



# New York City Department of Environmental Protection Police

## General Order

<b>EFFECTIVE DATE:</b> 11/01/2020	<b>SUBJECT:</b> Force, Arrest & Detention  <b>USE OF FORCE</b>	<b>ORDER#</b>  <b>7.03</b>
<b>RESCINDS:</b>  GO 7.03 07/07/2020	<b>ATTACHMENT(S):</b>  A – Garrity Document B – Use of Force Report C – Animal Dispatch Form	<b>PAGE</b>  1 of 10
<b>Review Date:</b>		

### I. PURPOSE

Law enforcement officers around the country and here in New York State are authorized to use reasonable force in specific circumstances. Federal constitutional and state statutory standards dictate when and how much force can be used and the mandatory reporting requirements associated with such use of force. This policy is founded in these standards but is not intended to be an exhaustive recitation of state and/or federal legal framework governing use of force. It is imperative that law enforcement officers adhere to the concepts contained in this policy and engage in use of force consistent with their comprehensive training in real world situations.

### II. POLICY

- A. The ability to use force against the public is the primary factor that distinguishes the police from the remainder of society. As a result of this responsibility, the use of force by the police comes under close scrutiny by both the public and the courts.
- B. The physical process of arrest occurs after control has been achieved. Force must cease when control has been effected. The use of force on an individual who is already under control is punishment and exceeds the bounds of all prevailing standards of police conduct.
- C. At the scene of a police incident, many members may be present and some officers may not be directly involved in taking police actions. However, this does not relieve any member present of the obligation to ensure that the requirements of the law and the Division regulations are complied with. Members are required to maintain control and/or intervene if the use of force against a subject clearly becomes excessive. Failure to

do so may result in both criminal and civil liability. Excessive force will not be tolerated.

- D. The federal and state standards by which use of force is measured are both founded in the basic premise of objective reasonableness.<sup>1</sup> The amount of force that is used by the officers shall be the amount of force that is objectively reasonable under the circumstances for the officer involved to effect an arrest, prevent an escape, or in defense of themselves or others. The standard of objective reasonableness, established by the United States Supreme Court in Graham v. Connor, is used in this policy and is intended to provide officers with guidelines for the use of force, including deadly physical force. As the Supreme Court has recognized, this reasonableness inquiry embodies "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation."<sup>2</sup>

This policy is written in recognition of 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 a careful balancing of all interests.

### III. DEFINITIONS

- A. Objectively Reasonable – An objective standard used to judge an officer's actions. Under this standard, a particular application of force must be judged through the perspective of a reasonable officer facing the same set of circumstances, without the benefit of 20/20 hindsight, and based on the totality of the facts and circumstances that are known to that officer at the time that the force was used.<sup>3</sup>
- B. Deadly Physical Force – Physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.<sup>4</sup>
- C. Physical Injury – Impairment of physical condition or substantial pain.<sup>5</sup>
- D. Serious Physical Injury – Physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.<sup>6</sup>

- E. Serious Bodily Injury – Bodily injury that creates or causes a substantial risk of death, unconsciousness, serious and protracted disfigurement, protracted loss or impairment of the function of any bodily member, organ or mental faculty.<sup>1</sup>
- F. Display a chemical agent – To point a chemical agent at a person or persons.
- G. Use/Deploy a chemical agent – The operation of the chemical agent against a person or persons in a manner capable of causing physical injury as defined in PL Article 10.
- H. Brandishes a firearm – To point a firearm at a person or persons.
- I. Uses/Discharges a firearm – To discharge a firearm at or in the direction of a person or persons.
- J. Brandishes an electronic control weapon – To point an electronic control weapon at a person or persons.
- K. Uses/Deploys electronic control weapon – the operation of an electronic control weapon against a person or persons in a manner capable of causing physical injury as defined in PL Article 10.
- L. Brandishes an impact weapon – To point an impact weapon at a person or persons.
- M. Uses/Deploys a impact weapon – the operation of an impact weapon against a person or persons in a manner capable of causing physical injury as defined in PL Article 10.
- N. Uses a chokehold or other similar restraint – Any application of sustained pressure to the throat or windpipe of a person in a manner that may hinder breathing or reduce intake of air.
- O. Member – a sworn police officer as defined by CPL 1.20 subdivision 34 (o).

#### IV. USE OF FORCE

- A. In general terms, force is authorized to be used when reasonably believed to be necessary to effect a lawful arrest or detention, prevent the escape of a person from custody, or in defense of one's self or another.<sup>7</sup>

- B. Under the 4th Amendment, a police officer may use only such force as is “objectively reasonable” under the circumstances.

V. DETERMINING THE OBJECTIVE REASONABLENESS OF FORCE

- A. When used, force should be only that which is objectively reasonable given the circumstances perceived by the officer at the time of the event.
- B. Factors that may be used in determining the reasonableness of force include, but are not limited to:
  - 1. The severity of the crime or circumstance;<sup>9</sup>
  - 2. The level and immediacy of threat or resistance posed by the suspect;<sup>10</sup>
  - 3. The potential for injury to citizens, officers, and suspects;<sup>11</sup>
  - 4. The risk or attempt of the suspect to escape;<sup>12</sup>
  - 5. The knowledge, training, and experience of the officer;<sup>13</sup>
  - 6. Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion, and the number of officers or subjects;<sup>14</sup>
  - 7. Other environmental conditions or exigent circumstances.<sup>15</sup>

VI. DUTY TO INTERVENE

- A. Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.
- B. An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.

VII. USE OF DEADLY PHYSICAL FORCE

- A. Deadly physical force may be used by an officer to protect themselves or another person from what the officer reasonably believes is an imminent threat of serious physical injury or death.<sup>16</sup>

B. Deadly physical force may be used to stop a fleeing suspect where:

1. The officer has probable cause to believe the suspect has committed a felony involving the infliction or threat of serious physical injury or death; AND,
2. the officer reasonably believes that the suspect poses an imminent threat of serious physical injury to the officer or to others.
3. Where feasible, some warning should be given prior to the use of deadly physical force.<sup>17</sup>

VIII. PROHIBITED USES OF FORCE

A. Force shall not be used by a member for the following reasons or in the following manner:

1. To extract an item from the anus or vagina of a subject without a warrant, except where exigent circumstances are present;
2. To coerce a confession from a subject in custody;
3. To obtain blood, saliva, urine, or other bodily fluid or cells, from an individual for the purposes of scientific testing in lieu of a court order where required;
4. Against persons who are handcuffed or restrained unless it is used to prevent injury, escape, or otherwise overcome active or passive resistance posed by the subject;
5. Use of a chokehold or similar restraint is prohibited except in the defense of the officer's life or the life of another as would be justified under Article 35 of the NY Penal Law.

IX. REPORTING AND REVIEWING THE USE OF FORCE

- A. Any injuries resulting from a use of force incident shall result in the appropriate and timely medical attention being provided to the injured party.
- B. Members involved in use of force incidents as described below shall notify their supervisor as soon as practicable and shall complete a departmental use of force report.

1. Use of force that results in a physical injury.
2. Use of force incidents that a reasonable person would believe is likely to cause an injury.
3. Incidents that result in a complaint of pain from the suspect except complaints of minor discomfort from compliant handcuffing.
4. Incidents where a chemical agent is displayed, used, or deployed.
5. Incidents where an impact or electronic control weapon, was brandished, used, or deployed.
6. Incidents where a firearm was brandished, used, or discharged.
7. Incidents where a chokehold or similar restraint was used.
8. Incidents which result in serious bodily injury or death.

X. PROCEDURES FOR INVESTIGATING USE OF FORCE INCIDENTS

- A. Where practicable, a supervisor should respond to the scene to begin the preliminary force investigation.
- B. A supervisor that is made aware of a force incident shall ensure the completion of a use of force report by all officers engaging in reportable use of force and, to the extent practical, make a record of all officers present.
- C. Photographs should be taken which sufficiently document any injuries or lack thereof to members and suspects.

XI. MEDICAL PROCEDURES

- A. Whenever a member has used force towards an individual; the member shall immediately evaluate the need for medical attention or treatment for that individual and themselves.
- B. Medical attention or treatment shall be provided upon the request of the subject involved in the incident.

XII. DOCUMENTATION

- A. Any member encountering physical resistance pursuant to their duties as a Police Officer shall notify their immediate supervisor of the incident as soon as possible.
- B. Any incident where members are required to use non-lethal, physical force, requires a Use of Force Report to be completed as soon as practical after the incident by the members involved who used force. (before filling out the Use of Force Report, members may choose to fill out a Garrity Document in consultation with their Union Representative and/or legal counsel). All members involved in the incident must also fill in a narrative on the Spectrum Justice System (SJS) reporting system. When documenting a case of violent resistance, always include the following:
1. The type of call which first brought the member in contact with the subject.
  2. The number of persons involved in the situation.
  3. The time of day, physical setting and type of situation.
  4. What the subject stated to the member.
  5. The subject's demeanor and attitude.
  6. What the member stated.
  7. The subject's action(s) and member's reaction(s).
  8. A detailed report of the member's injuries, including photographs when possible.
  9. A detailed report of the subject's injuries, including photographs when possible.
  10. Names, addresses and telephone numbers of neutral witnesses not involved in the confrontation

NOTE: Liability Considerations:

- Avoid conclusionary statements such as, "I used reasonable force to effect the arrest."

- Use concrete, precise descriptions of the confrontation and the force options used.
- Include all Member/Subject Factors and Special Circumstances involved in the confrontation.

These pieces of information will not only aid a conviction in criminal court, but will also help in defending the member's actions should a civil suit develop as a result of the confrontation. Short, generic descriptions of a confrontation may cause a future reader of the report to mistakenly believe something is being hidden.

- C. Members assisting or acting as backup in an incident where non-lethal, physical force has been used, are required to complete an SJS Report.
- D. Reports will be completed for all uses of force.
- E. When a firearm is utilized to terminate an animal, members will complete the Animal Dispatch Form.
- F. Immediate supervisors are required to read and correct all reports having to do with the use of non-lethal, physical force and inform the Division Commander of all details regarding the incident; presenting him/her the finished report for inspection.
- G. The Use of Force Report and Animal Dispatch Form will be emailed to the Bureau Administrator by the member's direct supervisor after being reviewed and signed off by that supervisor and the Captain.

### XIII. USE OF FORCE REVIEW BOARD

- A. The BPS Deputy Commissioner will request the incidents below be reviewed and investigated by the Use of Force Review Board ("Review Board"). The objective is to determine if the members' use of force was in compliance with Division Policy and Procedures as well as New York State and Federal Laws.
  1. With the exception of training purposes and animal dispatches, any situation involving the discharge of a firearm (whether on or off duty) will be reviewed.
  2. Any situation in which a person has been killed or injured by a member, whether on or off duty.

3. Any situation involving the use of any degree of force by a member upon another person, when the BPS Deputy Commissioner deems additional investigation is necessary.
- B. The BPS Deputy Commissioner may, in the case of a member involved in a shooting or use of force resulting in serious physical injury, serious bodily injury, or death:
1. Assign the member to administrative duty or other duty besides active patrol.
    - a. The new assignment is for the duration of the investigation.
    - b. Such assignment does not imply guilt or innocence of the member involved.
  - C. The Review Board will review the initial investigation and cause a subsequent investigation to be made into the matter when deemed necessary. The Review Board shall fully document all actions and procedures taken, as well as any information acquired via its investigation.
    1. The completed, fully documented investigation will be presented to the BPS Deputy Commissioner for their final review, appropriate referral when necessary, and the final resolution of the investigation.
- D. USE OF FORCE REVIEW BOARD
1. The Use of Force Review Board shall consist of:
    - a. Chief of Department
    - b. Bureau Administrator
    - c. Division Commander not overseeing the investigation
    - d. Defensive Tactics Instructor
    - e. Firearms Instructor
  2. During any or all parts of the review process, the member being investigated may have union representation and/or legal counsel present. Before filling out paperwork or questioning, members may choose to fill out a Garrity Document.

#### XIV. TRAINING

- A. All members should receive training and demonstrate their understanding on the proper application of force.
- B. Training topics will include use of force, conflict prevention, conflict resolution and negotiation, and de-escalation techniques and strategies, including, but not limited to, interacting with persons presenting in an agitated condition as well as duty to intervene and prohibited conduct.<sup>18</sup>
- C. This policy is not intended to be a substitute for proper training in the use of force. Comprehensive training is the key to the real-world application of the concepts discussed within this policy.

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<sup>1</sup> Force which is objectively reasonable is insulated from criminal liability through Article 35 of the NYS Penal Law and civil liability by the 4<sup>th</sup> Amendment standard of objective reasonableness.

<sup>2</sup> Graham v. Connor, 490 U.S. 386 at 396 (1989).

<sup>3</sup> Graham, 490 U.S. 396 (1989)

<sup>4</sup> NY Penal Law § 10 (11) (McKinney 2013)

<sup>5</sup> NY Penal Law § 10 (9) (McKinney 2013)

<sup>6</sup> NY Penal Law § 10 (10) (McKinney 2013)

<sup>7</sup> NY Penal Law and § 35.30(1) (McKinney 2013)

<sup>8</sup> Graham, 490 U.S. at 396 (1989)

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Scott v. Harris, 550 U.S. 372 (2007)

<sup>12</sup> Graham, 490 U.S. at 396 (1989)

<sup>13</sup> Analysis of cases under the 4<sup>th</sup> Amendment require the focus to be on the perspective of a reasonable officer on the scene which includes the training and experience of the officer. Graham v. Connor, 490 U.S. 386 (1989), Terry v. Ohio, 392 U.S. 1 (1968)

<sup>14</sup> Sharrar v. Felsing, 128 F. 3d 810 (3<sup>rd</sup> Cir. 1997) (numbers of officers or subjects)

<sup>15</sup> Courts have repeatedly declined to provide an exhaustive listing of factors. Chew v. Gates, 27 F. 3d 1432, 1475 n.5 9th Cir. (1994)

<sup>16</sup> NY Penal Law and § 35.30(1)(c)(McKinney 2013)

<sup>17</sup> NY Penal Law and § 35.30(1), as restricted by Tennessee v. Garner, 471 U.S. 1 (1985) (restricting the use of deadly physical force as it relates to fleeing felons) In Garner, the Supreme Court uses "significant threat of serious physical harm, either to the officer or others" in describing the limited circumstances under which deadly force can be used to prevent the escape of a felon.

<sup>18</sup> EXC §840(4)(d)(2)(vii)