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COMMENTS ON REVISED DRAFTS OF PPB FORCE AND TASER POLICIES
from Portland Copwatch March 18, 2013

To Chief Reese and the Portland Police Bureau:

Thank you for releasing the current ("final") drafts of the Force and Taser ("Electronic Control Weapon") policies. We will continue to refer to them as drafts since the Agreement with the Department of Justice (DOJ) requires that any such policies be approved by DOJ before being implemented. We refer you to our letter of October 22, 2012 analyzing the previous published drafts, in which we cautioned the Bureau not to adopt these policies in order to put off more far-reaching changes and then asking DOJ to "wait and see how the new changes work." Those concerns still apply. (The letter can be found at <http://www.portlandcopwatch.org/comments_directives102212.html>.)

There are several positive changes in the new drafts, not the least of which is that each section is now numbered separately so that people reviewing the Directives relating to officer behavior, training practices, policy issues or other concerns now can easily find the section under discussion.

That said, there are also many shortcomings in the new directives, several of them that we noted in the October 22 letter and others that are new to these drafts.

USE OF FORCE POLICY

On its face, it seems that it is a good idea to integrate the deadly force policy with the other use of force policy, especially since all force is part of the same continuum (Oops! Sorry to use this antiquated term--but it is accurate). We look forward to seeing the revised policy on what happens after a deadly force incident.

Referring back to the force continuum, which was part of the pre-2007 Force directive, it is interesting that the previous draft's explicit statement that the PPB follows "totality of the circumstances" and not "some mechanical model" is gone. With that amendment, we repeat our concern that some form of the old continuum be reinstated, depicting the maximum force allowed depending on the behavior of the suspect. By explicitly stating the maximum acceptable force in certain circumstances, the Bureau can enhance accountability when officers violate the directive.

We do appreciate that it is now explicitly stated that the policy is more restrictive than the constitutional standard (1.8). We also appreciate that the earlier draft's instruction that the Bureau "expects" members to develop force management skills now "requires" such skills to be developed (4.3).

It continues to be of concern that the Bureau says "duty may require [officers] to use force" (1.2 & 6.1). We noted previously that:

> If the point is to have officers take responsibility for their actions,
> the language should not blame "duty" for decisions the officers make.
> "When no alternatives appear to be effective, officers may choose to
> lawfully use force to accomplish a lawful objective" would be more
> clear and accurate.

No changes were made to the policy asking officers to "diligently work toward applying... less force than the maximum allowed" and then discussing "minimizing or avoiding force when possible" (4.2). We had suggested that being more direct and putting the concept of minimizing and avoiding force first would make more clear the goal of using less force. Similarly, the concept of de-escalation is only mentioned once in the guidelines for officers using force, in the context of continual assessment of a situation and de-escalating "as reasonable" (5.3). The DOJ Agreement suggests de-escalation as the resistance of the subject lessens.

It appears that "immediate threat" is defined and used appropriately in this Directive; that is, the threat has to currently exist and not be theoretical to justify an officer's use of force (2.5, 5.1.5, 6.1.1, 6.1.2). Meanwhile "imminent" is defined as "about to occur, impending, likely to happen very soon" (2.6), a terribly subjective standard, it is only used in one place: speaking of an "imminent death" that might be prevented by entering an occupied vehicle (9.1).

We also noted in our earlier analysis that while the Taser Directive calls for a Sergeant to come on scene, the Force Directive does not. We still believe it is more important for a neutral civilian investigator to come to the scene to avoid personal relationships contaminating the investigation. Nonetheless, we still are unsure why notification requirements for the involved officers is part of the Directive (12.7) but not for the supervisors (12.8 & 14).

Especially following a complaint heard before the Citizen Review Committee in January, we are concerned that "escort holds" are exempt in the new draft from Use of Force reporting (2.3). While such holds are described as similar to Boy Scouts escorting elderly people across the street, said Boy Scouts would at most be armed with multi-use utility knives, not guns, pepper spray, bullet-proof vests, and Tasers. Given the lowest level of the old continuum was "mere presence," and that unwanted touching between two civilians could be considered a crime (of "harassment,") it seems that officers should justify any time they put their hands on a community member.

It is good that the Carotid Hold has been added to the list of what could constitute deadly force (2.1). However, since that "choke hold" has been banned since the 1980s, we wonder why there is no statement that such force is prohibited.

Here is a list of some other changes that were made that we are concerned about:

--Additional warnings about why officers should not shoot at a moving car were cut, leaving only broad prohibition on doing so. (7.2)

--In the section about a person who may be having trouble breathing, the reference to maximum restraints has been removed, now only asking officers to take action if the person's lung or airway are restricted due to their position or due to being "pressed to the ground." It seems that "positional asphyxia" should be of concern whenever a person is in maximum restraints, and even if they are simply lying on the ground untethered when it's not clear whether their breathing is impeded, yet they are not moving (11.2).

--The addition of "if tactically appropriate and feasible" to clarify when medical aid will be applied (11.1) seems like a broad loophole (11.1). It does not address the concerns we noted earlier which have been raised by the Citizen Review Committee, the OIR Group, the AMA Coalition for Justice and Police Reform, our group, and others that aid should be rendered immediately.

--Less lethal weapons and tactics should be referred to as such, not as "tools" which removes the sense that they can cause serious damage (section 10). While it is true that the new added items-- "hobbling" (tying hands and feet) and use of canines-- are not necessarily "weapons," they are not necessarily "tools" either (10.1).

Here are some items where we questioned the proposed changes:

--The paragraph which described the appropriate use of "cover fire" is now gone, which is unusual since that tactic was used in the shootout with Ralph Turner in 2011 (8.1). We will not comment on the appropriateness of that tactic, but the Directive's silence on the matter means there are now no restrictions if officers choose to use it (although warning shots are still prohibited).

--The reference to damage to a person's organs in the definition of serious physical injury has been removed (2.10).

Here are items that were changed for the better:

--The Directive has been laid out to make clear the "START-IT" mnemonic is the reason the factors involved in "totality of the circumstances" are in the order they are (5.1). Perhaps it should be noted that this is not necessarily in any kind of priority order so that the actual threat (now the 2nd "T") will play more considerably into officers' decision making. (In fact, perhaps Threat should be swapped with "Time," the current first "T.")

--The language about considering whether a person has mental illness is improved over the earlier draft, which implied that de-escalation was only appropriate for such persons (5.4 and 5.5). The new language asks officers to take mental health into account, and to weigh the governmental interest during a confrontation.

--Officers will now be "prohibited from" entering an occupied vehicle, rather then being cautioned they "should not" do so (9.1.1).

--Officers who accidentally point guns at people will now have to file police reports as the exemption for this action has been deleted (12.5); similarly, reports have to be filed on dog bites whether or not the bite was "intentional" (13.3).

Finally, we wonder why the "history" section says that the Directive was established in "2014" and revised by M. Reese and D. Woboril (no date given) with "final draft February 2013."

TASER ("ELECTRONIC CONTROL WEAPON") DIRECTIVE

The first comment on this Directive is that the name should be changed. While it is better than using the brand name "Taser" (which we are using here because it is on the old Directive), using the term "electronic control weapon system" implies the purpose of the devices is to "control" someone, rather than to defend oneself against active threats. While we appreciate that the name does use the word "weapon" (instead of "tool,"), perhaps "Conductive Energy Weapon" is a better generic term.

Second, we applaud the fact that all references to "resistance" by the suspect are gone. "Active resistance" and "physical resistance" were too low a threshhold for Taser use. However, the prohibition on using Tasers on people who are _passively_ resisting is now missing and should be reinstated. We also thank the Bureau for removing the sentence stating that Tasers are used to ensure "a minimum risk of injury." As we suggested in the October memo, being hit by a Taser's 50,000 volts is injurious. We continue, however, to feel that the definition of "Active Aggression," which talks about verbal or physical threats by a person with the ability to carry out the threat, indicating that "an assault or injury to any person is imminent," does not necessarily meet the standard of an immediate threat.

Third, writing in a report whether a person who has been shocked belongs to a prohibited category (over 60, under 12, etc.) is no longer mandatory. This is odd since the officers should need to document any exigent circumstances that led them to zap such a person, which would otherwise violate the directive. There's also no mention of taking into account a person's mental health status, perhaps because that is covered in the Force policy (section 5.4 of 1010.00, above). We mentioned earlier, though, that other factors including drug use, and we would add, whether a person suffers from epilepsy, should be included. In addition, the exemption of a person being "capable of imminent harm to themselves or others" is, as we previously mentioned, apparently far below the 9th Circuit's immediate threat standard. Similarly, we continue to have concerns about allowing "drive stuns" to be used "to protect a member, create a safe distance between a member and a subject, or to avoid the use of a higher level of force" (2.2.3).

Fourth, the directive used to call for medical attention for "hyperstimulation" and "agitated delirium," but now only refers to people suffering from "Excited Delirium," a term that isn't universally medically accepted and is the favorite excuse of Taser, Inc. to excuse in custody deaths (5.3). PCW strongly urges against the inclusion of this term if for no other reason than it could open up the City to legal action.

Fifth, while the old Directive did not explicitly require officers to fill out a Force Data Collection Report and notify supervisors to write an after action report (at least, we couldn't find any such previous reference), the new one does (6.3.2&6.3.3). However, it is still not being required that officers report "Laser Light Only" as a use of force. As we noted earlier, the Community and Police Relations Committee, one-third of whose members are Portland police, suggested this change. People who see a red light on their chest cannot necessarily differentiate whether they are under threat from a lethal or less lethal firearm. We urge the Bureau to add "Laser Light Only" back to the report form, as it was prior to 2008.

Other comments:

Members now must give a warning "if feasible" (2.6), but it is not mandated that it must be a verbal warning (as in the old directive) nor is it clear whether officers could "arc" the Taser as a warning (as in the October draft). In the reporting section, the word "verbal" is deleted from the warning reporting requirement (6.3.1.2). This leaves an opening for officers to "arc" the Taser, point the laser sight light, or use other threatening gestures as "warnings," even though other language specifically prohibits Taser use to "threaten or coerce" (3.6). The previous language, incidentally, around that prohibition against harassment and "unduly influencing" a person might be added back in for clarity.

On a related topic, the new section prohibiting Taser use for interrogation or torture (3.7) is good. Since the United Nations Committee Against Torture thinks all uses are torture,* this gives us hope that the Taser is going to be removed from the Bureau's arsenal.

Regarding a person running away, the proposed language in the previous draft has been rewritten to say that Tasers can be used to prevent flight from custody IF the person presents an immediate threat (not defined in this Directive) OR the escape presents "a significant danger" (which is not defined) (2.2.4). This section needs more clarification if it is to meet the 9th Circuit's ruling on when Taser use is appropriate.

Prohibitions no longer include "horseplay" (Section 3). This may be due to the new section (3.4) limiting use to "purposes as directed in this policy and training," but we hope that specific restriction is reimposed.

Prohibitions now include that Tasers should not be used if a suspect is being held to the ground by multiple officers, in addition to if they are handcuffed, with exceptions for "substantial risk of injury" (3.2). This is another term that, left undefined, may not meet the 9th Circuit standard.

In the October draft, a prohibition was included against using multiple Tasers (as happened to Keaton Otis), but the new draft adds that multiple Tasers use is only banned "if the initial deployment was effective," which seems to undermine the purpose of the restriction (3.9). This prohibition also uses the word "intentionally" which probably means to exempt officers who fire Tasers at the same time without knowing other officers are doing so (which seems tactically inappropriate), but could also be read to exempt accidental discharges. ("Intentionally" similarly modifies the prohibition on aiming at heads, faces, or genitalia [3.8].)

The caution against using Tasers in conjunction with Pepper Spray is missing from the flammables warning (3.10).

In addition to elevated position and being near water, appropriate prohibitions have been added against using Tasers against people running, biking and skateboarding (3.11).

Where the Training Division was previously told to review the policies upon request from the Chief's office, they now are told to notify the Chief if their training is going to change (4.2). We hope this does not mean that the Training Division can make changes to their training curriculum without approval by the Chief, as "notification" does not necessarily require sign-off.

It is now required that, when possible, photos of a subject's injuries must be taken when Tasers are used in "drive stun" mode, in addition to when the Taser's probes are fired at a distance (6.2).

We are pleased that supervisors are now required to contact Professional Standards if they think the Taser use was out of policy (7.2.1).

We would like more information on why:
--a supervisor might tell an officer not to fill out police reports before the end of a shift (6.3.1);
--there is no longer a mention of the Taser Medical Safety Committee; and
--there is no longer a reference to the drive stun and the probe mode being considered the same "level of force." We imagine this has to do with the elimination of the continuum of force, but still, when weighing options, officers need to know that both uses are equally as serious.

Finally, we continue to be concerned that there has been no action to incorporate the Citizen Review Committee's recommendation (based on one from the nationally recognized Police Executive Research Forum) for medical aid to be called whenever a Taser is used.

Thank you again for putting the Directives out in draft form.
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* UN: Tasers Are A Form Of Torture--Associated Press/CBS News, November 25, 2007
http://www.commondreams.org/archive/2007/11/25/5431