted and a Training Memorandum is completed and forwarded to the Training Division for input into the Training Management System (TMS).

**AND/OR**

- c. Training is requested from the Training Division, through a Training Memorandum, when it cannot be accomplished at the division level. Training Division personnel shall input completed training in the TMS.
- d. If a Department-related service recommendation (e.g., policy revision, equipment evaluation, new Department publication) arises from a Level 3 incident, the Division Commander shall prepare and forward a recommendation memorandum through the chain-of-command to the Chief of Police.

## 2. BFO Administrative Unit shall:

- a. Notify the appropriate commander if the Use of Force Report packet has not been received **within 16 calendar days of the incident**.
- b. Review the Use of Force Report;
- c. If the Use of Force Report is returned for additional follow-up or clarification, the due date may be extended, as needed, by the BFO Administrative Supervisor and documented in the Chronological Activity Log.
- d. Forward completed Use of Force Report packet to the IAD, **within four (4) calendar days of receipt of a completed packet**.

## D. Level 4 Force Review Responsibilities

## 1. Reviewing supervisor:

- a. Conduct a thorough review of all documents to ensure completeness, accuracy, and quality.

- b. Ensure the appropriate Offense, Supplemental, or Use of Force Report contains the following minimum information regarding the use of force incident:
    - 1) The original reason for police presence on the scene;
    - 2) The circumstances that resulted in the use of force; and
    - 3) A detailed description of the force used.
  - c. Incomplete or inadequate reports shall be returned for additional details or clarification.
  - d. Ensure the Use of Force Report has an Incident number. Advise the Communications Division Shift Supervisor to enter the use of force into the Daily IAD Incident Log.
  - e. Ensure the **original** Offense Report **and** ancillary documents are deposited in the Report Writing Receptacle in an In-Custody or Case Envelope.
  - f. Upon approval, sign the appropriate Level 4 Reviewer box on the Use of Force Report; and
  - g. Ensure the Use of Force Report packet contains:
    - 1) The **original** Use of Force Report (No Chronological Activity Log or Use of Force Checklist is required);
    - 2) A **copy** of the appropriate report (e.g., Offense/Supplemental Report or field contact card); and
    - 3) **Copies** of statements (if any).
  - h. Forward the **original** Use of Force Report packet to the first-level commander for review, **prior to the end of tour of duty**.
2. The first-level commander shall:
- a. Review the **original** Use of Force Report packet. If the Use of Force Report is returned for additional follow-up or clarification, the due date may be extended, as needed, and documented in the Chronological Activity Log.

- b. Upon approval, sign the appropriate Level 4 Reviewer box on the Use of Force Report; and
- c. Forward approved Use of Force packet to the BFO Administrative Unit **within four (4) calendar days of approval.**

In the event the Watch Commander prepares a Level 4 Use of Force Report, he/she shall forward the report to the BFO Administrative Unit.

E. IAD

Upon receipt of a Level 2-4 Use of Force Report, IAD shall assign a Use of Force Tracking Number to and enter the Use of Force Report information into the appropriate database, and scan the file into electronic format. IAD shall retain a hardcopy and an electronic file of the Use of Force Report packet.

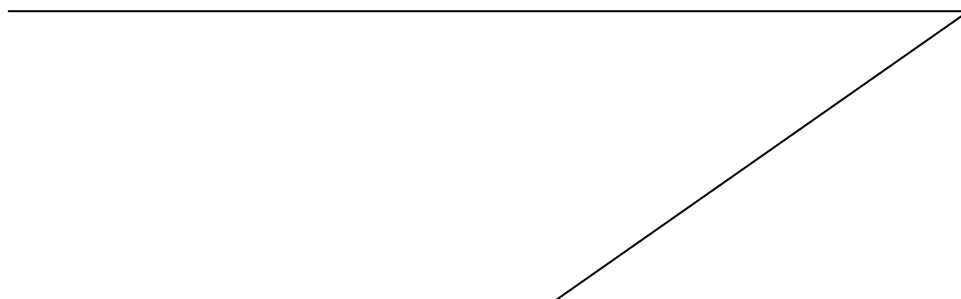
Additionally, IAD shall forward the entire electronic file of Level 2 Use of Force Report packets, via email or appropriate media, to the Training Division Commander and the Chief of Staff **within four (4) calendar days of receipt.**

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**IX. RISK MANAGEMENT**

The purpose of documenting risk management issues is to ensure a proper preliminary investigation is conducted and notification of the incident is made to the IAD (for units outside of the IAD) when any of the incidents enumerated in Part I, B, 2-4 occur.

The supervisor shall:

- A. Respond to the scene;
- B. Ensure the involved member documents the circumstances of the incident in the appropriate report;
- C. Obtain an Incident Number from the Communications Division;
- D. Conduct a preliminary investigation;
  1. If the preliminary investigation reveals corroborating evidence that the use of force occurred, the supervisor or commander shall conduct a Level 2 force investigation<sup>4</sup>, initiate an internal investigation in accordance with the provisions of DGO M-3, and notify the Watch Commander;
  2. The Watch Commander shall contact the IAD to determine if a call-out is warranted;
  3. If the preliminary investigation reveals no corroborating evidence that the alleged use of force occurred, the supervisor or commander shall document the results of the preliminary complaint investigation in the narrative of the Use of Force Narrative Report (Level 2-4) or a Risk Management Memorandum if no Use of Force Report is completed.
- E. Risk management documentation shall include:
  1. A summary of the incident;
  2. Written or recorded statement(s) from the complainant, injured person, and witnesses, if practical;

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<sup>4</sup> The IAD shall include risk management documentation in a Level 1/In-Custody Death Report.

3. Indicate complainant was:
    - a. Advised of their right to file a complaint with CPRB;
    - b. Provided with a Complaint Packet (TF-3208); and
    - c. Provided with the Incident Number.
  4. Photographs;
  5. Documentation of evidence collected or reason why evidence was not collected.
  6. Offense or Supplemental Report(s) from involved personnel; and
  7. Other pertinent documents (if available).
- F. Contact the Communications Division Shift Supervisor, at the conclusion of the preliminary investigation, and provide the following information:
1. Complainant's name (for verification);
  2. Time contact made with complainant;
  3. Name of Watch Commander/Unit Commander notified; and
  4. Disposition of complaint.
- G. If a Level 2-4 Use of Force Report is being prepared, check the "Risk Management Advisement" box on the Use of Force face sheet
- For Level 4 force incidents only:
1. The officer who used the force shall prepare a Use of Force Report.
  2. The notified supervisor shall prepare a Use of Force Narrative Report to include the required elements enumerated in Part IX, A-F.
  3. Include in the Use of Force Report packet.

DEPARTMENTAL GENERAL ORDER  
OAKLAND POLICE DEPARTMENT

K-4

Effective Date  
1 Aug 07

- H. When no Use of Force Report is required, the notified supervisor shall prepare a Risk Management Memorandum to include the required elements enumerated in Part IX, A-F.
- I. Forward the Use of Force Report packet or the Risk Management Memorandum with documentation, through the appropriate chain-of-review to the IAD.

By order of

Wayne G. Tucker  
Chief of Police

Date Signed: \_\_\_\_\_



Office of the City Manager

December 21, 2017

To: Honorable Mayor and Members of the City Council

From: *DWR* Dee Williams-Ridley, City Manager

Subject: Update; Use of Force Policy Development

This memorandum provides an update on the progress of the Berkeley Police Department's work on the revision of General Order U-2, Use of Force, as requested by Council on October 31, 2017.

The working group has drafted new and revised language to U-2, including:

- Formal language regarding the value of human life and dignity, without prejudice to anyone;
- Formal language regarding using de-escalation tactics and techniques which seek to minimize the need to use force and increase the likelihood of voluntary compliance;
- Re-draft definition of force;
- Expand the threshold of reporting force, including sub-categories of physical force;
- Consider approaches to categorization of force levels; using plain language to increase transparency;
- Posting of use of force statistics on the City's Open Data Portal.

Additionally, staff is drafting a model report to serve as a template for an annual use of force report.

External factors which could affect implementation of the completed policy include: necessary review from the City Attorney's office, and the need to meet and confer with the Berkeley Police Association. Once finalized, the policy will be provided to the Police Review Commission.

We look forward to completing work on this item. In the meantime, it may be helpful to note that the Department's overall use of force use appears quite small, proportional to the number of incidents to which the Department responds. The Chief has commented on this in the past, and provided the following information for your information.

Page 2 of 2

December 21, 2017

Re: Update, Use of Force Policy Development

**Use of Force data against calls for service data:** In the past three years, 2015,-2017, approximately 105 of the 223,878 incidents BPD responded to resulted in a Use of Force report. In other words, .047% (*forty-seven thousandths of a percent*) of the incidents BPD responded to resulted in a documented Use of Force report. The majority of force used is physical force.

**Use of Force Complaints data against calls for service data:** In the same period, approximately 34 of the 223,878 incidents BPD responded to resulted in a Use of Force complaint: about one out of every 6,500, or .015%, *fifteen-thousandths of a percent*.

If you have any questions, please let me know.

cc: Jovan Grogan, Deputy City Manager  
Ann Marie Hogan, City Auditor  
Mark Numainville, City Clerk  
Matthai Chakko, Assistant to the City Manager / Public Information Officer

Draft for PRC review



## Use of Force

### 300.1 PURPOSE AND SCOPE

**Best Practice**

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

#### 300.1.1 DEFINITIONS

**Federal**

Definitions related to this policy include:

**Deadly force** - Any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm (Penal Code § 835a).

Commented [GA1]: 835a

Commented [OJ2]: Changes based on Lexipol update related to the new use of force law

**Force** - The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

Commented [GA3]: New

**Less-Than-Lethal Force** - Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options. Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.

Commented [GA4]: Combines existing U-2 language

**Non-Lethal Force** - Any use of force other than lethal force or less-than lethal force.

Commented [GA5]: U-2

**Compliant** - Cooperative and/or response to lawful commands.

Commented [GA6]: New

**Passive Resistance** - Noncompliance to lawful authority without physical resistance or mechanical enhancement.

Commented [GA7]: New

**Active Resistance** - Use of physical effort or mechanical resistance in achieving and/or maintaining noncompliance.

Commented [GA8]: New

**Control Techniques** - Control holds, Personal Impact Weapons, and Take Downs.

Commented [GA9]: New

**Personal Body Weapons** - An officer's use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of kinetic energy transfer (impact) to gain control of a subject.

Commented [GA10]: New

Draft for PRC Review

**Blue Team (BT)** - Computer software that allows officers to enter use of force and other incidents from a Department computer.

Commented [GA11]: New

**Concealment** - Anything which conceals a person from view.

Commented [GA12]: New

**Cover** - Anything which provides protection from bullets or other projectiles fired or thrown. Cover is subjective and its effectiveness depends upon the threat's ballistic capability (handgun, rifle, etc...).

Commented [GA13]: New

**Blocking** - The positioning of a police vehicle in the path of an occupied subject vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal.

Commented [GA14]: New

**Ramming** - The use of a vehicle to intentionally hit another vehicle

Commented [GA15]: New

**Serious Bodily Injury** - A bodily injury that creates a substantial risk of death, causes serious, permanent disfigurement or results in a prolonged loss or impairment of the functioning of any bodily member or organ.

Commented [GA16]: New

**Officer (or) Police Officer** - Any sworn peace officer.

Commented [GA17]: Existing language

**Authorized Employee** - Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.

Commented [GA18]: Existing language

**Employee** - Any non-sworn employee of the Berkeley Police Department, including those deemed "authorized employees."

Commented [GA19]: Existing language

300.2 POLICY

Best Practice

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity, without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

300.2.1 DUTY TO INTERCEDE

Federal

Any officer present and observing another officer using force that is clearly beyond that which is



objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee or member of another department use force that exceeds the degree of force permitted by law shall promptly report these observations to a supervisor.

Commented [GA20]: Added from existing BPD U-2

300.3 USE OF FORCE

Federal

Officers shall use only that amount of force that is objectively reasonable given the facts and totality of the circumstances known or perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers shall use only the force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others. (Penal Code § 835a)

Commented [GA21]: Changes based on Lexipol/new use of force law

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident, rather than with the 20 / 20 vision of hindsight. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving. This policy takes into consideration that there are a range of reasonable responses to each situation. (Graham v. Connor 490 U.S. 386 (1989))

Commented [GA22]: Added citation

The decision to use force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (Graham v. Connor 490 U.S. 386 (1989))

Commented [GA23]: Added citation

In deciding what type of reasonable force to use, officers and employees must use sound judgment and their training to assess the degree of threat in a given situation, and to determine what departmentally authorized force technique or weapons will bring the situation under control in a reasonable manner.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.

300.3.1 USE OF FORCE TO EFFECT AN ARREST

State

Any peace officer may use reasonable force to effect an arrest, to prevent escape or to overcome

resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape or to overcome resistance (Penal Code § 835a).

### 300.3.2 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. In the instance when force is used an officer shall not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the department for the specific purpose of collecting evidence.

### 300.3.3 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

**Federal**

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include, but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others (Penal Code § 835a).
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer (Penal Code § 835a).
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity (Penal Code § 835a).
- (g) The individual's apparent ability to understand and comply with officer commands (Penal Code § 835a).
- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.

**Commented [GA24]:** Items in below listed with the PC 835a citation are new to the law.

- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

**Commented [OJ25]:** Lexipol updated this list based on changes in the law. The main changes are d) and g). Added "apparent" to sections a) and f) and included language referencing Penal Code section 835a, to certain sections.

**Commented [GA26]:** New language-BPD Unique

#### 300.3.4 DE-ESCALATION TACTICS

De-escalation tactics and techniques are actions which may be used by officers which seek to minimize the need to use force during an incident. Such tactics and techniques may increase the likelihood of voluntary compliance when employed and should be used when it is safe to do so, without compromising law enforcement objectives and priorities. De-escalation tactics emphasize slowing an incident down to allow time, distance and flexibility for the situation to resolve. The application of these tactics is intended to increase the potential for resolution with a minimal reliance on the use of force, or without using force at all.

If immediate action is not necessary, an officer(s) should attempt to use verbal de-escalation techniques. When available and when practicable, a Crisis Intervention Team (CIT) officer, crisis negotiator, or Berkeley Mental Health Mobile Crisis Team member should be called upon as a resource.

When reasonable under the totality of circumstances, officers should gather information about the incident, assess the risks, assemble resources, attempt to slow momentum and communicate and coordinate a response. In their interaction with subjects, officers should use advisements, warnings, verbal persuasion and other tactics and alternatives to higher levels of force. Officers may move to a position that is tactically more secure or allows them greater distance to consider or deploy a greater variety of force options.

When time and circumstances allow, officers should consider the following tactical principles:

- (a) Make a tactical approach to the scene.
- (b) Maintain a safe distance.
- (c) Use available cover or concealment and identify escape routes.
- (d) Stage Berkeley Fire Department.
- (e) Control vehicle and pedestrian traffic.
- (f) Establish communication, preferably with one officer.
- (g) Create an emergency plan and a deliberate plan with contingencies.
- (h) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

When time and circumstances reasonably permit, officers should consider whether a subject's

lack of compliance is a deliberate attempt to resist or is the result of an inability to comply based on factors such as:

- (a) Medical conditions
- (b) Mental impairment
- (c) Developmental disability
- (d) Physical Disability
- (e) Physical limitation
- (f) Language barrier
- (g) Drug interaction
- (h) Behavioral crisis

### 300.3.5 PAIN COMPLIANCE TECHNIQUES

**Best Practice**

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

### 300.3.6 USE OF NON-LETHAL FORCE

When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use reasonable approved non-lethal force techniques and weapons in the following circumstances:

- a) To protect themselves or another person from physical injury;
- b) To restrain or subdue a resistant individual; or
- c) To bring an unlawful situation safely and effectively under control.

### 300.3.7 CAROTID CONTROL HOLD PROHIBITION

The use of a Carotid Restraint Hold is prohibited. Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in

**Commented [GA27]:** Longstanding Berkeley City Council Resolution

the City of Berkeley” states: “Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley.”

The term bar-arm refers to a variety of techniques. As defined in the City Council Resolution, “bar-arm hold” refers to any use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.

**300.4 DEADLY FORCE APPLICATIONS**

**Federal**

If an objectively reasonable officer would consider it safe and feasible to do so under the totality of the circumstances, officers should evaluate the use of other reasonably available resources and techniques when determining whether to use deadly force. The use of deadly force is only justified in the following circumstances (Penal Code § 835a):

- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury to the officer or another person.
- (b) An officer may use deadly force to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended.

Where feasible, the officer shall, prior to the use of deadly force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

Officers shall not use deadly force against a person based on the danger that person poses to him/herself, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the officer or to another person (Penal Code § 835a).

An “imminent” threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer’s subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention (Penal Code § 835a).

**Commented [OJ28]:** Our policy used Lexipol language verbatim. This is the updated version from Lexipol that incorporates the new law that goes into effect in 2020. The most significant change is the second to last paragraph prohibiting the use of deadly force against someone who is only a danger to him or herself.

**Commented [GA29]:** BPD Language

**300.4.1 DIRECTED FIRE**

Officers may use controlled gunfire that is directed at the suspect, reducing the suspect’s ability to

return fire while a group or individual movement is conducted.

Officers may employ this tactic when dealing with a suspect who poses an immediate and ongoing lethal threat and only under circumstances where the use of deadly force is legally justified. Target acquisition and communication are key elements in the successful use of this tactic. Officers remain accountable for every round fired under these circumstances.

#### 300.4.2 SHOOTING AT OR FROM MOVING VEHICLES

**Best Practice**

Firearms should not be discharged at a stationary or moving vehicle, the occupants of a vehicle, or the tires of a vehicle unless a person in the vehicle is imminently threatening an officer or another person present with deadly force. The moving vehicle alone does not presumptively constitute a threat that justifies the use of deadly force.

Officers shall not move into, remain, or otherwise position themselves in the path of a vehicle in an effort to detain or apprehend the occupants. Any officer in the path of a moving vehicle shall immediately attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants.

Because this policy may not cover every situation that may arise, a deviation from this policy may be reasonable, depending on the circumstances. A deviation from this policy would, for instance, be justified if the officer used a firearm in an attempt to stop an imminent vehicle attack on a crowd or a mass casualty terrorist event.

Factors that may be used to evaluate the reasonableness of the use of a firearm against a vehicle include:

- (a) The availability and use of cover, distance and / or tactical relocation
- (b) Incident command and personnel placement
- (c) Tactical approach
- (d) Regard for viable target acquisition and background including location, other traffic, the presence of innocent persons, and police officers

#### 300.5 USE OF VEHICLES

Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except under circumstances outlined in section 300.4 and in Policy V-6 that covers vehicle operations.

Commented [GA30]: BPD Language

The Vehicle Containment Technique (VCT) is the positioning of a police vehicle in the path of a suspect vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal. VCT shall only to be used on vehicles that are either stationary or moving at a slow speed. This technique is designed to contain a suspect vehicle to a single stationary location, thereby preventing a pursuit from initiating, or a potentially violent situation (e.g. a hostage situation or person barricaded inside a vehicle) from becoming mobile.

When properly utilized, the VCT can give officers time, distance, and cover in order to safely and effectively resolve a situation.

#### 300.6 REPORTING REQUIREMENTS

**Best Practice**

Any use of force described in 300.6.2 shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) he or she must also complete a "Use of Pepper Spray Report"

A use of force report is not required when a person is handcuffed, searched, or subject to a control hold and there is no injury or complaint of injury.

300.6.1 INTENTIONALLY POINTING A FIREARM AT AN INDIVIDUAL

Commented [GA31]: BPD Language

Whenever an officer intentionally points a firearm at an individual they shall document the occurrence on a Blue Team report. Officers shall articulate the facts that lead them to point a firearm at an individual and advise a supervisor prior to the end of shift so they can review the report documenting the incident.

Commented [OJ32]: Requires us to be live on Blue Team.

Officers are not required to document drawing or deploying a firearm if they do not intentionally point it at a subject.

300.6.2 NOTIFICATION TO SUPERVISORS

Best Practice

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain as a result of the use of force.
- (d) Any application of less than lethal munitions or pepper spray.
- (e) The individual was struck by a baton
- (f) The individual subjected to the force was rendered unconscious.
- (g) The individual was struck with a personal body weapon or was subjected to a take-down.
- (h) An individual alleges any of the above has occurred.

300.6.3 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

State

Statistical data regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is to be reported to the California Department of Justice as required by Government Code § 12525.2. See the Records Management policy.

300.7 MEDICAL CONSIDERATION

Best Practice

When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall ensure that the subject receives appropriate medical care.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force.

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical evaluation as soon as practicable and have medical personnel stage away if appropriate.

**300.8 SUPERVISOR RESPONSIBILITY**

**Best Practice**

When a supervisor is able to respond to an incident in which there has been a reported application of force as defined in 300.6.2 and the scene is secure, the supervisor is expected to:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (d) Identify any witnesses not already included in related reports.
- (e) Review and approve all related reports
- (f) Review body worn camera footage related to the incident.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

**Commented [OJ33]:** All cases are investigated the same way regardless of intent to sue. IAB works with City Attorney's Office when there is civil litigation.

**300.9 WATCH COMMANDER RESPONSIBILITY**

**Best Practice**

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.



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**300.10 USE OF FORCE ADMINISTRATIVE REVIEW**

The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings. The Chief of Police may convene a Review Board as outlined in Policy 301 instead of utilizing Division Captain Review.

The Chief of Police will make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.

Any determination concerning the propriety of force used will be based on the facts and information available to the officer at the time the force was employed, and not upon information gained after the fact.

All Use of Force Reports will be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; and/or, 3) require revision or additional training.

Use of Force Reports will be held in file for at least five (5) years

**300.11 TRAINING**

**Best Practice**

Officers will receive periodic training on this policy and demonstrate their knowledge and understanding.

**300.12 USE OF FORCE ADMINISTRATIVE REVIEW**

**Best Practice**

The Professional Standards Division Captain or his or her designee shall prepare an analysis report on use of force incidents to be included as part of the Police Department's Annual Crime Report to Council. The report shall not contain the names of officers, suspects or case numbers, and should include:

**Commented [OJ34]:** Changed language so the information is included as part of the Crime Report.

- (a) An analysis of use of force incidents with demographic details of the individual impacted and type of force used
- (b) The identification of any trends in the use of force by members.
- (c) Training needs recommendations.
- (d) Equipment needs recommendations.
- (e) Policy revisions

Lee, Katherine

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**From:** Greenwood, Andrew  
**Sent:** Thursday, January 2, 2020 4:03 PM  
**To:** Lee, Katherine  
**Cc:** Norris, Byron  
**Subject:** Use of Force Policy Draft and Materials  
**Attachments:** Policy300UseofForcePRC.pdf; Lexipol\_Use\_of\_Force.pdf; AB392.pdf; PC 835a.pdf

Greetings,

Sorry for the delay; my planned time in town over the holidays shifted around, and caused some delay...

Attached are:

- Policy 300 Draft for PRC Review and input. Comments in the doc generally indicate the source for language. There are small boxes reading "Best Practice" or "Federal", etc... the boxes are original Lexipol references. BPD has brought over some language from our original policy, as well as new language covering a number of sections.
- Lexipol's latest force policy, which includes their new law material.
- AB-392
- Penal Code 835a

I'd also like to share this link with the Commission: <https://post.ca.gov/use-of-force-standards>. This was created by the California Peace Officer Standards and Training (POST) Commission as a source of information for law enforcement and the public. In particular, I'd invite all commissioners to view the 15 minute training video, which our sworn personnel viewed in December. It's a solid introduction to the new changes in law.

Best regards,

Andrew Greenwood  
Chief of Police  
Berkeley Police Department  
(510) 981-5700

*Link shared by Chief Greenwood*

# AB 392 and Peace Officer Use of Force Standards

## Background

On August 19, 2019, Governor Newsom signed AB 392 which both redefines the circumstances under which a homicide by a peace officer is deemed justifiable and affirmatively prescribes the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, to prevent escape, or to overcome resistance.

## Affected Statutes

AB 392, effective January 1, 2020, amends the language of the following statutes and includes:

### Penal Code 196 PC

The circumstances of justifiable homicide change from when "overcoming actual resistance to the execution of some legal process or in the discharge of any other legal duty" to "the homicide results from a peace officer's use of force that is in compliance with PC 835a."

### Penal Code 835a PC

PC 835a(a) added to reflect legislative intent including:

Use of force authority conferred on peace officers is a serious responsibility.

Deadly force should be used only when necessary.

Use of force decisions are to be evaluated carefully and from a "reasonable officer" perspective.

Individuals with disabilities may be affected in their ability to understand or comply with peace officer commands.

PC 835a(b) amends reasonable force standard to "objectively reasonable force"

PC 835a(c)(1) amends deadly force standards to include "totality of the circumstances" when:

defending against imminent threat of death or serious bodily injury

apprehending fleeing persons for felony

involving threatened or actual death or serious bodily injury

immediate apprehension is reasonably believed to be needed

requires, when reasonable, that officers identify themselves and warn of intent to use force

### Contact Us

For further information, please contact your Regional Consultant

### Additional Resources

#### AB 392

"AB 392: California's New Use of Force Standard" Video

Available on Learning Portal (recommended for CA POST agency personnel to receive notation on POST Profile)

Available on POST Website (identical video to that on the Learning Portal)

AB 392 Use of Force Update course, 2-hours, Course #33888

Expanded Course Outline (pdf)

"Use of Force: Totality of the Circumstances" Training Video (2017)

#### Current Statutes:

PC 196

PC 835a

PC 835a(c)(2) includes prohibition on using deadly force against persons who pose a danger only to themselves.

PC 835a(d) amends self-defense language to include objectively reasonable force.

PC 835a(e) added definitions for deadly force, imminent, and totality of the circumstances.

## Use of Force Information and Training Courses

The following special video or training courses are related to this subject:

**POST video that is identical on the Learning Portal and to the public, provides expert commentary on changes with the new law.**

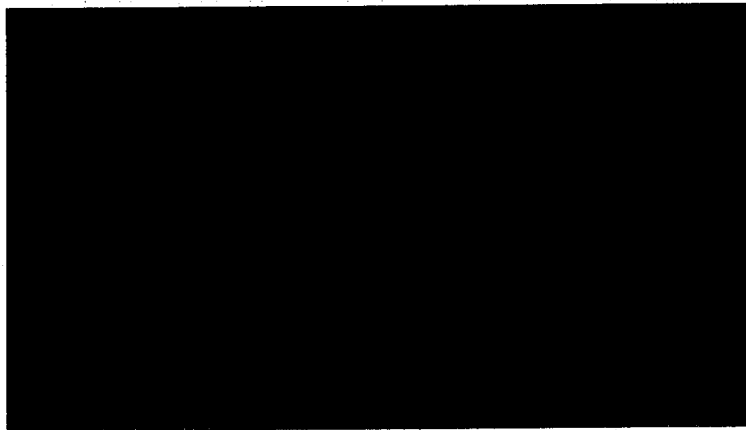
The video may be viewed through the Learning Portal or general viewing:

Learning Portal Video (recommended for CA POST agency personnel to receive notation on POST Profile)

General Public Video

### *AB 392: Use of Force Standards*

General Public Video



AB.392 Use of Force Update, Course #33888, 2 hours (Available November 2019)

Use of Force: Totality of the Circumstances Training Video (2017)

California peace officers should be thoroughly familiar with use of force laws and their agency's policy and procedures regarding use of force. Questions and clarification regarding local policy or legal interpretations should be directed to the appropriate agency representative.

Draft for PRC review



Berkeley Police Department Policy Manual

Use of Force

300.1 PURPOSE AND SCOPE

Best Practice

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

300.1.1 DEFINITIONS

Federal

Definitions related to this policy include:

Deadly force - Any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm (Penal Code § 835a).

Commented [GA1]: 835a

Commented [OJ2]: Changes based on Lexipol update related to the new use of force law

Commented [GA3]: New

Force - The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

Less-Than-Lethal Force - Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options. Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.

Commented [GA4]: Combines existing U-2 language

Non-Lethal Force - Any use of force other than lethal force or less-than lethal force.

Commented [GA5]: U-2

Compliant - Cooperative and/or response to lawful commands.

Commented [GA6]: New

Passive Resistance - Noncompliance to lawful authority without physical resistance or mechanical enhancement.

Commented [GA7]: New

Active Resistance - Use of physical effort or mechanical resistance in achieving and/or maintaining noncompliance.

Commented [GA8]: New

Control Techniques - Control holds, Personal Impact Weapons, and Take Downs.

Commented [GA9]: New

Personal Body Weapons - An officer's use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of kinetic energy transfer (impact) to gain control of a subject.

Commented [GA10]: New

**Blue Team (BT)** - Computer software that allows officers to enter use of force and other incidents from a Department computer.

Commented [GA11]: New

**Concealment** - Anything which conceals a person from view.

Commented [GA12]: New

**Cover** - Anything which provides protection from bullets or other projectiles fired or thrown. Cover is subjective and its effectiveness depends upon the threat's ballistic capability (handgun, rifle, etc...).

Commented [GA13]: New

**Blocking** - The positioning of a police vehicle in the path of an occupied subject vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal.

Commented [GA14]: New

**Ramming** - The use of a vehicle to intentionally hit another vehicle

Commented [GA15]: New

**Serious Bodily Injury** - A bodily injury that creates a substantial risk of death, causes serious, permanent disfigurement or results in a prolonged loss or impairment of the functioning of any bodily member or organ.

Commented [GA16]: New

**Officer (or) Police Officer** - Any sworn peace officer.

Commented [GA17]: Existing language

**Authorized Employee** - Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.

Commented [GA18]: Existing language

**Employee** - Any non-sworn employee of the Berkeley Police Department, including those deemed "authorized employees."

Commented [GA19]: Existing language

**300.2 POLICY**

**Best Practice**

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity, without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

**300.2.1 DUTY TO INTERCEDE**

**Federal**

Any officer present and observing another officer using force that is clearly beyond that which is

objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee or member of another department use force that exceeds the degree of force permitted by law shall promptly report these observations to a supervisor.

Commented [GA20]: Added from existing BPD U-2

300.3 USE OF FORCE

Federal

Officers shall use only that amount of force that is objectively reasonable given the facts and totality of the circumstances known or perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers shall use only the force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others. (Penal Code § 835a)

Commented [GA21]: Changes based on Lexipol/new use of force law

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident, rather than with the 20 / 20 vision of hindsight. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving. This policy takes into consideration that there are a range of reasonable responses to each situation. (Graham v. Connor 490 U.S. 386 (1989))

Commented [GA22]: Added citation

The decision to use force "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (Graham v. Connor 490 U.S. 386 (1989))

Commented [GA23]: Added citation

In deciding what type of reasonable force to use, officers and employees must use sound judgment and their training to assess the degree of threat in a given situation, and to determine what departmentally authorized force technique or weapons will bring the situation under control in a reasonable manner.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.

300.3.1 USE OF FORCE TO EFFECT AN ARREST

State

Any peace officer may use reasonable force to effect an arrest, to prevent escape or to overcome

resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape or to overcome resistance (Penal Code § 835a).

### 300.3.2 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. In the instance when force is used an officer shall not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the department for the specific purpose of collecting evidence.

### 300.3.3 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

#### Federal

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include, but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others (Penal Code § 835a).
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer (Penal Code § 835a).
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity (Penal Code § 835a).
- (g) The individual's apparent ability to understand and comply with officer commands (Penal Code § 835a).
- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.

**Commented [GA24]:** Items in below listed with the PC 835a citation are new to the law.



- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

#### 300.3.4 DE-ESCALATION TACTICS

De-escalation tactics and techniques are actions which may be used by officers which seek to minimize the need to use force during an incident. Such tactics and techniques may increase the likelihood of voluntary compliance when employed and should be used when it is safe to do so, without compromising law enforcement objectives and priorities. De-escalation tactics emphasize slowing an incident down to allow time, distance and flexibility for the situation to resolve. The application of these tactics is intended to increase the potential for resolution with a minimal reliance on the use of force, or without using force at all.

If immediate action is not necessary, an officer(s) should attempt to use verbal de-escalation techniques. When available and when practicable, a Crisis Intervention Team (CIT) officer, crisis negotiator, or Berkeley Mental Health Mobile Crisis Team member should be called upon as a resource.

When reasonable under the totality of circumstances, officers should gather information about the incident, assess the risks, assemble resources, attempt to slow momentum and communicate and coordinate a response. In their interaction with subjects, officers should use advisements, warnings, verbal persuasion and other tactics and alternatives to higher levels of force. Officers may move to a position that is tactically more secure or allows them greater distance to consider or deploy a greater variety of force options.

When time and circumstances allow, officers should consider the following tactical principles:

- (a) Make a tactical approach to the scene.
- (b) Maintain a safe distance.
- (c) Use available cover or concealment and identify escape routes.
- (d) Stage Berkeley Fire Department.
- (e) Control vehicle and pedestrian traffic.
- (f) Establish communication, preferably with one officer.
- (g) Create an emergency plan and a deliberate plan with contingencies.
- (h) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

When time and circumstances reasonably permit, officers should consider whether a subject's

**Commented [OJ25]:** Lexipol updated this list based on changes in the law. The main changes are d) and g). Added "apparent" to sections a) and f) and included language referencing Penal Code section 835a, to certain sections.

**Commented [GA26]:** New language-BPD Unique

lack of compliance is a deliberate attempt to resist or is the result of an inability to comply based on factors such as:

- (a) Medical conditions
- (b) Mental impairment
- (c) Developmental disability
- (d) Physical Disability
- (e) Physical limitation
- (f) Language barrier
- (g) Drug interaction
- (h) Behavioral crisis

#### 300.3.5 PAIN COMPLIANCE TECHNIQUES

**Best Practice**

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

#### 300.3.6 USE OF NON-LETHAL FORCE

When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use reasonable approved non-lethal force techniques and weapons in the following circumstances:

- a) To protect themselves or another person from physical injury;
- b) To restrain or subdue a resistant individual; or
- c) To bring an unlawful situation safely and effectively under control.

#### 300.3.7 CAROTID CONTROL HOLD PROHIBITION

The use of a Carotid Restraint Hold is prohibited. Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in

**Commented [GA27]:** Longstanding Berkeley City Council Resolution

the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."

The term bar-arm refers to a variety of techniques. As defined in the City Council Resolution, "bar-arm hold" refers to any use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.

**300.4 DEADLY FORCE APPLICATIONS**

**Federal**

If an objectively reasonable officer would consider it safe and feasible to do so under the totality of the circumstances, officers should evaluate the use of other reasonably available resources and techniques when determining whether to use deadly force. The use of deadly force is only justified in the following circumstances (Penal Code § 835a):

- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury to the officer or another person.
- (b) An officer may use deadly force to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended.

Where feasible, the officer shall, prior to the use of deadly force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

Officers shall not use deadly force against a person based on the danger that person poses to him/herself, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the officer or to another person (Penal Code § 835a).

An "imminent" threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer's subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention (Penal Code § 835a).

**300.4.1 DIRECTED FIRE**

Officers may use controlled gunfire that is directed at the suspect, reducing the suspect's ability to

**Commented [OJ28]:** Our policy used Lexipol language verbatim. This is the updated version from Lexipol that incorporates the new law that goes into effect in 2020. The most significant change is the second to last paragraph prohibiting the use of deadly force against someone who is only a danger to him or herself.

**Commented [GA29]:** BPD Language

return fire while a group or individual movement is conducted.

Officers may employ this tactic when dealing with a suspect who poses an immediate and ongoing lethal threat and only under circumstances where the use of deadly force is legally justified. Target acquisition and communication are key elements in the successful use of this tactic. Officers remain accountable for every round fired under these circumstances.

#### 300.4.2 SHOOTING AT OR FROM MOVING VEHICLES

##### **Best Practice**

Firearms should not be discharged at a stationary or moving vehicle, the occupants of a vehicle, or the tires of a vehicle unless a person in the vehicle is imminently threatening an officer or another person present with deadly force. The moving vehicle alone does not presumptively constitute a threat that justifies the use of deadly force.

Officers shall not move into, remain, or otherwise position themselves in the path of a vehicle in an effort to detain or apprehend the occupants. Any officer in the path of a moving vehicle shall immediately attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants.

Because this policy may not cover every situation that may arise, a deviation from this policy may be reasonable, depending on the circumstances. A deviation from this policy would, for instance, be justified if the officer used a firearm in an attempt to stop an imminent vehicle attack on a crowd or a mass casualty terrorist event.

Factors that may be used to evaluate the reasonableness of the use of a firearm against a vehicle include:

- (a) The availability and use of cover, distance and / or tactical relocation
- (b) Incident command and personnel placement
- (c) Tactical approach
- (d) Regard for viable target acquisition and background including location, other traffic, the presence of innocent persons, and police officers

#### 300.5 USE OF VEHICLES

Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except under circumstances outlined in section 300.4 and in Policy V-6 that covers vehicle operations.

Commented [GA30]: BPD Language

The Vehicle Containment Technique (VCT) is the positioning of a police vehicle in the path of a suspect vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal. VCT shall only to be used on vehicles that are either stationary or moving at a slow speed. This technique is designed to contain a suspect vehicle to a single stationary location, thereby preventing a pursuit from initiating, or a potentially violent situation (e.g. a hostage situation or person barricaded inside a vehicle) from becoming mobile.

When properly utilized, the VCT can give officers time, distance, and cover in order to safely and effectively resolve a situation.

#### 300.6 REPORTING REQUIREMENTS

##### **Best Practice**

Any use of force described in 300.6.2 shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) he or she must also complete a "Use of Pepper Spray Report"

A use of force report is not required when a person is handcuffed, searched, or subject to a control hold and there is no injury or complaint of injury.

300.6.1 INTENTIONALLY POINTING A FIREARM AT AN INDIVIDUAL

Commented [GA31]: BPD Language

Whenever an officer intentionally points a firearm at an individual they shall document the occurrence on a Blue Team report. Officers shall articulate the facts that lead them to point a firearm at an individual and advise a supervisor prior to the end of shift so they can review the report documenting the incident.

Commented [OJ32]: Requires us to be live on Blue Team.

Officers are not required to document drawing or deploying a firearm if they do not intentionally point it at a subject.

300.6.2 NOTIFICATION TO SUPERVISORS

Best Practice

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain as a result of the use of force.
- (d) Any application of less than lethal munitions or pepper spray.
- (e) The individual was struck by a baton
- (f) The individual subjected to the force was rendered unconscious.
- (g) The individual was struck with a personal body weapon or was subjected to a take-down.
- (h) An individual alleges any of the above has occurred.

300.6.3 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

State

Statistical data regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is to be reported to the California Department of Justice as required by Government Code § 12525.2. See the Records Management policy.

300.7 MEDICAL CONSIDERATION

Best Practice

When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall ensure that the subject receives appropriate medical care.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force.

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical evaluation as soon as practicable and have medical personnel stage away if appropriate.

### 300.8 SUPERVISOR RESPONSIBILITY

**Best Practice**

When a supervisor is able to respond to an incident in which there has been a reported application of force as defined in 300.6.2 and the scene is secure, the supervisor is expected to:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (d) Identify any witnesses not already included in related reports.
- (e) Review and approve all related reports
- (f) Review body worn camera footage related to the incident.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

### 300.9 WATCH COMMANDER RESPONSIBILITY

**Best Practice**

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.

**Commented [OJ33]:** All cases are investigated the same way regardless of intent to sue. IAB works with City Attorney's Office when there is civil litigation.

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**300.10 USE OF FORCE ADMINISTRATIVE REVIEW**

The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings. The Chief of Police may convene a Review Board as outlined in Policy 301 instead of utilizing Division Captain Review.

The Chief of Police will make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.

Any determination concerning the propriety of force used will be based on the facts and information available to the officer at the time the force was employed, and not upon information gained after the fact.

All Use of Force Reports will be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; and/or, 3) require revision or additional training.

Use of Force Reports will be held in file for at least five (5) years

**300.11 TRAINING**

**Best Practice**

Officers will receive periodic training on this policy and demonstrate their knowledge and understanding.

**300.12 USE OF FORCE ADMINISTRATIVE REVIEW**

**Best Practice**

The Professional Standards Division Captain or his or her designee shall prepare an analysis report on use of force incidents to be included as part of the Police Department's Annual Crime Report to Council. The report shall not contain the names of officers, suspects or case numbers, and should include:

**Commented [OJ34]:** Changed language so the information is included as part of the Crime Report.

- (a) An analysis of use of force incidents with demographic details of the individual impacted and type of force used
- (b) The identification of any trends in the use of force by members.
- (c) Training needs recommendations.
- (d) Equipment needs recommendations.
- (e) Policy revisions

## Use of Force

### 300.1 PURPOSE AND SCOPE

#### Best Practice

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

#### 300.1.1 DEFINITIONS

##### Federal

Definitions related to this policy include:

**Deadly force** - Any use of force that creates a substantial risk of causing death or serious bodily injury, including but not limited to the discharge of a firearm (Penal Code § 835a).

**Force** - The application of physical techniques or tactics, chemical agents, or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed, or restrained.

### 300.2 POLICY

#### Best Practice

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

#### 300.2.1 DUTY TO INTERCEDE

##### Federal

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.

### 300.3 USE OF FORCE

#### Federal



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Officers shall use only that amount of force that reasonably appears necessary given the facts and totality of the circumstances known to or perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose (Penal Code § 835a).

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain, and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons, or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be objectively reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.

**300.3.1 USE OF FORCE TO EFFECT AN ARREST****State**

Any peace officer may use objectively reasonable force to effect an arrest, to prevent escape, or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or to overcome resistance. Retreat does not mean tactical repositioning or other de-escalation techniques (Penal Code § 835a).

**300.3.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE****Federal**

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others (Penal Code § 835a).
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.

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- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer (Penal Code § 835a).
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity (Penal Code § 835a).
- (g) The individual's apparent ability to understand and comply with officer commands (Penal Code § 835a).
- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

### 300.3.3 PAIN COMPLIANCE TECHNIQUES

**Best Practice**

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

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The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

### 300.3.4 CAROTID CONTROL HOLD

**Best Practice**

The proper application of the carotid control hold may be effective in restraining a violent or combative individual. However, due to the potential for injury, the use of the carotid control hold is subject to the following:

- (a) The officer shall have successfully completed department-approved training in the use and application of the carotid control hold.
- (b) The carotid control hold may only be used when circumstances perceived by the officer at the time indicate that such application reasonably appears necessary to control a person in any of the following circumstances:
  1. The subject is violent or physically resisting.
  2. The subject, by words or actions, has demonstrated an intention to be violent and reasonably appears to have the potential to harm officers, him/herself or others.
- (c) The application of a carotid control hold on the following individuals should generally be avoided unless the totality of the circumstances indicates that other available options reasonably appear ineffective, or would present a greater danger to the officer, the subject or others, and the officer reasonably believes that the need to control the individual outweighs the risk of applying a carotid control hold:
  1. Females who are known to be pregnant
  2. Elderly individuals
  3. Obvious juveniles
  4. Individuals who appear to have Down syndrome or who appear to have obvious neck deformities or malformations, or visible neck injuries
- (d) Any individual who has had the carotid control hold applied, regardless of whether he/she was rendered unconscious, shall be promptly examined by paramedics or other qualified medical personnel and should be monitored until examined by paramedics or other appropriate medical personnel.
- (e) The officer shall inform any person receiving custody, or any person placed in a position of providing care, that the individual has been subjected to the carotid control hold and whether the subject lost consciousness as a result.
- (f) Any officer attempting or applying the carotid control hold shall promptly notify a supervisor of the use or attempted use of such hold.

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- (g) The use or attempted use of the carotid control hold shall be thoroughly documented by the officer in any related reports.

### **300.4 DEADLY FORCE APPLICATIONS**

**Federal**

If an objectively reasonable officer would consider it safe and feasible to do so under the totality of the circumstances, officers should evaluate the use of other reasonably available resources and techniques when determining whether to use deadly force. The use of deadly force is only justified in the following circumstances (Penal Code § 835a):

- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury to the officer or another person.
- (b) An officer may use deadly force to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, the officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

Officers shall not use deadly force against a person based on the danger that person poses to him/herself, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the officer or to another person (Penal Code § 835a).

An "imminent" threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer's subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention (Penal Code § 835a).

#### **300.4.1 SHOOTING AT OR FROM MOVING VEHICLES**

**Best Practice**

Shots fired at or from a moving vehicle are rarely effective. Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants. An officer should only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others.

Officers should not shoot at any part of a vehicle in an attempt to disable the vehicle.

### **300.5 REPORTING THE USE OF FORCE**

**Best Practice**

Any use of force by a member of this department shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should

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articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. To collect data for purposes of training, resource allocation, analysis and related purposes, the Department may require the completion of additional report forms, as specified in department policy, procedure or law.

**300.5.1 NOTIFICATION TO SUPERVISORS****Best Practice**

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain.
- (d) The individual indicates intent to pursue litigation.
- (e) Any application of a TASER device or control device.
- (f) Any application of a restraint device other than handcuffs, shackles or belly chains.
- (g) The individual subjected to the force was rendered unconscious.
- (h) An individual was struck or kicked.
- (i) An individual alleges any of the above has occurred.

**300.5.2 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE****State**

Statistical data regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is to be reported to the California Department of Justice as required by Government Code § 12525.2. See the Records Management policy.

**300.6 MEDICAL CONSIDERATION****Best Practice**

Prior to booking or release, medical assistance shall be obtained for any person who exhibits signs of physical distress, who has sustained visible injury, expresses a complaint of injury or continuing pain, or who was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until he/she can be medically assessed.

Based upon the officer's initial assessment of the nature and extent of the subject's injuries, medical assistance may consist of examination by fire personnel, paramedics, hospital staff or medical staff at the jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another officer and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

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The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the officer reasonably believes would be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called "excited delirium"), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage away if appropriate.

### **300.7 SUPERVISOR RESPONSIBILITY**

**Best Practice**

When a supervisor is able to respond to an incident in which there has been a reported application of force, the supervisor is expected to:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) When possible, separately obtain a recorded interview with the subject upon whom force was applied. If this interview is conducted without the person having voluntarily waived his/her *Miranda* rights, the following shall apply:
  1. The content of the interview should not be summarized or included in any related criminal charges.
  2. The fact that a recorded interview was conducted should be documented in a property or other report.
  3. The recording of the interview should be distinctly marked for retention until all potential for civil litigation has expired.
- (d) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (e) Identify any witnesses not already included in related reports.
- (f) Review and approve all related reports.

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- (g) Determine if there is any indication that the subject may pursue civil litigation.
  - 1. If there is an indication of potential civil litigation, the supervisor should complete and route a notification of a potential claim through the appropriate channels.
- (h) Evaluate the circumstances surrounding the incident and initiate an administrative investigation if there is a question of policy non-compliance or if for any reason further investigation may be appropriate.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

**300.7.1 WATCH COMMANDER RESPONSIBILITY**

**Best Practice**

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.

**300.8 TRAINING**

**Best Practice**

Officers will receive periodic training on this policy and demonstrate their knowledge and understanding.

**300.9 USE OF FORCE ANALYSIS**

**Best Practice**

At least annually, the Operations Division Captain should prepare an analysis report on use of force incidents. The report should be submitted to the Chief of Police. The report should not contain the names of officers, suspects or case numbers, and should include:

- (a) The identification of any trends in the use of force by members.
- (b) Training needs recommendations.
- (c) Equipment needs recommendations.
- (d) Policy revision recommendations.



Assembly Bill No. 392

CHAPTER 170

An act to amend Sections 196 and 835a of the Penal Code, relating to peace officers.

[Approved by Governor August 19, 2019. Filed with Secretary of State August 19, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 392, Weber. Peace officers: deadly force.

Existing law authorizes a peace officer to make an arrest pursuant to a warrant or based upon probable cause, as specified. Under existing law, an arrest is made by the actual restraint of the person or by submission to the custody of the arresting officer.

Existing law authorizes a peace officer to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. Existing law does not require an officer to retreat or desist from an attempt to make an arrest because of resistance or threatened resistance of the person being arrested.

Under existing law, a homicide committed by a peace officer is justifiable when necessarily committed in arresting a person who has committed a felony and the person is fleeing or resisting such arrest.

Existing case law deems such a homicide to be a seizure under the Fourth Amendment of the Constitution of the United States, and as such, requires the actions to be reasonable.

This bill would redefine the circumstances under which a homicide by a peace officer is deemed justifiable to include when the officer reasonably believes, based on the totality of the circumstances, that deadly force is necessary to defend against an imminent threat of death or serious bodily injury to the officer or to another person, or to apprehend a fleeing person for a felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless the person is immediately apprehended.

The bill would also affirmatively prescribe the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, to prevent escape, or to overcome resistance.

*The people of the State of California do enact as follows:*

SECTION 1. Section 196 of the Penal Code is amended to read:

196. Homicide is justifiable when committed by peace officers and those acting by their command in their aid and assistance, under either of the following circumstances:



- (a) In obedience to any judgment of a competent court.
- (b) When the homicide results from a peace officer's use of force that is in compliance with Section 835a.

SEC. 2. Section 835a of the Penal Code is amended to read:

835a. (a) The Legislature finds and declares all of the following:

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

(3) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(4) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

(5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement.

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

(c) (1) Notwithstanding subdivision (b), a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.

(B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to

the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or to overcome resistance. For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other deescalation tactics.

(e) For purposes of this section, the following definitions shall apply:

(1) "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

(2) A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(3) "Totality of the circumstances" means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

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**State of California**

**PENAL CODE**

**Section 835a**

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835a. (a) The Legislature finds and declares all of the following:

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

(3) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(4) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.

(5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement.

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

(c) (1) Notwithstanding subdivision (b), a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.

(B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or to overcome resistance. For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other deescalation tactics.

(e) For purposes of this section, the following definitions shall apply:

(1) "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

(2) A threat of death or serious bodily injury is "imminent" when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

(3) "Totality of the circumstances" means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

(Amended by Stats. 2019, Ch. 170, Sec. 2. (AB 392) Effective January 1, 2020.)

Lee, Katherine

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**From:** Greenwood, Andrew  
**Sent:** Monday, January 6, 2020 5:23 PM  
**To:** Lee, Katherine; Norris, Byron  
**Cc:** Williams-Ridley, Dee; White, David  
**Subject:** Special Order 2020-0001; Changes to 835a PC  
**Attachments:** Special\_Order\_2020-0001.pdf

Ms. Lee,

This is to update the Commission regarding the Use of Force policy draft and the recent law change concerns I expressed in the last PRC meeting of December.

I wanted to let the Commission know that I've issued a Special Order to ensure our staff is aware of the requirements of the new law, *and* that our current GO U-2 Use of Force remains in effect.

At the last PRC meeting, I mentioned that I potentially would need to issue the entirety of the new Force policy on Jan. 1, though it had not yet gone to the PRC Subcommittee and full PRC for review. I considered this possible action in order to ensure our folks are fully aware of the new requirements of the law.

Upon further review, and based in part on the concerns voiced by the PRC Chair and commission, I decided to issue a Special Order which would both address our immediate concerns regarding the new law, while *not* requiring immediate implementation of the new draft Policy 300 - Use of Force.

This approach will, I hope, re-assure Commission members that the process for review and input is preserved, and we look forward to working with the PRC Subcommittee and the full PRC to obtain input on the Force policy draft, prior to moving it further through the implementation process.

Best regards,

Andrew Greenwood  
Chief of Police  
Berkeley Police Department  
(510) 981-5700

## Special Order 2020-0001

### 1101.1 PC 835; CHANGES IN PENAL CODE

On January 1, 2020, CA Penal Code 835a, which governs use of force by police officers, became law. Per Departmental Training Order 2019-00277, all sworn personnel were required to view POST's Training video, "AB 392: California's New Use of Force Standards: What You Need to Know", which can be found at <https://lp.post.ca.gov/activity/3023>. POST also created a publicly available resource page which includes this video and other resources, at <https://post.ca.gov/use-of-force-standards>.

BPD's current Use of Force Policy, General Order U-2, is being revised not only to incorporate provisions of PC 835a, but also as a result of a Council referral. The revised policy will be issued as Policy 300 in 2020.

Effective immediately, and until such time as the revised Use of Force policy is issued, General Order U-2 remains in effect, and sworn personnel shall further ensure their actions are in accordance with the new requirements of PC 835a, including but not limited to the provisions below:

PC 835a(b) amends the "reasonable force" standard to "objectively reasonable force."

PC 835a(c)(1) amends deadly force standards to include "totality of the circumstances" when:

- Defending against imminent threat of death or serious bodily injury to an officer or to another person.
- Apprehending a fleeing person for a felony
  - Involving threatened or actual death or serious bodily injury;
  - Where immediate apprehension is reasonably believed to be needed in order to prevent death or serious bodily injury to another; and
  - Which requires, when reasonable, that officers identify themselves and warn of intent to use force.

PC 835a(c)(2) prohibits using deadly force against persons who pose a danger only to themselves.

PC 835a(d) amends self-defense language to include "objectively reasonable" force.

PC 835a(e) adds definitions for deadly force, imminent, and totality of the circumstances.

This order is meant to highlight legal requirements pertaining to use of force by sworn personnel in light of the recent changes to CA Penal Code 835a, and will be in effect until it is rescinded or issued in the form of a revised use of force policy.

Andrew R. Greenwood

Chief of Police

Issued: Jan. 3, 2020

**Policy  
300****Berkeley Police Department**  
Policy Manual

## Use of Force

### 300.1 SANCTITY OF LIFE

The Berkeley Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to protect and serve. The Department is committed to accomplishing this mission with respect and minimal reliance on the use of force by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force. Officers must respect the sanctity of all human life, act in all possible respects to preserve human life, do everything possible to avoid unnecessary uses of force, and minimize the force that is used, while still protecting themselves and the public.

#### 300.1.1 PURPOSE AND SCOPE

This policy sets forth criteria governing the use of force. All officers are responsible for knowing and complying with this policy and conducting themselves in a manner that reflects the Berkeley Police Department's Use of Force Core Principles. Violations of this policy may result in disciplinary action, including and up to termination, and may subject the officer to criminal prosecution. Supervisors shall ensure that all personnel in their command know the content of this policy and operate in compliance with it.

#### 300.1.2 USE OF FORCE STANDARD

In dealing with suspects, officers shall strive to use alternatives to physical force whenever reasonably possible. In all cases where physical force is used, officers shall use the minimum amount of force that is objectively reasonable, objectively necessary, and proportional to effectively and safely resolve a conflict.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), held that, in order to comply with the U.S. Constitution, an officer's use of force must be objectively reasonable under the totality of circumstances known to the officer at the time. Additionally, Penal Code section 835(a) imposes further restrictions on an officer's use of force. But these standards merely set the minimum standard for police conduct, below which an officer's conduct would be regarded as unlawful.

In fulfilling this Department's mission to safeguard the life, dignity, and liberty of officers themselves and all members of the community they are sworn to protect and serve, this policy

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requires more of our officers than simply not violating the law. As a result, this policy is more restrictive than the minimum constitutional standard and state law in two important respects.

First, it imposes a higher duty upon officers to use the minimal amount of force objectively necessary to safely achieve their legitimate law enforcement objective. And, second, this policy imposes a stricter obligation on officers to exert only such force that is objectively proportionate to the circumstances, requiring a consideration of the seriousness of the suspected offense, the availability of de-escalation and other less aggressive techniques, and the risks of harm presented to members of the public and to the officers involved.

Additionally, Penal Code section 835(a) imposes further restrictions on an officer's use of force.

### **300.1.3 CORE PRINCIPLES**

**A. DE-ESCALATION AND FORCE MINIMIZATION.** Every officer's goal, throughout an encounter with a member of the public, shall be to de-escalate wherever possible and resolve the encounter without resorting to the use of force. Wherever possible, officers shall employ de-escalation techniques to increase the likelihood of voluntary compliance with law enforcement requests or directives and, thereby, decrease the likelihood that a use of force will become necessary during an incident. Further, in any encounters that do call for applying force, officers must always strive to use the minimal amount of force that is objectively reasonable and objectively necessary to safely achieve their legitimate law enforcement objective.

**B. PROPORTIONALITY.** When determining the appropriate level of force, at all times officers shall balance the severity of the offense committed and the level of resistance based on the totality of the circumstances known to or perceived by the officer at the time. It is particularly important that officers apply proportionality and critical decision making when encountering a subject who is unarmed or armed with a weapon other than a firearm.

**C. MINIMIZING THE USE OF DEADLY FORCE.** Deadly force may only be used when the officer reasonably believes that such action is immediately necessary to protect the officer or another person from imminent danger of death or serious bodily harm. Officers shall not use deadly force if the officer reasonably believes that alternative techniques will eliminate the imminent danger and ultimately achieve the law enforcement purpose with less risk of harm to the officer or to other persons

**D. DUTY TO INTERCEDE.** Whenever possible, officers shall intervene when they know or have reason to know that another officer is about to use, or is using, unnecessary force. Officers shall promptly report any use of unnecessary force and the efforts made to intervene to a supervisor.

**E. VULNERABLE POPULATIONS.** Officers should be particularly sensitive when considering the use of force against vulnerable populations, including children, elderly persons, pregnant women, people with physical and mental disabilities, and people with limited English proficiency.

**F. FOSTER STRONG COMMUNITY RELATIONSHIPS.** The Berkeley Police Department understands that uses of force, even if lawful and proper, can have a damaging effect on the public's perception of the Department and the Department's relationship with the community. The Department is committed to fostering strong community relations by building on its historic tradition of progressive policing, ensuring accountability and transparency, and striving to increase trust with our community.

**G. FAIR AND UNBIASED POLICING.** Members of the Berkeley Police Department shall carry out their duties, including the use of force, in a manner that is fair and unbiased, in accordance with Policy 401, Fair and Impartial Policing.



### 300.1.4 DEFINITIONS

Definitions related to this policy include:

**Minimal amount necessary** – The least amount of force that is objectively reasonable and objectively necessary to safely effect an arrest or achieve some other legitimate law enforcement purpose.

**Deadly force** - Any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm).

**Force** - The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

**Less-Than-Lethal Force** – Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options. Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.

**Non-Lethal Force** – Any use of force other than lethal force or less-than lethal force.

**Compliant Suspect** – Cooperative and/or responsive to lawful commands.

**Passive Resistance** - When an individual does not follow the lawful verbal commands of a police officer, but does not physically resist in any way.

Examples: A person who goes completely limp, sits down and refuses to stand or walk, or who may stand with arms at their sides without attempting to strike at or physically resist officers.

**Active Resistance** - An individual who is uncooperative and fails to comply with the lawful verbal commands of a police officer, and attempts to avoid physical control and/or arrest by physically struggling to free oneself from being restrained. The individual may also use verbal non-compliance (refusing a lawful order or direction).

Examples: A person who attempts to avoid physical control and/or arrest by pulling or pushing away from the officer, tensing arm or muscles, hiding from the officer, and/or fleeing.

**Combative Resistance** - An individual not only resists the officer, but poses a threat of harm to the officer or others, in an aggressive manner that may cause physical injury.

Examples: A person who violently attempts to or attacks an officer. This action is sometimes preceded by “pre-assault” cues such as taking a threatening stance (clenching fists, facial expressions, threats, etc.) and non-verbal **non-compliance**.

**Control Hold** - Any Department approved hold, designed to allow an officer to control the movement of a subject (e.g., twist lock, rear wrist lock, finger lock, etc.). A control hold can be applied without implementing pain.

**Pain Compliance Technique** - Involves either the manipulation of a person’s joints or activating certain pressure points intended to create sufficient pain for the purpose of motivating a person to comply with verbal commands (examples of pressure points include buccal nerve, gum nerve, sternum rub).

**Control Techniques** – Personal Impact Weapons and Take Downs.

**Personal Body Weapons** - An officer's use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of kinetic energy transfer (impact) to gain control of a subject.

**Blue Team (BT)** – Computer software that allows officers to enter use of force and other incidents from a Department computer.

**Concealment** - Anything which conceals a person from view.

**Cover** - Anything which provides protection from bullets or other projectiles fired or thrown. Cover is subjective and its effectiveness depends upon the threat's ballistic capability (handgun, rifle, etc.).

**Blocking** - The positioning of a police vehicle in the path of an occupied subject vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal.

**Ramming** - The use of a vehicle to intentionally hit another vehicle

**Serious Bodily Injury** - A bodily injury that creates a substantial risk of death, causes serious, permanent disfigurement or results in a prolonged loss or impairment of the functioning of any bodily member or organ

**Officer (or) Police Officer** - Any sworn peace officer.

**Authorized Employee** - Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.

**Employee** – Any non-sworn employee of the Berkeley Police Department, including those deemed “authorized employees.”

### **300.2.1 DUTY TO INTERCEDE AND DUTY TO REPORT**

Any officer who observes another officer or member of the Berkeley Police Department using force that is clearly in violation of this policy shall immediately take reasonable action to attempt to mitigate such use of force. This may include verbal intervention or, when in a position to do so, physical intervention. Further, any officer who learns of a potentially unauthorized use of force, even if the officer did not witness it personally, shall promptly report this information to an on-duty sergeant or a command officer at the first opportunity.

Any officer who observes an employee or member of a different law enforcement agency use force that exceeds the degree of force permitted by law shall promptly report these observations to an on-duty sergeant or a command officer at the first opportunity.

### **300.3.1 USE OF FORCE TO EFFECT AN ARREST**

Any peace officer may use objectively reasonable, objectively necessary, and proportional force to effect an arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape or to overcome resistance. For purposes of this policy, “retreat” does not mean tactical repositioning or other de-escalation tactics...

### **300.3.2 USE OF FORCE TO SEIZE EVIDENCE**

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In general, officers may use objectively reasonable, objectively necessary, and proportional force to lawfully seize evidence and to prevent the destruction of evidence. In the instance when force is used an officer shall not use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the department for the specific purpose of collecting evidence.

### **300.3.3 FACTORS USED TO DETERMINE THE REASONABLENESS, NECESSITY, AND PROPORTIONALITY OF FORCE**

When determining whether to apply force and evaluating whether an officer has used objectively reasonable, objectively necessary, and proportional force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include, but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity
- (g) The individual's apparent ability to understand and comply with officer commands
- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness).
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

The level of resistance that an officer encounters is a key factor in determining the proportionate amount of force. It is not possible to determine ahead of time what the proportionate level of force is for every possible situation that officers may face. Nevertheless, one of the key factors in determining what level of force is objectively reasonable, objectively necessary, and proportionate in a given situation is the level of resistance that an officer encounters. In general, the less resistance an officer faces, the less force the officer should use. The types of resistance officers may encounter fall along a continuum, from a cooperative person to an active assailant. Consistent with training, the following general rules apply when officers are exercising judgment in determining what level of force is necessary and proportionate:

- Compliant – In general, when dealing with a compliant person, officers may rely on police presence and/or verbal control techniques, but should not use greater force.
- Passive resistance – In general, when dealing with a suspect involved in passive resistance, officers may rely on police presence, verbal control techniques, or control holds, but should not use greater force.
- Active resistance – In general, in dealing with a suspect involved in active resistance, in addition to the options available for passive resistance, officers may rely on pain compliance techniques or takedowns, but should not use greater force.
- Combative resistance – In general, in dealing with a suspect involved in combative resistance, officers have all use-of-force options available to them, but deadly force shall only be used in compliance with this policy as described in Section 300.4.

### 300.3.4 USE OF FORCE CONTINUUM

The Department uses a “use of force continuum” that refers to the concept that there are reasonable responses for every threat an officer faces in a hostile situation. The force utilized need not be sequential (e.g., gradual or preceded by attempts at lower levels of force) if those lower levels are not appropriate. All Uses of Force must be objectively reasonable, objectively necessary, and proportional, based on a totality of the circumstances. All progressions must rest on the premise that officers shall escalate and de-escalate their level of force in response to the subject's actions.

#### Continuum of Force

- **Officer Presence — No force is used. Considered the best way to resolve a situation.**
  - The mere presence of a law enforcement officer works to deter crime or diffuse a situation.
  - Officers' attitudes are professional and nonthreatening.
- **Verbalization — Force is not physical.**
  - Officers issue calm, nonthreatening commands, such as "Let me see your identification and registration."
  - Officers may increase their volume and shorten commands in an attempt to gain compliance. Short commands might include "Stop," or "Don't move."
- **Weaponless defense — Officers use bodily force to gain control of a situation.**

- *Pain compliance and control holds.* Officers use grabs, holds and joint locks to restrain an individual.
- *Personal body weapons.* Officers may use punches and kicks to restrain an individual.
- **Less-Lethal Force Methods — Officers use less-lethal technologies to gain control of a situation.**
  - *Blunt impact.* Officers may use a baton or projectile to immobilize a combative person.
  - *Chemical.* Officers may use chemical sprays or projectiles embedded with chemicals to restrain an individual (e.g., pepper spray).
- **Lethal Force — Officers may use lethal weapons only in compliance with Section 300.4.**

### 300.3.5 DE-ESCALATION TACTICS

De-escalation tactics and techniques are actions used by officers which seek to minimize the need to use force during an incident. Such tactics and techniques may increase the likelihood of voluntary compliance when employed and shall be used when it is safe to do so. De-escalation tactics emphasize slowing an incident down to allow time, distance and flexibility for the situation to resolve. Officers shall continually assess the dynamics of a situation, and modulate their response and actions appropriately. Officers may be justified in using force at one moment, but not justified in using force the next moment due to a change in dynamics.

The application of these tactics is intended to increase the potential for resolution with a minimal reliance on the use of force, or without using force at all.

If immediate action is not necessary, an officer(s) shall attempt to use verbal de-escalation techniques. When available and when practicable, a Crisis Intervention Team (CIT) officer, crisis negotiator, or Berkeley Mental Health Mobile Crisis Team member shall be called upon as a resource.

Officers shall gather information about the incident, assess the risks, assemble resources, attempt to slow momentum and communicate and coordinate a response. In their interaction with subjects, officers should use advisements, warnings, verbal persuasion and other tactics and alternatives to any levels of force. Officers shall move to a position that is tactically more secure or allows them greater distance to consider or deploy a greater variety of force options.

- a) De-escalation techniques may include verbal persuasion, warnings and tactical de-escalation techniques, such as: slowing down the pace of an incident; “waiting out” subjects; creating distance (and thus the reactionary gap) between the officer and the threat; and requesting additional resources (e.g., specialized units, mental health care providers, negotiators, etc.) to resolve the incident.
- b) Officers should recognize that they may withdraw to a position that is tactically advantageous or allows them greater distance to de-escalate a situation.
- c) Officers should consider a variety of options, including lesser force or no force options.
- d) Officers should attempt to understand and consider possible reasons why a subject may be noncompliant or resisting arrest.
- e) A subject may not be capable of understanding the situation because of a medical condition;

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

- f) Officers should continue de-escalation techniques, when feasible and appropriate, and take as much time as reasonably necessary to resolve the incident, in effort to avoid and/or minimize the use of force.
- g) When an officer recognizes that mental illness, post-traumatic stress disorder, alcohol and/or drug addictions, or other health issues are causing an individual to behave erratically, the officer shall, when feasible and appropriate, try to de-escalate the situation using de-escalation and/or crisis Intervention techniques.
- h) Establishing communication with non-compliant subjects is often most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.
- i) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

When time and circumstances allow, officers shall consider the following tactical principles:

- (a) Make a tactical approach to the scene.
- (b) Maintain a safe distance.
- (c) Use available cover or concealment and identify escape routes.
- (d) Stage Berkeley Fire Department.
- (e) Control vehicle and pedestrian traffic.
- (f) Establish communication, preferably with one officer.
- (g) Create an emergency plan and a deliberate plan with contingencies.
- (h) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

### **300.3.6 PAIN COMPLIANCE TECHNIQUES**

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance and threat posed by the person.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

The purpose of pain compliance is to direct a person's actions. The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

### **300.3.7 USE OF NON-LETHAL FORCE**

When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use objectively reasonable, objectively necessary, and proportional approved non-lethal force techniques and weapons in the following circumstances:

- a) To protect themselves or another person from physical injury;
- b) To restrain or subdue a resistant individual; or
- c) To bring an unlawful situation safely and effectively under control.

#### **300.3.7.1 RESTRAINT AND CONTROL DEVICES**

Restraint and control devices shall not be used to punish, to display authority or as a show of force. Handcuffs, body wraps and spit hoods shall only be used consistent with Policy 302. Batons, approved less-lethal projectiles, and approved chemical agents shall only be used consistent with Policy 303. As per City Council resolution (June 9, 2020), the use of tear gas by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited. Pepper spray or smoke for crowd control by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited during the COVID-19 pandemic, or until such time as the City Council removes the prohibition.

### **300.3.8 CHOKEHOLD PROHIBITION**

The use of a Carotid Restraint Hold is prohibited. Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."

The term bar-arm refers to a variety of techniques. The use of any chokehold is strictly prohibited. A chokehold is any hold or contact with the neck – including a carotid restraint -- that may inhibit breathing by compression of the airway in the neck, may inhibit blood flow by compression of the blood vessels in the neck, or that applies pressure to the front, side, or back of the neck. As defined in the City Council Resolution, "bar-arm hold" refers to *any* use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.

### **300.4 USE OF DEADLY FORCE**

An officer's use of deadly force is justified only when the officer holds an objectively reasonable belief, based on the totality of the circumstances, that such force is objectively necessary to, 1) defend against an imminent threat of death or serious bodily injury to the officer or another or 2) apprehend a suspected fleeing person for any felony that threatened or resulted in death or serious bodily injury, provided the officer has a objectively reasonable belief that the person will cause imminent death or serious bodily injury to another unless immediately apprehended.

Where feasible, the officer shall, prior to the use of deadly force, make reasonable efforts to

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identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

An officer shall not use deadly force against another person unless the officer objectively and reasonably believes that using deadly force would not unnecessarily endanger innocent people.

Lethal force is prohibited when its sole purpose is to effect an arrest, overcome resistance or prevent a subject from escaping when the subject does not present an immediate danger of death or serious bodily injury. Lethal force is also prohibited solely to prevent property damage or prevent the destruction of evidence.

An “imminent” threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer’s subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention.

### **300.4.1 DRAWING AND POINTING FIREARMS**

#### **300.4.1 DIRECTED FIRE**

Officers may use controlled gunfire that is directed at the suspect, reducing the suspect’s ability to return fire while a group or individual movement is conducted, such as in a rescue operation.

Officers may only employ this tactic when dealing with a suspect who poses an immediate and ongoing lethal threat and only under circumstances where the use of deadly force is legally justified. Target acquisition and communication are key elements in the successful use of this tactic. Officers remain accountable for every round fired under these circumstances. Officers must consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.

#### **300.4.2 SHOOTING AT OR FROM MOVING VEHICLES**

Absent exigent circumstances, officers shall not discharge firearms from a moving vehicle.

Firearms shall not be discharged at a stationary or moving vehicle, the occupants of a vehicle, or the tires of a vehicle unless a person in the vehicle is imminently threatening an officer or another person present with deadly force. The moving vehicle alone does not presumptively constitute a threat that justifies the use of deadly force.

Officers shall not move into, remain, or otherwise position themselves in the path of a vehicle in an effort to detain or apprehend the occupants. Any officer in the path of a moving vehicle shall immediately attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants.

Because this policy may not cover every situation that may arise, a deviation from this policy may be objectively reasonable and objectively necessary depending on the totality of the circumstances. A deviation from this policy would, for instance, be justified if the officer used a firearm in an attempt to stop an imminent vehicle attack on a crowd or a mass casualty terrorist event.

Factors that may be used to evaluate the reasonableness of the use of a firearm against a



vehicle include:

- (a) The availability and use of cover, distance and / or tactical relocation
- (b) Incident command and personnel placement
- (c) Tactical approach
- (d) Regard for viable target acquisition and background including location, other traffic, the presence of innocent persons, and police officers

### **300.5 USE OF VEHICLES**

Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except under circumstances outlined in section 300.4 and in Policy V-6 that covers vehicle operations.

The Vehicle Containment Technique (VCT) is the positioning of a police vehicle in the path of a suspect vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal. VCT shall only to be used on vehicles that are either stationary or moving at a slow speed. This technique is designed to contain a suspect vehicle to a single stationary location, thereby preventing a pursuit from initiating, or a potentially violent situation (e.g. a hostage situation or person barricaded inside a vehicle) from becoming mobile.

When properly utilized, the VCT can give officers time, distance, and cover in order to safely and effectively resolve a situation.

### **300.6 REPORTING REQUIREMENTS**

All uses of force shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident and the level of force used. The officer should articulate the factors perceived and why he/she believed the use of force was objectively reasonable and objectively necessary under the circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) he or she must also complete a "Use of Pepper Spray Report."

Upon receiving notification of a use of force, an uninvolved supervisor, when feasible, shall determine the level of force reporting level, investigation, documentation and review requirements.

#### **300.6.1 SUPERVISOR RESPONSIBILITY**

When a supervisor is able to respond to an incident in which there has been a reported application of force as defined in 300.6.2 and the scene is secure, the supervisor should:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible

injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.

- (d) Identify any witnesses not already included in related reports.
- (e) Review and approve all related reports
- (f) Review body worn camera footage related to the incident.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

### **300.6.2 USE OF FORCE REPORTING LEVELS**

#### **Level 1**

(a) Subject allowed him/herself to be searched, escorted, and/or handcuffed. The officer did not use force to overcome resistance, nor did the officer use force in the absence of resistance.

(b) The officer used any of the following, and the circumstances of the application would lead an objectively reasonable officer to conclude that the subject did not experience more than momentary discomfort:

1. Control holds/ pain compliance techniques
2. Leverage
3. Grab
4. Bodyweight
5. The officer lowered the subject to a seated position or to the ground while partially or completely supporting the person's bodyweight.
6. Takedown

Officers shall document Level 1 actions in a police report, citation, Field Interview, and / or CAD entry. Supervisors will review police report narratives for approval.

#### **Level 2**

(a) No suspect injury or complaint of continuing pain due to interaction with officer.

(b) Officer's use of force was limited to the following:

1. Firearm drawn in an interaction with an individual and/or pointed at an individual.
2. Control hold, pressure point, leverage, grab, takedown, and/or bodyweight, and the application would lead a reasonably objective officer to conclude that the individual may have experienced more than momentary discomfort.

An uninvolved supervisor, when feasible, will respond to the scene and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses, and that photos are taken of all involved parties. If the incident fits the parameters for a Level 2 incident, the supervisor will enter all applicable data into Blue Team and attach a completed Use of Force Investigation Checklist with a brief summary.

#### **Level 3**

(a) Would have otherwise been classified as a Level 2, except one or more of the following apply:

1. Suspect injury or complaint of injury or continuing pain due to interaction with the officer.
2. Officer body worn camera was not activated in a timely manner, prior to the enforcement contact, per policy.

(b) The officer used any of the following force options:

1. Chemical Agents/Munitions
2. Impact Weapon Strikes
3. Personal Body Weapons

An uninvolved supervisor, when practical, will respond to the scene and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses. If the incident fits the parameters for a Level 3 incident, the supervisor will enter all applicable data into Blue Team and attach a completed Use of Force Investigation Checklist.

The supervisor will also complete a Use of Force Investigation Report narrative for review through the Use of Force Review process. Suspect and witness statements from the crime report will be attached to the use of force investigation.

#### **Level 4**

Any incident involving deadly force or any force likely to cause death or serious bodily injury will be investigated under the protocols outlined in Policy P-12.

### **300.6.2 EMPLOYEE USE OF FORCE**

When any Berkeley Police Department employee has engaged in a use of force as defined in this policy, the use of force must be reported to a Berkeley Police supervisor and investigated in accordance with this policy.

### **300.6.3 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE**

Statistical data regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is to be reported to the California Department of Justice as required by Government Code § 12525.2. See the Records Management policy.

### **300.6.4 PUBLIC RECORDS**

Records related to use of force incidents shall be retained and disclosed in compliance with California Penal Code section 832.7, California Government Code section 6254 and Department Policy R-23.

### **300.7 MEDICAL CONSIDERATION**

When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall promptly provide, if properly trained, or otherwise promptly procure medical assistance when reasonable and safe to do so in order to ensure that the subject receives appropriate medical care

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The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force.

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called “excited delirium”), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical evaluation as soon as practicable and have medical personnel stage away if appropriate.

### **300.8 WATCH COMMANDER RESPONSIBILITY**

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.

### **300.9 USE OF FORCE ADMINISTRATIVE REVIEW**

The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings. The Chief of Police may convene a Review Board as outlined in Policy 301 instead of utilizing Division Captain Review.

The Chief of Police shall make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.

Any determination concerning the propriety of force used shall be based on the facts and information available to the officer at the time the force was employed, and not upon information gained after the fact.

All Use of Force Reports shall be reviewed to determine whether Departmental use of force regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; 3) require further investigation; and/or, 4) require revision or additional training.

Use of Force Reports shall be held in file for at least five (5) years

### **300.10 TRAINING**

Officers shall receive periodic training on this policy and demonstrate their knowledge and understanding as per SB 230

### **300.11 USE OF FORCE ANALYSIS**

The Professional Standards Division Captain or his or her designee shall prepare a comprehensive analysis report on use of force incidents. The report shall not contain the names of officers, suspects or case numbers, and should include but not be limited to:

- (a) An analysis of use of force incidents with demographic details of the individual impacted including, but not limited to race, gender and age.

- (b) All types of force as delineated in Levels 1, 2, 3 and 4 in Section 300.6.(2)
- (c) The identification of any trends in the use of force by members.
- (d) Training needs recommendations.
- (e) Equipment needs recommendations.
- (f) Policy revisions recommendations.

### **300.11.1 REPORTING FREQUENCY**

- (a) On a quarterly basis via the City's Open Data Portal website;
- (b) On a quarterly basis to the Police Review Commission; and
- (c) On a yearly basis as part of the Police Department's Annual Crime Report to Council

### **300.12 CIVILIAN COMPLAINTS**

Complaints by members of the public related to this policy may be filed with the Berkeley Police Department Internal Affairs Bureau (IAB) and/or the Police Review Commission (PRC). Complaints will be investigated in compliance with the applicable procedures of the IAB and the PRC.

### **300.13 POLICY REVIEW AND UPDATES**

This policy shall be regularly reviewed and updated to reflect developing practices and procedures.

At least annually, the Berkeley Police Department and the Police Review Commission shall convene to review and update the Use of Force Policy to reflect developing practices and procedures per SB230.

**Policy  
300****Berkeley Police Department**  
Policy Manual

## Use of Force

### 300.1 **SANCTITY OF LIFE**

The Berkeley Police Department's highest priority is safeguarding the life, dignity, and liberty of all persons. Officers shall demonstrate this principle in their daily interactions with the community they are sworn to protect and serve. The Department is committed to accomplishing this mission with respect and minimal reliance on the use of force by using rapport-building communication, crisis intervention, and de-escalation tactics before resorting to force. Officers must respect the sanctity of all human life, act in all possible respects to preserve human life, do everything possible to avoid unnecessary uses of force, and minimize the force that is used, while still protecting themselves and the public.

#### 300.1.1 **PURPOSE AND SCOPE**

**Best Practice**

~~This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.~~

This policy sets forth criteria governing the use of force. All officers are responsible for knowing and complying with this policy and conducting themselves in a manner that reflects the Berkeley Police Department's Use of Force Core Principles. Violations of this policy may result in disciplinary action, including and up to termination, and may subject the officer to criminal prosecution. Supervisors shall ensure that all personnel in their command know the content of this policy and operate in compliance with it.

#### 300.1.2 **USE OF FORCE STANDARD**

In dealing with suspects, officers shall strive to use alternatives to physical force whenever reasonably possible. In all cases where physical force is used, officers shall use the minimum amount of force that is objectively reasonable, objectively necessary, and proportional to effectively and safely resolve a conflict.

The United States Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989), held that, in order to comply with the U.S. Constitution, an officer's use of force must be objectively reasonable under the totality of circumstances known to the officer at the time. Additionally, Penal Code section 835(a) imposes further restrictions on an officer's use of force. But these standards merely set the minimum standard for police conduct, below which an officer's conduct would be

regarded as unlawful.

In fulfilling this Department's mission to safeguard the life, dignity, and liberty of officers themselves and all members of the community they are sworn to protect and serve, this policy requires more of our officers than simply not violating the law. As a result, this policy is more restrictive than the minimum constitutional standard and state law in two important respects.

First, it imposes a higher duty upon officers to use the minimal amount of force objectively necessary to safely achieve their legitimate law enforcement objective. And, second, this policy imposes a stricter obligation on officers to exert only such force that is objectively proportionate to the circumstances, requiring a consideration of the seriousness of the suspected offense, the availability of de-escalation and other less aggressive techniques, and the risks of harm presented to members of the public and to the officers involved.

Additionally, Penal Code section 835(a) imposes further restrictions on an officer's use of force.

### **300.1.3 CORE PRINCIPLES**

**A. DE-ESCALATION AND FORCE MINIMIZATION.** Every officer's goal, throughout an encounter with a member of the public, ~~should~~ **shall** be to de-escalate wherever possible and resolve the encounter without resorting to the use of force. ~~Whenever possible, officers shall employ de-escalation techniques to increase the likelihood of voluntary compliance with law enforcement requests or directives and, thereby, decrease the likelihood that a use of force will become necessary during an incident. Further, in any encounters that do call for applying force, officers must always strive to use the minimal amount of force that is objectively reasonable and objectively necessary to safely achieve their legitimate law enforcement objective.~~

**B. PROPORTIONALITY.** When determining the appropriate level of force, at all times officers shall balance the severity of the offense committed and the level of resistance based on the totality of the circumstances known to or perceived by the officer at the time. It is particularly important that officers apply proportionality and critical decision making when encountering a subject who is ~~unarmed or armed with a weapon other than a firearm.~~

**C. MINIMIZING THE USE OF DEADLY FORCE.** Deadly force may only be used when the officer reasonably believes that such action is immediately necessary to protect the officer or another person from imminent danger of death or serious bodily harm. Officers shall not use deadly force if the officer reasonably believes that alternative techniques will eliminate the imminent danger and ultimately achieve the law enforcement purpose with less risk of harm to the officer or to other persons

**D. DUTY TO INTERVENE/INTERCEDE.** ~~Whenever possible, officers shall intervene when they know or have reason to know that another officer is about to use, or is using, unnecessary force. Officers shall promptly report any use of unnecessary force and the efforts made to intervene to a supervisor.~~

**E. VULNERABLE POPULATIONS.** Officers should be particularly sensitive when considering the use of force against vulnerable populations, including children, elderly persons, pregnant women, people with physical and mental disabilities, and people with limited English proficiency.

**F. FOSTER STRONG COMMUNITY RELATIONSHIPS.** The Berkeley Police Department understands that uses of force, even if lawful and proper, can have a damaging effect on the public's perception of the Department and the Department's relationship with the community. The Department is committed to fostering strong community relations by building on its historic tradition of progressive policing, ensuring accountability and transparency, and striving to

increase trust with our community. Officers therefore must carry out their duties, including use of force, in a manner that is fair and unbiased.

**G. FAIR AND UNBIASED POLICING.** Members of the Berkeley Police Department shall carry out their duties, including the use of force, in a manner that is fair and unbiased, in accordance with Policy 401, Fair and Impartial Policing.

### 300.1.4 DEFINITIONS

Federal

Definitions related to this policy include:

Minimal amount necessary – The least amount of force that is objectively reasonable and objectively necessary to safely effect an arrest or achieve some other legitimate law enforcement purpose.

**Deadly force** - Any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm ~~(Penal Code § 835a)~~.

**Force** - The application of physical techniques or tactics, chemical agents or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

**Less-Than-Lethal Force** – Any use of force which, due to possible physiological effects of application, presents less potential for causing death or serious injury than conventional lethal force options. Less-than-lethal force options include, but are not limited to, a specialized launcher, or other authorized device that can discharge, fire, launch or otherwise propel single or multiple flexible or non-flexible projectiles designed to cause physiological effects consistent with blunt force impact.

**Non-Lethal Force** – Any use of force other than lethal force or less-than lethal force.

**Compliant Suspect** – Cooperative and/or responsive to lawful commands.

~~**Passive Resistance** – Noncompliance to lawful authority without physical resistance or mechanical enhancement.~~

~~**Active Resistance** – Use of physical effort or mechanical resistance in achieving and/or maintaining noncompliance.~~

**Passive Resistance** - When an individual does not follow the lawful verbal commands of a police officer, but does not physically resist in any way.

Examples: A person who goes completely limp, sits down and refuses to stand or walk, or who may stand with arms at their sides without attempting to strike at or physically resist officers.

**Active Resistance** - An individual who is uncooperative and fails to comply with the lawful verbal commands of a police officer, and attempts to avoid physical control and/or arrest by physically struggling to free oneself from being restrained. The individual may also use verbal non-compliance (refusing a lawful order or direction).

Examples: A person who attempts to avoid physical control and/or arrest by pulling or pushing away from the officer, tensing arm or muscles, hiding from the officer, and/or fleeing.

**Combative Resistance** - An individual not only resists the officer, but poses a threat of harm to the officer or others, in an aggressive manner that may cause physical injury.

Examples: A person who violently attempts to or attacks an officer. This action is sometimes



preceded by “pre-assault” cues such as taking a threatening stance (clenching fists, facial expressions, threats, etc.) and non-verbal non-compliance.

**Control Hold** - Any Department approved hold, designed to allow an officer to control the movement of a subject (e.g., twist lock, rear wrist lock, finger lock, etc.). A control hold can be applied without implementing pain.

**Pain Compliance Technique** - Involves either the manipulation of a person’s joints or activating certain pressure points intended to create sufficient pain for the purpose of motivating a person to comply with verbal commands (examples of pressure points include buccal nerve, gum nerve, sternum rub).

**Control Techniques** — Control holds, Personal Impact Weapons, and Take Downs.

**Personal Body Weapons** - An officer’s use of his/her body part, including but not limited to hand, foot, knee, elbow, shoulder, hip, arm, leg or head by means of kinetic energy transfer (impact) to gain control of a subject.

**Blue Team (BT)** – Computer software that allows officers to enter use of force and other incidents from a Department computer.

**Concealment** - Anything which conceals a person from view.

**Cover** - Anything which provides protection from bullets or other projectiles fired or thrown. Cover is subjective and its effectiveness depends upon the threat’s ballistic capability (handgun, rifle, etc.).

**Blocking** - The positioning of a police vehicle in the path of an occupied subject vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal.

**Ramming** - The use of a vehicle to intentionally hit another vehicle

**Serious Bodily Injury** - A bodily injury that creates a substantial risk of death, causes serious, permanent disfigurement or results in a prolonged loss or impairment of the functioning of any bodily member or organ

**Officer (or) Police Officer** - Any sworn peace officer.

**Authorized Employee** - Any non-sworn employee who has received defensive tactics training and has been authorized by the Chief of Police to use non-lethal force.

**Employee** – Any non-sworn employee of the Berkeley Police Department, including those deemed “authorized employees.”

### 300.2 POLICY

#### Best Practice

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity, without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

**300.2.1 DUTY TO INTERCEDE****Federal**

~~Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee or member of another department use force that exceeds the degree of force permitted by law shall promptly report these observations to a supervisor.~~

**300.2.1 DUTY TO INTERCEDE AND DUTY TO REPORT**

~~Any officer who observes another officer or member of the Berkeley Police Department using force that is clearly in violation of this policy shall immediately take reasonable action to attempt to mitigate such use of force. This may include verbal intervention or, when in a position to do so, physical intervention. Further, any officer who learns of a potentially unauthorized use of force which the officer reasonably believes, based on the totality of information actually known to the officer, to be a violation of this policy, even if the officer did not witness it personally, shall promptly report this information to an on-duty sergeant or a command officer at the first opportunity.~~

~~Any officer who observes an employee or member of a different law enforcement agency use force that exceeds the degree of force permitted by law shall promptly report these observations to an on-duty sergeant or a command officer at the first opportunity.~~

**300.3 USE OF FORCE****Federal**

~~Officers shall use only that amount of force that is objectively reasonable given the facts and totality of the circumstances known or perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose. Officers shall use only the force that is objectively reasonable to effectively bring an incident under control, while protecting the safety of the officer and others. (Penal Code § 835a)~~

~~The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident, rather than with the 20 / 20 vision of hindsight. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving. This policy takes into consideration that there are a range of reasonable responses to each situation. (Graham v. Connor 490 U.S. 386 (1989))~~

~~The decision to use force “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” (Graham v. Connor 490 U.S. 386 (1989))~~

~~In deciding what type of reasonable force to use, officers and employees must use sound judgment and their training to assess the degree of threat in a given situation, and to determine what departmentally authorized force technique or weapons will bring the situation under control in a reasonable manner.~~

~~It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the~~

~~Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.~~

~~While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.~~

### 300.3.1 USE OF FORCE TO EFFECT AN ARREST

**State**

Any peace officer may use [objectively](#) reasonable, [objectively necessary, and proportional](#) force to effect an arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape or to overcome resistance. [For purposes of this policy, "retreat" does not mean tactical repositioning or other de-escalation tactics.](#) ~~(Penal Code § 835a).~~

### 300.3.2 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use [objectively](#) reasonable, [objectively necessary, and proportional](#) force to lawfully seize evidence and to prevent the destruction of evidence. In the instance when force is used an officer shall not ~~intentionally~~ use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the department for the specific purpose of collecting evidence.

### 300.3.3 FACTORS USED TO DETERMINE THE REASONABLENESS, [NECESSITY, AND](#)

**Federal**

#### [PROPORTIONALITY OF FORCE](#)

When determining whether to apply force and evaluating whether an officer has used [objectively](#) reasonable, [objectively necessary, and proportional](#) force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include, but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others ~~(Penal Code § 835a).~~
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer ~~(Penal Code § 835a).~~
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity ~~(Penal Code § 835a).~~
- (g) The individual's apparent ability to understand and comply with officer commands

~~(Penal Code § 835a).~~

- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness ~~(Penal Code § 835a).~~
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

The level of resistance that an officer encounters is a key factor in determining the proportionate amount of force. It is not possible to determine ahead of time what the proportionate level of force is for every possible situation that officers may face. Nevertheless, one of the key factors in determining what level of force is objectively reasonable, objectively necessary, and proportionate in a given situation is the level of resistance that an officer encounters. In general, the less resistance an officer faces, the less force the officer should use. The types of resistance officers may encounter fall along a continuum, from a cooperative person to an active assailant. Consistent with training, the following general rules apply when officers are exercising judgment in determining what level of force is necessary and proportionate:

- Compliant – In general, when dealing with a compliant person, officers may rely on police presence and/or verbal control techniques, but should not use greater force.
- Passive resistance – In general, when dealing with a suspect involved in passive resistance, officers may rely on police presence, verbal control techniques, or control holds, but should not use greater force.
- Active resistance – In general, in dealing with a suspect involved in active resistance, in addition to the options available for passive resistance, officers may rely on pain compliance techniques or takedowns, but should not use greater force.
- Combative resistance – In general, in dealing with a suspect involved in combative resistance, officers have all use-of-force options available to them, but deadly force shall only be used in compliance with this policy as described in Section 300.4.

### **300.3.4 USE OF FORCE CONTINUUM**

The Department uses a “use of force continuum” that refers to the concept that there are reasonable responses for every threat an officer faces in a hostile situation. The force utilized need not be sequential (e.g., gradual or preceded by attempts at lower levels of force) if those lower levels are not appropriate. All Uses of Force must be objectively reasonable, objectively necessary, and proportional, based on a totality of the circumstances. All progressions must rest on the premise that officers shall escalate and de-escalate their level of force in response to the subject's actions.

#### **Five levels of Continuum of Force**

- **Officer Presence — No force is used. Considered the best way to resolve a situation.**
  - The mere presence of a law enforcement officer works to deter crime or diffuse a situation.
  - Officers' attitudes are professional and nonthreatening.
- **Verbalization — Force is not physical.**
  - Officers issue calm, nonthreatening commands, such as "Let me see your identification and registration."
  - Officers may increase their volume and shorten commands in an attempt to gain compliance. Short commands might include "Stop," or "Don't move."
- **Weaponless defense — Officers use bodily force to gain control of a situation.**
  - *Pain compliance and control holds.* Officers use grabs, holds and joint locks to restrain an individual.
  - *Personal body weapons.* Officers may use punches and kicks to restrain an individual.
- **Less-Lethal Force Methods — Officers use less-lethal technologies to gain control of a situation.**
  - *Blunt impact.* Officers may use a baton or projectile to immobilize a combative person.
  - *Chemical.* Officers may use chemical sprays or projectiles embedded with chemicals to restrain an individual (e.g., pepper spray).
- **Lethal Force — Officers may use lethal weapons only in compliance with Section 300.4.**

### **300.3.4300.3.5 DE-ESCALATION TACTICS**

De-escalation tactics and techniques are actions ~~which may be~~ used by officers which seek to minimize the need to use force during an incident. Such tactics and techniques may increase the likelihood of voluntary compliance when employed and ~~should shall~~ be used when it is safe to do so, ~~without compromising law enforcement objectives and priorities~~. De-escalation tactics emphasize slowing an incident down to allow time, distance and flexibility for the situation to resolve. ~~Officers shall, when feasible, continually assess the dynamics of a situation, and modulate their response and actions appropriately. Officers may be justified in using force at one moment, but not justified in using force the next moment due to a change in dynamics.~~

The application of these tactics is intended to increase the potential for resolution with a minimal reliance on the use of force, or without using force at all.

If immediate action is not necessary, an officer(s) ~~should~~ shall attempt to use verbal de-escalation techniques. When available and when practicable, a Crisis Intervention Team (CIT) officer, crisis negotiator, or Berkeley Mental Health Mobile Crisis Team member ~~should~~ shall be called upon as a resource.

~~When reasonable under the totality of circumstances, o~~Officers ~~should~~ shall gather information about the incident, assess the risks, assemble resources, attempt to slow momentum and communicate and coordinate a response. In their interaction with subjects, officers should use advisements, warnings, verbal persuasion and other tactics and alternatives to ~~higher~~ any levels of force. Officers ~~may~~ shall move to a position that is tactically more secure or allows them greater distance to consider or deploy a greater variety of force options.

- a) De-escalation techniques may include verbal persuasion, warnings and tactical de-escalation techniques, such as: slowing down the pace of an incident; "waiting out" subjects; creating distance (and thus the reactionary gap) between the officer and the threat; and requesting additional resources (e.g., specialized units, mental health care providers, negotiators, etc.) to resolve the incident.
- b) Officers should recognize that they may withdraw to a position that is tactically advantageous or allows them greater distance to de-escalate a situation.  
Officers should consider a variety of options, including lesser force or no force options. ~~3-~~ Officers should perform their work in a manner that avoids unduly jeopardizing their own safety or the safety of others.
- c) ~~Officers shall not intentionally and unnecessarily escalate and/or create a need to use force.~~
- d) Officers should attempt to understand and consider possible reasons why a subject may be noncompliant or resisting arrest.
- e) A subject may not be capable of understanding the situation because of a medical condition; mental, physical, or hearing impairment; language barrier; drug interaction; or emotional crisis, and have no criminal intent. These situations may not make the subject any less dangerous, but understanding a subject's situation may enable officers to calm the subject and allow officers to use de-escalation techniques while maintaining public and officer safety.
- f) Officers should continue de-escalation techniques, when feasible and appropriate, and take as much time as reasonably necessary to resolve the incident, in effort to avoid and/or minimize the use of force.
- g) When an officer recognizes that mental illness, post-traumatic stress disorder, alcohol and/or drug addictions, or other health issues are causing an individual to behave erratically, the officer shall, when feasible and appropriate, try to de-escalate the situation using de-escalation and/or crisis Intervention techniques.
- h) Establishing ~~C~~ommunication with non-compliant subjects is often most effective when officers establish rapport, use the proper voice intonation, ask questions and provide advice to defuse conflict and achieve voluntary compliance before resorting to force options.
- i) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

When time and circumstances allow, officers ~~should~~shall consider the following tactical principles:

- (a) Make a tactical approach to the scene.
- (b) Maintain a safe distance.
- (c) Use available cover or concealment and identify escape routes.
- (d) Stage Berkeley Fire Department.
- (e) Control vehicle and pedestrian traffic.
- (f) Establish communication, preferably with one officer.
- (g) Create an emergency plan and a deliberate plan with contingencies.
- (h) The officer's physical actions may also de-escalate a potentially volatile/violent situation; e.g., exhibiting relaxed body language.

~~When time and circumstances reasonably permit, officers should consider whether a subject's lack of compliance is a deliberate attempt to resist or is the result of an inability to comply based on factors such as:-~~

- ~~(a) — Medical conditions~~
- ~~(b) — Mental impairment~~
- ~~(c) — Developmental disability~~
- ~~(d) — Physical Disability~~
- ~~(e) — Physical limitation~~
- ~~(f) — Language barrier~~
- ~~(g) — Drug interaction~~
- ~~(h) — Behavioral crisis~~

### ~~300.3.5~~300.3.6 PAIN COMPLIANCE TECHNIQUES

#### Best Practice

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance and threat posed by the person.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

The purpose of pain compliance is to direct a person's actions. The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

**300.3.6300.3.7 USE OF NON-LETHAL FORCE**

When lethal force and less-than-lethal force are not authorized, officers and authorized employees may use objectively reasonable, objectively necessary, and proportional approved non-lethal force techniques and weapons in the following circumstances:

- a) To protect themselves or another person from physical injury;
- b) To restrain or subdue a resistant individual; or
- c) To bring an unlawful situation safely and effectively under control.

**300.3.7.1 RESTRAINT AND CONTROL DEVICES**

Restraint and control devices shall not be used to punish, to display authority or as a show of force. Handcuffs, body wraps and spit hoods shall only be used consistent with Policy 302. Batons, approved less-lethal projectiles, and approved chemical agents shall only be used consistent with Policy 303. As per City Council resolution (June 9, 2020), the use of tear gas (CS gas) for crowd control by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited. Pepper spray or smoke for crowd control by employees of the Berkeley Police Department, or any outside department or agency called to respond to mutual aid in Berkeley, is prohibited during the COVID-19 pandemic, or until such time as the City Council removes the prohibition.

**300.3.7300.3.8 CAROTID CONTROL CHOKEHOLD PROHIBITION**

The use of a Carotid Restraint Hold is prohibited. Carotid Restraint Hold: Council Resolution No. 52,605 - N.S., February 14, 1985, "Prohibiting use of 'chokehold' for law enforcement purposes in the City of Berkeley" states: "Be it resolved by the Council of the City of Berkeley as follows: That the chokehold, including but not limited to the carotid restraint and the bar-arm hold, is hereby banned from use for law enforcement purposes in the City of Berkeley."

The term bar-arm refers to a variety of techniques. The use of any chokehold is strictly prohibited. A chokehold is any hold or contact with the neck – including a carotid restraint -- that may inhibit breathing by compression of the airway in the neck, may inhibit blood flow by compression of the blood vessels in the neck, or that applies pressure to the front, side, or back of the neck. As defined in the City Council Resolution, "bar-arm hold" refers to *any* use of the forearm to exert pressure against the front of the neck. However, other types of arm hold techniques (e.g., those that involve control of the arm, wrist or elbow) remain authorized.

**300.4 DEADLY FORCE APPLICATIONS****Federal**

If an objectively reasonable officer would consider it safe and feasible to do so under the totality of the circumstances, officers should evaluate the use of other reasonably available resources and techniques when determining whether to use deadly force. The use of deadly force is only justified in the following circumstances (Penal Code § 835a):

- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury to the officer or another person.



~~(b) — An officer may use deadly force to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended.~~

~~Where feasible, the officer shall, prior to the use of deadly force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.~~

~~Officers shall not use deadly force against a person based on the danger that person poses to him/herself, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the officer or to another person (Penal Code § 835a).~~

~~An “imminent” threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer’s subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention (Penal Code § 835a).~~

### **300.4 USE OF DEADLY FORCE**

~~An officer’s use of Ddeadly force may only be usedis justified only when **the officer holds an objectively reasonable belief** the officer reasonably believes, based on the totality of the circumstances, that such force is objectively necessary to-, as a last resort- 1) defend againstwhen **an imminent threat of death or serious bodily injury to the officer orf another is imminent**; or 2) apprehend a suspected fleeing person for any felony that threatened or resulted in death or serious bodily injury, provided the officer has a **objectively reasonable** objective belief that the person will cause **imminent** death or serious bodily injury to another unless immediately apprehended.~~

~~Where feasible, the officer shall, prior to the use of deadly force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.~~

~~**An officer shall not use deadly force against another person unless** the officer objectively and reasonably believes that using deadly force would not unnecessarily endanger innocent people.~~

~~all of the following conditions are met:~~

~~The officer has an objectively reasonable belief that deadly force is necessary to protect the officer or another person from a subject who is posing a current, active and immediate threat of death;~~

~~The officer has exhausted all reasonable alternatives to the use of force, including de-escalation, other reasonable means of apprehending the subject, self defense or defense of others; and~~

~~The officer objectively and reasonably believes that using deadly force would not unnecessarily endanger innocent people.~~

~~**Lethal force is prohibited when its sole purpose is to effect an arrest, overcome resistance or prevent a subject from escaping when the subject does not present an immediate danger of death or serious bodily injury. Lethal force is also prohibited solely to prevent property damage or prevent the destruction of evidence.; disable a moving vehicle or against a person who only**~~

poses a threat to him/herself and not to others.

An “imminent” threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer’s subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention.

### **300.4. 1. DRAWING AND POINTING FIREARMS**

#### **300.4.1 DIRECTED FIRE**

Officers may use controlled gunfire that is directed at the suspect, reducing the suspect’s ability to return fire while a group or individual movement is conducted, such as in a rescue operation.

Officers may only employ this tactic when dealing with a suspect who poses an immediate and ongoing lethal threat and only under circumstances where the use of deadly force is legally justified. Target acquisition and communication are key elements in the successful use of this tactic. Officers remain accountable for every round fired under these circumstances. Officers must consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.

#### **300.4.2 SHOOTING AT OR FROM MOVING VEHICLES**

##### **Best Practice**

Absent exigent circumstances, officers shall not discharge firearms from a moving vehicle.

Firearms ~~should~~ shall not be discharged at a stationary or moving vehicle, the occupants of a vehicle, or the tires of a vehicle unless a person in the vehicle is imminently threatening an officer or another person present with deadly force. The moving vehicle alone does not presumptively constitute a threat that justifies the use of deadly force.

Officers shall not move into, remain, or otherwise position themselves in the path of a vehicle in an effort to detain or apprehend the occupants. Any officer in the path of a moving vehicle shall immediately attempt to move to a position of safety rather than discharging a firearm at the vehicle or any of the occupants.

Because this policy may not cover every situation that may arise, a deviation from this policy may be objectively reasonable and, objectively necessary depending on the totality of the circumstances. A deviation from this policy would, for instance, be justified if the officer used a firearm in an attempt to stop an imminent vehicle attack on a crowd or a mass casualty terrorist event.

Factors that may be used to evaluate the reasonableness of the use of a firearm against a vehicle include:

- (a) The availability and use of cover, distance and / or tactical relocation
- (b) Incident command and personnel placement
- (c) Tactical approach
- (d) Regard for viable target acquisition and background including location, other traffic,

the presence of innocent persons, and police officers

### 300.5 USE OF VEHICLES

Officers shall not use police vehicles to ram or block other vehicles, persons, or moving objects in a manner that reasonably appears to constitute the use of lethal force, except under circumstances outlined in section 300.4 and in Policy V-6 that covers vehicle operations.

The Vehicle Containment Technique (VCT) is the positioning of a police vehicle in the path of a suspect vehicle where contact between the vehicles is not anticipated or is anticipated to be minimal. VCT shall only to be used on vehicles that are either stationary or moving at a slow speed. This technique is designed to contain a suspect vehicle to a single stationary location, thereby preventing a pursuit from initiating, or a potentially violent situation (e.g. a hostage situation or person barricaded inside a vehicle) from becoming mobile.

When properly utilized, the VCT can give officers time, distance, and cover in order to safely and effectively resolve a situation.

### 300.6 REPORTING REQUIREMENTS

#### Best Practice

~~Any use of force described in 300.6.2 shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) he or she must also complete a "Use of Pepper Spray Report."~~

~~Any incident involving deadly force will be investigated under the protocols outlined in Policy P-12.~~

~~A use of force report is not required when a person is handcuffed, searched, or subject to a control hold and there is no injury or complaint of injury.~~

~~Absent any factors outlined in Section 306.2 officers shall document the following actions in a police report, citation, Field Interview, and / or CAD entry. Supervisors will review police report narratives for approval:~~

~~Control Hold / Pressure point application~~

~~Grab~~

~~Application of bodyweight~~

~~Lowering a subject to a seated position or to the ground while partially or complete supporting the person's body weight.~~

~~All uses of force shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident and the level of force used. The officer should articulate the factors perceived and why he/she believed the use of force was objectively reasonable and objectively necessary under the circumstances. Whenever an officer or employee uses Oleoresin Capsicum (pepper spray) he or she must also complete a "Use of Pepper Spray Report."~~

~~Upon receiving notification of a use of force, an uninvolved supervisor, when feasible, will **shall**~~

determine the level of force reporting level, investigation, documentation and review requirements.

### **300.6.1 SUPERVISOR RESPONSIBILITY**

**Best Practice**

When a supervisor is able to respond to an incident in which there has been a reported application of force as defined in 300.6.2 and the scene is secure, the supervisor is expected to should:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (d) Identify any witnesses not already included in related reports.
- (e) Review and approve all related reports
- (f) Review body worn camera footage related to the incident.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

### **300.6.2 USE OF FORCE REPORTING LEVELS**

#### **Level 1**

(a) Subject allowed him/herself to be searched, escorted, and/or handcuffed. The officer did not use force to overcome resistance, nor did the officer use force in the absence of resistance.

(b) The officer used any of the following, and the circumstances of the application would lead an objectively reasonable officer to conclude that the subject did not experience more than momentary discomfort:

1. Control holds/ pain compliance techniques
2. Leverage
3. Grab
4. Bodyweight
5. The officer lowered the subject to a seated position or to the ground while partially or completely supporting the person's bodyweight.
6. Takedown

Officers shall document Level 1 actions in a police report, citation, Field Interview, and / or CAD entry. Supervisors will review police report narratives for approval.

**Level 2**

(a) No suspect injury or complaint of continuing pain due to interaction with officer.

(b) Officer's use of force was limited to the following:

1. Firearm drawn in an interaction with an individual and/or pointed at an individual.
2. Control hold, pressure point, leverage, grab, takedown, and/or bodyweight, and the application would lead a reasonably objective officer to conclude that the individual may have experienced more than momentary discomfort.

An uninvolved supervisor, when feasible, will respond to the scene and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses, and that photos are taken of all involved parties. If the incident fits the parameters for a Level 2 incident, the supervisor will enter all applicable data into Blue Team and attach a completed Use of Force Investigation Checklist with a brief summary.

**Level 3**

(a) Would have otherwise been classified as a Level 2, except one or more of the following apply:

1. Suspect injury or complaint of injury or continuing pain due to interaction with the officer.
2. Officer body worn camera was not activated in a timely manner, prior to the enforcement contact, per policy.

(b) The officer used any of the following force options:

1. Chemical Agents/Munitions
2. Impact Weapon Strikes
3. Personal Body Weapons

An uninvolved supervisor, when practical, will respond to the scene and conduct a Use of Force Investigation, ensuring that statements are taken from the suspect and witnesses. If the incident fits the parameters for a Level 3 incident, the supervisor will enter all applicable data into Blue Team and attach a completed Use of Force Investigation Checklist.

The supervisor will also complete a Use of Force Investigation Report narrative for review through the Use of Force Review process. Suspect and witness statements from the crime report will be attached to the use of force investigation.

**Level 4**

Any incident involving deadly force or any force likely to cause death or serious bodily injury will be investigated under the protocols outlined in Policy P-12.

**300.6.2 EMPLOYEE USE OF FORCE**

When any Berkeley Police Department employee has engaged in a use of force as defined in this policy, the use of force must be reported to a Berkeley Police supervisor and investigated in accordance with this policy.

**300.6.1— INTENTIONALLY POINTING A FIREARM AT AN INDIVIDUAL**

~~Whenever an officer intentionally points a firearm at an individual they shall document the occurrence on a Blue Team report. Officers shall articulate the facts that lead them to point a firearm at an individual and advise a supervisor prior to the end of shift so they can review the~~

report documenting the incident.

~~Officers are not required to document drawing or deploying a firearm if they do not intentionally point it at a subject.~~

### 300.6.2 NOTIFICATION TO SUPERVISORS

#### Best Practice

~~Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:~~

- ~~(a) The application caused a visible injury.~~
- ~~(b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.~~
- ~~(c) The individual subjected to the force complained of injury or continuing pain as a result of the use of force.~~
- ~~(d) Any application of less than lethal munitions or pepper spray.~~
- ~~(e) The individual was struck by a baton~~
- ~~(f) The individual subjected to the force was rendered unconscious.~~
- ~~(g) The individual was struck with a personal body weapon or was subjected to a take-down.~~
- ~~(h) An individual alleges any of the above has occurred.~~

### 300.6.3 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

#### State

Statistical data regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is to be reported to the California Department of Justice as required by Government Code § 12525.2. See the Records Management policy.

### 300.6.4 PUBLIC RECORDS

Records related to use of force incidents shall be retained and disclosed in compliance with California Penal Code section 832.7, California Government Code section 6254 and Department Policy R-23.

### 300.7 MEDICAL CONSIDERATION

#### Best Practice

When an officer or employee uses force that results in injury, or when a subject complains that an injury has been inflicted, the officer or employee shall promptly provide, if properly trained, or otherwise promptly procure medical assistance when reasonable and safe to do so in order to ensure that the subject receives appropriate medical care.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force.

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called “excited delirium”), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical evaluation as soon as practicable and have medical personnel stage away if appropriate.

### ~~300.8 SUPERVISOR RESPONSIBILITY~~

#### ~~Best Practice~~

~~When a supervisor is able to respond to an incident in which there has been a reported application of force as defined in 300.6.2 and the scene is secure, the supervisor is expected to:~~

- ~~(g) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.~~
- ~~(h) Ensure that any injured parties are examined and treated.~~
- ~~(i) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.~~
- ~~(j) Identify any witnesses not already included in related reports.~~
- ~~(k) Review and approve all related reports~~
- ~~(l) Review body worn camera footage related to the incident.~~

### 300.9 WATCH COMMANDER RESPONSIBILITY

#### Best Practice

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.

### 300.10 USE OF FORCE ADMINISTRATIVE REVIEW

The Division Captain shall review the Use of Force Report (and when applicable, Use of Pepper Spray Report) and route the report to the Chief of Police with a recommendation of findings. The Chief of Police may convene a Review Board as outlined in Policy 301 instead of utilizing Division Captain Review.

The Chief of Police ~~will~~shall make a finding that the use of force was either within policy or initiate additional administrative review/investigation as may be appropriate.

Any determination concerning the propriety of force used ~~shall~~will be based on the facts and information available to the officer at the time the force was employed, and not upon information gained after the fact.

All Use of Force Reports ~~will~~shall be reviewed to determine whether Departmental use of force

regulations, policies, or procedures were: 1) violated or followed; 2) clearly understood, effective, and relevant to the situation; 3) require further investigation; and/or, 34) require revision or additional training.

Use of Force Reports will-shall be held in file for at least five (5) years

### 300.11 TRAINING

Best Practice

Officers will-shall receive periodic training on this policy and demonstrate their knowledge and understanding as per SB 230-

### 300.12 USE OF FORCE ANALYSIS

Best Practice

The Professional Standards Division Captain or his or her designee shall prepare an comprehensive analysis report on use of force incidents to be included as part of the Police Department's Annual Crime Report to Council. The report shall not contain the names of officers, suspects or case numbers, and should include but not be limited to:

- (a) An analysis of use of force incidents with demographic details of the individual impacted and type of force used including, but not limited to race, gender and age.
- (b) All types of force as delineated in Levels 1, 2, 3 and 4 in Section 300.6.(2)
- (b)(c) The identification of any trends in the use of force by members.
- (e)(d) Training needs recommendations.
- (d)(e) Equipment needs recommendations.
- (e)(f) Policy revisions recommendations.

#### 300.11.1 REPORTING FREQUENCY

- (a) On a ~~monthly~~ quarterly basis via ~~its~~ the City's Open Data Portal website;
- (b) On a quarterly basis to the Police Review Commission; and
- (c) On a yearly basis as part of the Police Department's Annual Crime Report to Council

#### 300.12.3 CITIZEN-CIVILIAN COMPLAINTS

Citizen eComplaints by members of the public related to this policy may be filed with the Berkeley Police Department Internal Affairs Bureau (IAB) and/or the Police Review Commission (PRC). Complaints will be investigated in compliance with the applicable procedures of the (IAB) and the (PRC) as applicable.

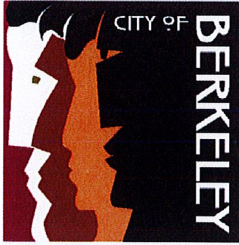
#### 300.12.4 POLICY REVIEW AND UPDATES

This policy shall be regularly reviewed and updated to reflect developing practices and procedures.

At least annually, the Berkeley Police Department and the Police Review Commission shall



[convene to review and update the Use of Force Policy to reflect developing practices and procedures per SB-230.](#)



Police Review Commission (PRC)

Attachment 7

July 16, 2020

Honorable Mayor and Members of the City Council  
City of Berkeley  
2180 Milvia Street, 5<sup>th</sup> Floor  
Berkeley, CA 94704

Dear Mayor Arrequin and Members of the City Council:

I am pleased to submit the Police Review Commission's report and recommendations for a revised Use of Force Policy 300. The proposal represents many hours of work on the part of the Use of Force Subcommittee and the whole Police Review Commission, as well as PRC Officer Katherine Lee and her staff.

Revisions to the Berkeley Police Department's use of force (UOF) policy have for too long been allowed to remain on the back burner. Recent events, including the murder of George Floyd and so many other Black men and women, have added a new sense of urgency to this task.

The BPD is not the Minneapolis Police Department nor that of other cities where unarmed Blacks are killed by the police with chilling frequency. But, here in Berkeley too, police use of force is a racial justice issue. According to the Center for Policing Equity report of 2018, Blacks in Berkeley are 12 times more likely to be subjected to the use of force by police than are Whites, and this cannot be attributed to such factors as poverty or crime rates in the neighborhood.

Developing revisions to our UOF policy is not only – or even primarily – about trying to correct for past mistakes. And, it is not about casting blame. It is about looking to the future. It is about researching and studying best practices around the country and making sure we have the kind of progressive policy that ensures that the life, health and civil liberties of all people are safeguarded, consistent with the values of the Berkeley community.

Law and policy are in part about restricting behavior, but they are also about codifying a community's values. We believe that the proposed policy achieves both these goals.

Mayor and Members of the City Council  
July 16, 2020  
p. 2

The PRC appreciates the hard work and commitment you are putting into this and other policing issues. I and others from the PRC will be available at the Council's special meeting on July 23<sup>rd</sup> to respond to any questions you might have.

Sincerely,

A handwritten signature in blue ink that reads "Kitty Calavita" followed by a stylized flourish or initials.

Kitty Calavita  
Chair, Berkeley Police Review Commission





**SOPHIE HAHN**  
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## **EMERGENCY ITEM AGENDA MATERIAL**

**Meeting Date:** June 9, 2020  
**Item Description:** Emergency Declaration and First Amendment Curfew Criteria  
**Submitted By:** Vice Mayor Sophie Hahn (Author), Councilmembers Ben Bartlett and Kate Harrison, and Mayor Jesse Arreguin (Co-Sponsors)

This item is submitted as an Immediate Action Item pursuant to Section III.D.4.b of the Berkeley Council Rules of Procedure.

In light of ongoing demonstrations throughout California and across the Bay Area in response to illegal police killings of Black individuals, there is a need for immediate action to establish policy on the order, scope, terms, duration and other conditions and elements of curfews in the City of Berkeley.

The Council must immediately take action because demonstrations have occurred in recent days and there is evidence of planning for [additional demonstrations](#) similar to the ones that prompted the recent curfew in the City of Berkeley. Such demonstrations, including potentially challenging situations in which bad actors infiltrate groups of peaceful protestors, can place outsized demands on police and others responsible for ensuring public order and safety. In addition, the City must be prepared to protect the constitutional rights of individuals who wish to peacefully assemble and protest injustices in Berkeley and beyond.

Sadly, we know that unjust and discriminatory killings of Black individuals will continue. According to a Washington Post [database](#) tracking police killings, more than 1000 people have been shot and killed by the police in the past year, with Black Americans killed at more than twice the rate of white Americans. Shocking incidents happen all the time. In the past few days, we have had a slaying in Vallejo and a shooting in Oakland of individuals of color. Because such events occur with sad frequency, protests in opposition could arise at any time as well, potentially prompting the City to seek another declaration of Local Emergency, and curfew. Therefore, new policies must be established immediately.

The Agenda for the June 9 City Council Special Meeting was published on the afternoon of June 2, prior to the meeting at which the Council approved an emergency resolution from the City Manager imposing a curfew in response to scheduled demonstrations. Therefore, the need to take immediate action to establish a policy on curfews came to the attention of the Council after the publishing of the Agenda.



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ACTION CALENDAR  
July 23, 2020  
(Continued from June 16, 2020)

**To:** Honorable Members of the City Council  
**From:** Vice Mayor Sophie Hahn (Author), Councilmembers Ben Bartlett and Kate Harrison, and Mayor Jesse Arreguin (Co-Sponsors)  
**Subject:** Changes to the Berkeley Municipal Code and City of Berkeley Policies with Respect to Local Emergency Declarations and First Amendment Curfews

RECOMMENDATION

1. Direct the City Manager to return to the City Council for adoption amendments to the Berkeley Municipal Code and/or policies to approve that clarify and codify the following with respect to the declaration of a Local Emergency:
  - a. A Local Emergency can only be declared by the Director of Emergency Services if a regular or special meeting and session of the City Council cannot be called due to physical impossibility of holding a meeting, because a quorum cannot be established, or because the urgency of the Local Emergency is such that waiting 24 hours for the City Council to convene a session and/or Special Meeting would endanger the community;
  - b. Should the Director declare a Local Emergency without action of the City Council (due to one of the reasons stated at (a), above), Council ratification of such action occurs at the first possible opportunity, even if it requires calling a Special Meeting and/or session of the Council; and
  - c. The applicable statutory and legal standards (Federal, State and Local) for calling a Local Emergency shall be presented to the City Council when seeking declaration or ratification of a Local Emergency, along with facts to support meeting those standards, so that the City Council, likely acting under rushed and exigent circumstances, is able to make a carefully considered and fact-based determination that declaration of such Local Emergency conforms with the legal standards and is supported by facts.
2. Direct the City Manager to return to the City Council for adoption amendments to the Berkeley Municipal Code and/or policies to approve that clarify and codify policies, terms and procedures for the order, scope, terms, duration, and all other elements and conditions of curfews called in response to, or likely to have the effect of limiting or banning, planned, expected or reasonably foreseeable first amendment activity,

including rallies, marches, demonstrations and assemblies of all kinds (“First Amendment Curfews”),as enumerated (1-8) under the “Background” section of this item, below.

3. Advise the City Manager and/or Director of Emergency Services that approval of this item represents the will and direction of the City Council with respect to declarations of Local Emergencies and imposition of First Amendment Curfews, and should the occasion to declare a Local Emergency or impose a First Amendment curfew arise prior to formal Council adoption of the requested amendments and policies, the City Manager and/or Director of Emergency Services shall, to the greatest extent possible under existing law, strive to encompass actionable elements, and meet spirit, of this item.

**BACKGROUND:**

*“Those who won our . . . revolution were not cowards. . . They did not exalt order at the cost of liberty. . . . Only an emergency can justify repression [of speech]. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.”* US Supreme Court Justice Brandeis, *Whitney v. California*, 274 U.S. 357, 377–78 (1927) (Brandeis, J., concurring)

State law and the Berkeley Municipal Code both include provisions for the calling of a Local Emergency. Once a Local Emergency has been called, the power to impose curfews is in the hands of the Director of Emergency Services (“Director”), with ratification by the City Council.

This item seeks to achieve two goals:

First, the Berkeley Municipal Code only allows the Director to proclaim a Local Emergency if the City Council is not “in session.” If the City Council is “in session,” the City Council must call the Local Emergency. It also requires the City Council to ratify a Local Emergency called by the Director within seven days, or the proclamation has no further effect.

**2.88.040 Director of Emergency Services--Powers and duties.**

- A. The Director of Emergency Services is empowered:

1. If, in the Director’s judgment, the conditions will require the combined forces of other political subdivisions to combat, to request the City Council to proclaim the existence of a "Local Emergency" if the City Council is in session, or to issue such proclamation if the City Council is not in session. Whenever a Local Emergency is proclaimed by the Director, the City Council shall take action ratifying said proclamation within seven days of issuance or the proclamation shall have no further force and effect;

This item directs the City Manager to return to the City Council amendments to the Berkeley Municipal Code and/or a policy to adopt that emphasize and clarify that the City Council is the body empowered to call Local Emergencies, and the Director of Emergency Services must present a proclamation of Local Emergency either at a Regular meeting of the City Council, or call for a Council session and/or Special Meeting to be immediately convened, and the Director may only call a Local Emergency himself in circumstances where, despite the requirement to convene the City Council, it is either (1) extremely difficult or impossible for the City Council to meet, such as a major wildfire or earthquake that renders both physical and virtual meetings physically difficult or impossible, or (2) after convening a session and/or Special Meeting, or at a Regular Meeting of the Council, a quorum cannot be established, or (3) if the emergency is so extreme and dangers to the community so grave and imminent that waiting for a Regular or Special Meeting or session of the City Council to be convened would endanger the community.

Further, the item requests clarification that City Council ratification of a declaration of Local Emergency by the Director should take place as quickly as possible, at the first possible occasion that a Special City Council meeting or session can be convened.

Second, once a Local Emergency has been declared, the Director of Emergency Services has the following powers under BMC Section 2.88.04(A)(6)(a):

To make and issue lawful rules and regulations on matters reasonably related to the protection of life, public health or safety, or improved property as affected by such emergencies; provided, however, such rules and regulations must be confirmed at the earliest practicable time by the City Council, shall be in writing, and shall be given widespread publicity and notice

It is according to this power that a curfew can be imposed by the Director.

A second set of BMC amendments and policies will address imposition of certain types of curfews. This item directs the City Manager to return to the City Council for adoption amendments to the Berkeley Municipal Code and/or policies to approve that clarify and codify new procedures and requirements applicable curfews which may be called in response to, or are likely to have the effect of limiting or banning, planned, expected or reasonably foreseeable first amendment activity, including rallies, marches, demonstrations and assemblies of all kinds, hereinafter referred to as "First Amendment Curfews".

Establishment of all curfews impacts constitutional rights, most notably the 5th Amendment protection against government deprivation of "life, liberty, or property, without due process of law." By limiting movement of individuals during the period of the curfew in the locations where a curfew is imposed, liberty is impacted. Thus, imposition of any curfew and must meet a high standard.

Under any curfew, first amendment activity - free speech - is also curtailed, by implication. If residents are confined to their homes some or all of the day and night due to safety concerns



and dangerous conditions after a disaster, they cannot assemble publicly for any purpose, and their first amendment rights have been curtailed. But there is a difference between a curfew that is called in the wake of a major disaster such as an earthquake or fire, to protect people from dangerous conditions, and a curfew that is called specifically in response to, or anticipation of, first amendment activity. This item asks for amendments to the Berkeley Municipal Code and/or the drafting of new policies that establish higher standards and more robust processes and policies with respect to potential First Amendment Curfews.

After an earthquake, fire, landslide or other major disaster, if a curfew is imposed to avoid the possibility that individuals out at night, for example, will be hurt by falling debris, encounter live electrical wires, or fall into sinkholes, the nexus between potential harm to community members and the calling of a curfew is clear and relatively uncontroversial. The fact that the curfew also precludes a rally, protest, funeral or other assembly is incidental.

But when a curfew is issued primarily to limit or preclude assemblies, free speech and the right to “peaceably assemble” is the direct target of the curfew, and higher standards must apply. The City Council should be the body to review the statutory and legal standards for imposition of a First Amendment Curfew, to review the facts, and to evaluate whether the intrusion on First Amendment rights is necessary to address a compelling interest, narrowly tailored to achieving that purpose, and uses the least restrictive means to achieve the purpose.

Changes to the BMC and/or new policies relating to First Amendment Curfews should include, at a minimum, the following:

1. An assertion or codification that the First Amendment shall not be infringed upon by the City of Berkeley without establishing that the proposed intrusion on First Amendment rights is necessary to address a compelling interest, narrowly tailored to achieving that purpose, and uses the least restrictive means to achieve the purpose
2. Imposition of First Amendment Curfews, if any, shall be by action of the City Council at a Regular or Special meeting, except in circumstances where it is extremely difficult or impossible for the City Council to meet, such as a major wildfire or earthquake that renders both physical and virtual meetings physically difficult or impossible, or if a quorum of the City Council cannot be established, in which case the Director of Emergency Services may impose a First Amendment Curfew that meets the requirements of all applicable Federal, State and local laws, legal standards, and policies. A curfew imposed by the Director must be ratified by the City Council within the following 24 hours, except if it is extremely difficult or impossible for the City Council to meet either physically or virtually, or a quorum of the City Council cannot be convened at a regular or special meeting.
3. A First Amendment Curfew and each and every element of such curfew, including but not limited to the curfew’s physical boundaries; times of day or night; duration; and the individuals/businesses/establishments, modes of transportation, and other activities or

elements to which it applies; shall not be imposed unless specific findings are made, based on substantial evidence, that:

- a. Each element of such curfew is narrowly tailored to meet specific violence or conditions which pose a clear and present danger of imminent violence likely to be perpetrated in each covered location (residential vs. commercial/manufacturing areas, specific residential or commercial/manufacturing areas, specific types of establishments such as bars, dispensaries, big box stores, etc.), using the covered modes (pedestrians, bike riders, people in vehicles, parking, etc.), during the covered times (morning, mid day, afternoon, evening, etc.), for the covered duration (one day, half day, etc.), and in, by or during all other conditions to which the order applies, and
- b. All reasonable alternatives and more narrowly tailored means to avoid or address specific violence or conditions which pose a clear and present danger of imminent violence, as well as any new rules or regulations which may be promulgated short of a curfew in those locations, even if more expensive to deploy, for those individuals and modes, during those times and for that duration, and for all other conditions to which the curfew applies, have been explored and found to be deficient in their ability to address specific violence or conditions which pose a clear and present danger of imminent violence, and only a curfew can reasonably provide for the necessary public safety and welfare.

All reasonable alternative means, considered and rejected, to address threats related to each covered location, population, mode or other condition or element of the curfew, shall be described in the report provided to the City Council upon the Director of Emergency Services' request for Council to impose such curfew, or upon the Director's request for ratification of a curfew imposed by the Director.

4. First Amendment Curfew orders must clearly state and/or designate on a map the specific areas to be covered, list the covered individuals/businesses, modes, times, duration and any other elements and conditions to which the order applies, and explain the specific violence or conditions which pose a clear and present danger of imminent violence, that justify imposition of the curfew to each element of the order. First Amendment Curfews may not be based on fear of violence alone; there must be specific, identified threats and/or a reasonable basis to believe threats might materialize in the locations, at the times, and by the means being banned or restricted by the curfew order.
5. A First Amendment Curfew can provide a specific number of days, or unlimited days, for which the curfew is suggested to apply. However, First Amendment Curfews can only be ordered by the City Council or, if necessary, by the Director of Emergency Services, for one twenty-four hour period at a time, and may only be extended or re-imposed, if at all, through additional action taken by the the City Council at a regular or special meeting or by the Director.

Notwithstanding the above, if, after 7 consecutive days of the City Council issuing daily First Amendment Curfew orders or the Director of Emergency Services issuing daily orders for the City Council's ratification, the Council or the Director wishes, on the 8th day, to issue a First Amendment Curfew order for a period longer than one day, the City Council, by a vote of  $\frac{2}{3}$ , or the Director, may issue or ratify curfew orders of up to 7 days in duration.

6. An overall finding must be made by the City Council or Director, in imposing a First Amendment Curfew, that reasonable alternative measures that burden substantially less speech would fail to achieve the City's interests, even if more complicated or costly to implement, and the added value of the curfew will make a substantial positive impact on public safety without unduly impacting rights guaranteed under local, state and federal laws, and in particular the First, Fifth and Fourteenth amendments of the US Constitution.
7. To the greatest extent possible, First Amendment Curfew orders shall refrain from using vague standards for enforcement and exemptions, that may result in selective, disparate or biased enforcement.
8. To mirror the notice requirements of Berkeley Municipal Code Section 2.88.040(6)(a), which requires "widespread publicity and notice" of a declaration of Local Emergency, and to meet ensure that a First Amendment Curfew is only enforceable against individuals who do not obey the curfew "after due notice, oral or written, has been given to said persons," and, to the greatest extent possible under the time constraints and physical conditions (lack of electricity or internet, widespread destruction in the event of a sudden wildfire or earthquake, etc.) which exist at the time a First Amendment order is ordered, the City of Berkeley shall publicize the First Amendment Curfew through, at a minimum, the following means:
  - a. By posting a notice at all locations where formal notices are regularly posted
  - b. By posting a notice prominently on the Home Page of the City of Berkeley website and on other appropriate pages of the website
  - c. By publicizing notice of the order through major City of Berkeley and police department social media accounts
  - d. By providing a copy of the notice to a broad array of traditional Bay Area media outlets including paper and online newspapers, radio and television stations, and other similar media
  - e. If the order applies only to specific locations within the City of Berkeley, by posting temporary signs on street fixtures and poles in such area(s), and in particular at major entrances to such areas such as on arterials and collector streets as they enter such restricted areas.
  - f. And by other means of broadcasting notice of the order to the general public.

In addition, notice and a reasonable opportunity to comply with the curfew (a “warning”) shall be provided to all individuals against whom enforcement is contemplated, by announcing the order through amplified communications and providing a verbal warning and reasonable opportunity to comply before enforcement.

FINANCIAL IMPLICATIONS

Cost of holding additional virtual or in-person meetings of the City Council to ensure rights guaranteed by the Constitution of the United States of America are upheld in all actions to declare Local Emergencies and impose First Amendment Curfews in the City of Berkeley.

CONTACT INFORMATION

Vice Mayor Sophie Hahn, Council District 5, 510-682-5905 (Cell)

ATTACHMENTS

1. ACLU of Northern California’s June 3, 2020 letter to Alameda County Sheriff Ahern
2. Karen J. Pita Loor, *When Protest Is The Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1 (2019)