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Use of Force – Does Policy Matter? (Pre and Post Incident)

By **DLG Learning Center**

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Prepared by: Officer Jamie Borden, Henderson Police Department

As a Use of Force instructor for the past several years, as well as an expert in human factors and an experienced video analyst, I have seen first-hand the disparaging differences between the intended purpose of a policy and how that policy is actually applied in the aftermath of a critical incident, particularly where an officer is expected to use reasonable tactics and objectively reasonable force. This is true especially for the pressing subject matter of Use of Force.

Nineteen years ago, as a new employee with my department, I was taught that policy is a parameter, a guideline if you will, and should be carefully studied and applied when it concerned a police Use of Force. When I started with my department in 1997, even as a new officer, I had questions about policy. As a new officer, however, those questions remained on lock down until I could figure out what I was doing within this career. Regardless of my questions, I always managed to use reasonable force, even before the policy reflected *Graham v. Conner* standards and the Calculus for Objective Reasonableness. Use of Force always seemed to be very *common sense* oriented, and was reasonable based on my views of what the 4th Amendment meant to me in my application of newly acquired police authority. I remember a performance rating in those early days stating, “I had a very good grasp of the 4th Amendment and related policies concerning search, seizure and Use of Force.” Back then, I wasn’t any more into policy than any other new employee. I had read it and struggled with understanding it just like everyone else. So, I attributed that rating to life experience and common sense. With consideration given now to the onset of cameras and cell phone video, the game has changed significantly, and policies need more thought and scrutiny than ever before. Many years later, I found myself as the “Use of Force” specialist for my department and immediately found it necessary to revamp our policy. The first change was simply to get it into the current century. Our Use of Force policy had not been updated with any significance in nearly 16 years.

After months of research, my first step was to rid our department of the Use of Force continuum, or anything resembling a continuum. These decisions were not made of my own volition, rather they were made by entrenching myself in the pressing subject matter of Use of Force, Human Factors, and police procedure, along with the support and vision of my Chief of Police. Significant changes were made to the policy, and it was vetted out by the department’s unions and membership, approved by upper

management, and subsequently submitted, proactively, to the ACLU and other watchdog groups, that closely monitor existing and changing police policies, and ultimately accepted by those groups as well.

How do we train Use of Force Policies?

No matter how well we know policy as police officers, from the line level to command staff or “upper management,” this knowledge doesn’t change the fact that critical incidents are rapidly evolving, requiring split second decisions with extreme consequences, and with police officers who are subject to human factors and limitations. During these critical incidents, policy and procedure and trained techniques may fall by the wayside, as they may not be safe or have a low probability of success based on the circumstances. In these uncommon scenarios, where an officer is forced to make decisions in fractions of a second, or a “split second decision” as described in *Graham v. Conner*, these decisions are based on what an officer is faced with at the time force is employed. For instance, if an officer is in a fight for his/her life, or the consequences of the subject escaping outweigh the safety of the public or officers, the officer may not have a “policy perfect scenario” from which to derive his/her chosen response.

If the officer uses an improvised response in this case, it must be articulated in the officer’s account of the incident. An improvised response includes a tactic or technique that falls outside of policy, or that is not a specifically trained technique, or a variation of a specifically trained technique, that the officer has adapted to survive, de-escalate or to protect the public. To that end, policy must be written to allow for an officer to operate outside of policy guidelines in those infrequent occasions when officers are faced with the most dangerous, dynamic and rapidly evolving scenarios that create ambiguity in the subsequent application of policy.

In consideration of the above, I believe training should be focused on creating officers who can make thoughtful and balanced, reasonable decisions in a time of crisis. Training the mechanics of a policy as it were does not create officers with good decision making skills, who are expected by all to perform at a super human level; humans expected to transcend the human factors that affect us all. The true task and challenge at hand is creating thoughtful officers, who can think and respond quickly and effectively, and subsequently recall and report “why, where, when, and how” a Use of Force was used and *what* drove the officers’ decision to use such force.

The task of decision making in a critical and time compressed incident, is one laced with superhuman expectations; not only by the public but by our own peers, supervisors, investigators, management, legal representation and decision makers. The perception that police officers can and are expected to make perfect decisions is not a condition prescribed by law. This is a volatile mix, combining an

officer's need to use force in a critical incident, and a policy that disallows an officer to make an effective split second decision by placing limitations on tactical choices within the reasonable range of responses. The courts have soundly and consistently prescribed that police officers are not to be held to this unreasonable standard of making perfect decisions in the application of force. This solution is based on limited departmental training and limited application experience, considering the infrequency of these types of events. Policy should not limit an officer's thought process; rather, enable the officer to think outside of the box, defeating the dire results of an improper focus of attention and subsequent improper or unsafe decision.

What about the Policy:

Example policy verbiage –

“Officers may not use force or any compliance technique that they have not been trained to use. If an officer uses an improvised technique or tactic, in a dynamic and rapidly evolving situation, the officer will specifically articulate the need to do so. Also, the officer shall articulate and describe the improvised technique or tactic.”

The purpose for this or similar verbiage in policy is **not** to excuse unreasonable, unnecessary or excessive force. The purpose is to allow officers to be decisive based on available training and limited experience; where an officer is subject to human limitations in perspective and perception and action/reaction, and forced to effectively respond to a violent offender in fractions of a second. In these uncommon critical incidents, the officer's decision is very possibly the difference between life and death for the officer, or the public, or detention and escape of an otherwise violent offender.

In the climate of today's policing, there does exist a need to prohibit certain police behavior. For this reason, policy is normally focused on the lowest common denominator. This prohibition opens the door for learning and improving a department's approach to Use of Force, and give officers a *guideline* as to what is reasonable, if the common sense gene is missing for some reason. However, with this caveat in a police Use of Force policy, it will allow an officer to articulate his/her actions in the Use of Force based on a range of responses, not a force continuum. With knowledge of this policy verbiage, officers are more likely to act decisively and reasonably in a fast paced and dynamic incident. This then allows those responsible for investigating the officer's Use of Force to approve, disapprove, or identify potential issues with the Use of Force. This process is also instrumental in identifying elements that may be driving the officer's decision during the incident, which is ultimately where we derive any valuable lessons learned to better our officers and our department.

How do we use policy after the fact:

(hindsight analytics, investigations, review)

In the recent months, I have been involved in some significant arbitrations as a Use of Force expert, where a "Use of Force Continuum" has been the cause, possibly a direct cause, of an officer's termination. This is due simply to the misperception that there exists a mechanical application of force in a critically dynamic and rapidly evolving scenario, based on the use of a "force continuum" in department policy.

As the May 15, 1989, S.C.O.T.U.S. decision in *Graham v. Conner*, is the standard for determining the Objective Reasonableness of a Use of Force, it is paramount to recognize the spirit of wording in the decision and the directions to the lower courts generated by that decision, and how it *should* apply to police policy as it relates to Use of Force, how it affects training, and how it affects the investigative process of Use of Force, from a low level Use of Force to a critical use of deadly force.

There are critical uses of force, where it is not possible, considering the facts and circumstances known to the officer, and considering the actions of the offender, to effectively stay within the confines of policy guidelines regarding tactics and techniques. Officers are subjecting themselves to unreasonable scrutiny and possible termination based on a mechanical application of the Use of Force, an element of police Use of Force that is discouraged in the very Supreme Court case law decision that governs and determines the objective reasonableness of the Use of Force.

As the officer articulates and describes his/her actions, which may have fallen outside of the guidelines established by policy, reviewers will be able to identify the officer's perspective and perceptions and make a determination of the reasonableness of the officer's actions. Policy that specifically forbids a particular tactic or technique, and does not include verbiage allowing an officer to explain his/her intentions in the application of the improvised tactic, especially in the realm of hands, fists, and feet as control or impact weapons, is limiting the officer's ability to effectively de-escalate a potentially critical incident. An officer needs to be able to apply his training in tactics, known policy elements, and life experiences as they applies to a specific incident, considering a unique set of facts and circumstances, and improvise his or her response, tailored to the level of resistance the officer is being faced with at the time, and other factors the officer knows at the time of the application of the force. This is not implying that an officer use excessive, unnecessary, or unreasonable force. It is negligent thinking to expect a policy to cover every aspect of the application of a Use of Force. In other words, policy cannot possibly list every justifiable and reasonable response in an infinite array of possible force encounters or levels of resistance. This is addressed in *Graham v. Connor*,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court

Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” Bell v. Wolfish, 441 U.S. 520, 559 (1979), however, its proper application 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 officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. See Tennessee v. Garner, 471 U.S., at 8 -9 (the question is “whether the totality of the circumstances justify[es] a particular sort of . . . seizure”).

The Force Continuum or the Response Continuum, both a fashion of mechanical application of Use of Force, is not a reflection of Objective Reasonableness based on the three-prong test, (The Calculus for Objective Reasonableness). The Use of Force Continuums is systematically being removed from policy across the county, and for good reason. In documents generated by IACP and their primary publication, *Police Chief Magazine*, (Peters and Brave), it discusses in depth and at length how the Use of “Force Continuums” is not an effective element of a constitutionally based Use of Force Policy and can adversely affect an officers ability to make a split second decision in a critical Use of Force. The following segment from a document titled *legal implications of force continuums* (Ciminelli), reflects the change happening nationwide:

At a recent conference sponsored by the Police Executive Research Forum (PERF), Los

Angeles Assistant Police Chief Sandy Jo MacArthur stated that officers are taught, “to evaluate the entire situation,” and while a continuum is still used in training, it has been eliminated from policy:

In 2009 we implemented a major change in our use-of force policy so that it was infused with the concept of an objectively reasonable standard. Although some people see the potential for flexibility in use-of-force continuums, unfortunately, there is a tendency for officers to look at a continuum and think, “If the subject does X, I use force option Y.” This is the danger in our continuums.

We still use a continuum in our training, but it is not part of our policy. We emphasize teaching officers to properly respond to suspects’ behavior, rather than simply prescribing a formula. This has helped us tremendously in getting officers to understand how to articulate their reasonable response to the incident. We have had this in place since 2009, and it’s been very successful.

Whatever the outcome of the incident, the outcome should be the result of a thoughtful Use of Force Policy, a responsible investigation and a fair analysis based on the officer’s statements as supported by all other investigative information available including any video or audio recordings of the incident.

In summary, a Use of Force Policy and the verbiage used in the policy is in need of careful scrutiny by policy writers with input from the line level to the top management of a police department. The application of the policy in the analysis and review of Use of Force needs to be reasonable and balanced based on current case law, policy, the considerations of human factors and the officer's intentions when the force was applied. Officers need to understand the balance of the need to use force and the liability issues that exist for the department. Line level supervisors need to understand the importance of thorough on scene investigations, and the department should be balanced and working toward a cultural change in the matter of Use of Force, based on the vocation of police work, and not a knee jerk reaction to outside pressure. Police departments need to protect themselves from rogue or criminal behavior from officers that shouldn't be officers, protect officers that have signed up to do the job in the selfless servant based attitude that exists in most officers, and be able to identify changes necessary to improve the department globally through transparency and relationships, both interdepartmentally and with the public.

Prepared by:

Officer Jamie Borden, Use of Force Training & Analysis Unit, Henderson Police Department, Henderson NV

Certified Advanced Specialist, Force Science Institute, Force Science Staff

Officer Borden has six years as a Use of Force Instructor, firearms instructor, Taser instructor and Defensive Tactics Instructor with the Henderson Police Department, Officer Jamie Borden is currently work in the position of "Use of Training and Analysis Officer. Jamie has been instrumental in writing the existing Use of Force policy and has been conducting force investigations for approximately four years. Jamie is a Certified Analyst and has obtained the Advanced Specialist Certification in human factors from The Force Science Institute. Jamie has been deposed as an expert in human factors, Use of Force, Video Analysis and police procedure related to police officers in a critical incident primarily in Arbitrations. Additionally, Jamie has provided testimony and reports in the capacity of expert in Use of Force, video analysis, police procedures and training. Jamie is currently on staff with the Force Science Institute.

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and, Fridell, et al. (2011), *supra* at n. 8.

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