Less-Lethal Force Recommendations

A Policy and Case File Review Conducted by the Taser/Less-Lethal Workgroup of the Citizen Review Committee

September 2012

Scope of Inquiry

The research, legal, policy, and best-practices fields surrounding less-lethal law enforcement tools are vast and continually changing. The Citizen Review Committee (CRC) Taser/Less Lethal workgroup started its inquiry in early 2010 and during the two year period that the workgroup conducted its research, it met 26 times; interviewed members of the Portland Police Bureau including the Training Division and Internal Affairs, officials of the Public Defender's Office, the Independent Police Review (IPR) Division and members of the Audit Division of the City Auditor's Office and a representative of the City Attorney's Office; received input from members of the community including Portland Copwatch, the League of Women Voters, the National Alliance on Mental Illness and Disability Rights Oregon. The workgroup reviewed legal decisions relating to Less-Lethal Weapons by the Supreme Court and United States 9th Circuit Court of Appeals. In addition, the workgroup analyzed documents on Less-Lethal Weapons from the City Auditor's Office, the Police Executive Research Forum, the American Civil Liberties Union, Amnesty International, the Legal and Liability Risk Management Institute, Manual of Policies and Procedures of the Portland Police Bureau among other miscellaneous documents.

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Recommendations

CRC Recommendation 2012.1: To eliminate confusion and minimize questionable ECW uses, the phrase "or displays the intent to engage in" should be removed from Directive 1051.00 (Authorized Use of the Taser). Police Bureau members should be retrained in the appropriate level of force through annual in-service training and roll call updates.

CRC Recommendation 2012.2: The Police Bureau should limit the use of the Taser to three cycles unless exigent circumstances exist. Further the Bureau should automatically, systematically, and critically examine instances in which the Taser has been cycled for more than three standard cycles.

CRC Recommendation 2012.3: Police Bureau policy should require an evaluation by emergency medical responders in the field or at a medical facility for all subjects exposed to the application of an ECW either in drive stun and probe mode.

CRC Recommendation 2012.4: The Police Bureau should collect data on 'laser dot only' uses of ECWs on its Use of Force reports. Force data from those reports should be publicly released on a regular basis.

CRC Recommendation 2012.5: The Police Bureau's less-lethal weapon systems should not be capable of firing lethal ammunition.

CRC Recommendation 2012.6: The Police Bureau's pepper spray policy should mirror the proposed ECW policy with tighter use restrictions in regard to noncompliant subjects. The Bureau should remove the phase 'intent to resist' and consider additional, similar revisions.

CRC Recommendation 2012.7: ECW training and recertification should be conducted annually during in-service training and should be scenario-based. As with any use of force training, presentations should stress extra patience, de-escalation techniques, and the totality of the circumstances.

CRC Recommendation 2012.8: IPR should seek out staff training from professionals in the mental health field.

CRC Recommendation 2012.9: IPR should enhance its documentation of case-handling decisions.

CRC Recommendation 2012.10: IPR Staff in conjunction with the City Attorney's Office and the Portland Police Bureau of Professional Standards should prepare a training course for command staff on current policies on the use of force polices including, but not limited to, using the Graham Standard in reviewing force complaints and in preparing findings in general.

CRC Recommendation 2012.11: Police Bureau managers need to accept greater responsibility for the use of force decisions made by officers under their supervision.

Introduction

The Portland Police Bureau employs several less- lethal weapon systems. These systems grouped into three main types: Electronic Control Weapons (ECWs, also known as Tasers or Conductive Energy Devices, CEDs), iess-lethal or impact munitions, and aerosol restraints.

ECWs, such as Tasers, produce a high-volt, low-amp charge that temporarily disables people by causing involuntary muscle contractions. Police use of Tasers has been controversial since the first release of the weapon system in the early 2000s. Like the aerosol restraints and less-lethal munitions, ECWs are advertised as an alternative to lethal force. However, some advocacy groups claim that the devises are too commonly used, are used when lethal force would not be justified, and pose greater health and safety risks than generally acknowledged. [1]

Portland Police Bureau (PPB or the Police Bureau) officers trained in their use are supplied with designated shotguns and 'bean bag' or less-lethal munitions rounds. The PPB directive states "[L]ess lethal munitions are not intended to produce deadly effects, but just as with other impact weapons, they can cause serious injury or death. Although this round was designed to be less lethal, it is not to be considered non-lethal."[2]

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1 ACLU of Northern California,: How the Lack of Taser Regulation Endangers Lives, September, 2005 (hereafter "Stun Gun Fallacy"); Amnesty International, "Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers," November 30, 2004, (hereafter "Amnesty International, 2004), available at http://web.amnesty.org/library/index/engamr511392004; Amnesty International, Amnesty's continuing concerns about taser use, March 28, 2006,

[2] 1050.00 *Less Lethal Weapons and Munitions,* Manual of Policy and Procedure, Portland Police Bureau, Online version updated 1/2010

Aerosol restraints (also known as pepper spray) became widely used by law enforcement in the 1990s and are often near the front lines of large crowd control situations.

The CRC workgroup reviewed relevant court cases, research reports, and less-lethal force complaints received by the Auditor's Independent Police Review (IPR) Division.

Tasers

Legal Considerations – The Graham Standard

Within the last seven years, ECWs have become standard among most metropolitan police departments. Unfortunately, the judicial system has been slow to respond to answer the question: When is ECW use to be considered excessive force and when is the force appropriate? When ECWs were first introduced, the only guiding standard was *Graham v. Connor*.

"Today we hold that all claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard rather than a due process approach."[3]

In 1989, the Supreme Court issued a decision in *Graham v. Connor* stating the use of force by a police officer must be objectively reasonable under the Fourth Amendment to the Constitution. The Court set forth a three-pronged test for determining the reasonableness of such force:

> Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, 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

[3] *Graham v. Connor* 490 U.S. 396 (1989).

> attempting to evade arrest by flight. The question is whether the totality of the circumstances justifies a particular sort of seizure.[4]

Bryan v. McPherson

Although the Supreme Court has not set a standard in the use of ECWs, the 9th Circuit Court of Appeals used the Graham Standard to test the use ECWs in *Bryan v McPherson*. For law enforcement agencies in the Western United States, the 9th Circuits rulings are the prevailing standard. The Court found although the deployment of ECWs is a non-lethal force, "non-lethal, however, is not synonymous with non-excessive; all force—lethal and non-lethal—must be justified by the need for the specific level of force employed."[5] Further, the Court stated: "The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted."[6]

The Court used the Graham Standard to evaluate governmental interest in the use of force by

> . . .examining three core factors, "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 These factors, however, are not exclusive. Rather, we examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in Graham.[7]

To the Court, the most important factor to consider in its evaluation, was risk to the officers. Though Bryan was clad in boxer shorts and standing in the middle of the street and yelling incoherently, the Court determined he posed no immediate threat to the officers or bystanders. Second, the initial reason for the stop was a mere traffic infraction, failure to wear a seatbelt. Finally, though Bryan was agitated, he was not actively resisting arrest nor was he attempting to flee. In fact, "[t]he only resistance

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[4] Ibid.

[5] *Bryan v. McPherson,* 590 F.3d 767 (9th Cir. 2009)

[6] Ibid

[7] Ibid

Officer McPherson testified to was a *failure to comply* with his order that Bryan remain in his car."[8] The Court was careful to distinguish between active and passive resistance.

In sum, the Court found that McPherson's use of force against Bryan was unconstitutional.

> We thus conclude that the intermediate level of force employed by Officer McPherson against Bryan was excessive in light of the governmental interests at stake. Bryan never attempted to flee. He was clearly unarmed and was standing without advancing in any direction, next to his vehicle. Officer McPherson was standing approximately twenty feet away observing Bryan's stationary, bizarre tantrum with his X26 drawn and charged. Consequently, the objective facts reveal a tense, but static, situation with Officer McPherson ready to respond to any developments while awaiting back-up. Bryan was neither a flight risk, a dangerous felon, nor an immediate threat. Therefore, there was simply "no immediate need to subdue [Bryan]" before Officer McPherson's fellow officers arrived or less-invasive means were attempted."[9]

<u>Brooks v. Seattle</u>
<u>Mattos v. Agarano</u>

During the workgroup interviews in August of 2011, City Attorney Dave Woboril, opined that the 9th Circuit might weaken or reverse the precedent set in *Bryan v. McPherson* when they decided two pending ECW cases, *Brooks v. Seattle* and *Mattos v. Agarano.* Decisions on both cases were issued in a consolidated opinion on October 17, 2011. And both cases were decided *en banc*. The cases instead bolstered the concept of requiring active physical resistance for ECW deployment as enumerated in *Bryan.*

In *Brooks,* a 33 year old woman who was seven months pregnant refused to sign a citation for speeding in school zone. She also refused to exit her vehicle. After lengthy discussions between the officers, Officer Jones tased her in drive stun three times within one minute with each shock being "extremely painful".

The Court sought to determine "whether Jones's use of the taser against Brooks in this case was reasonable, keeping in mind the magnitude of the electric shock at issue and

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[8] Ibid

[9] Ibid

the extreme pain that Brooks experienced."[10] by using the three-prong evaluation of the Graham Standard. The Court found that the offense was minor. "Indeed, our case law demonstrates that far more serious offenses than Brooks's do not constitute severe crimes in a *Graham* analysis."[11] Brooks posed no threat to the officers, made no verbal threats nor did she claim to be armed. Finally, though Brooks refused to get out of her car and stiffened her body in an attempt to frustrate the officers' efforts to remove her from the vehicle, her resistance "did not involve any violent actions towards the officers." In addition, Brooks did not attempt to flee, and there were no other exigent circumstances at the time." [12] The Court found "[a] reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of force was unreasonable and therefore constitutionally excessive."[13]

In *Matto*s, Ms. Jayzel Mattos called the police to report a case of domestic violence. After the police arrived, Officer Aikala determined that he would arrest Ms. Mattos' husband, Troy. She happened to be standing in front of her husband at this time, but when she didn't move from in front of her husband quickly enough, she was tased without warning. The Court again used the Graham Standard to evaluate the reasonableness of the force. The Court determined:

> Aikala used the intermediate force of a taser in dart-mode on Jayzel after he and the other officer arrived to ensure her safety. Her offense was minimal at most. She posed no threat to the officers. She minimally resisted Troy's arrest while attempting to protect her own body and to comply with Agarano's request that she speak to him outside, and she begged everyone not to wake her sleeping children. She bears minimal culpability for the escalation of the situation. The officers were faced with a *potentially* dangerous domestic dispute situation in which they reasonably felt that Troy could physically harm them if he chose to, but there was no indication that Troy intended to harm the officers or that he was armed. When Aikala encountered slight difficulty in arresting Troy because Jayzel was between the two men, Aikala tased her without warning. Considering

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[10] *Brooks v. Seattle* 08-15567

[11] Ibid.

[12] Ibid

[13] Ibid

> the totality of these circumstances, we fail to see any reasonableness in the use of a taser in dart-mode against Jayzel.[14]

"The force used against Jayazel was constitutionally excessive. For the purposes of this *Graham* factor, however, we draw a distinction between a failure to facilitate an arrest and active resistance to arrest. Moreover, the crux of this *Graham* factor is compliance with the officers' requests, or refusal to comply ."[15]

The 9th Circuit has consistently found that the use of ECWs requires active physical resistance and/or a threat to the officer for the deployment to be constitutional. Mere refusal to comply with an officer's order is not justification for a level of intrusion equal to the taser.

Because of the prevailing case law at the time of the rulings, officers in both cases were granted qualified immunity.[16]

Tasers – Best Practices

In November 2010, the Portland City Auditors Office at the direction of Auditor Lavonne Griffin-Valade issued an audit report evaluating Portland Police taser use. The audit group examined a random sample of 50 taser incidents from 2009. They also reviewed available literature, recommendations from professional organizations such as the International Chiefs of Police (IACP) and Police Executive Research Forum (PERF). The group also compared Portland Police Bureau Taser policy to model policies and to other police agencies. The audit report relied heavily on the model policies adopted by PERF. "After reviewing many of the available studies on Taser use, we found the PERF guidelines to be the most comprehensive. They are based on extensive literature reviews and interviews with knowledgeable stakeholders. We used PERF's fifty- two suggestions as criteria to measure the Bureau's adherence to best practice."[17]

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[14] *Mattos v. Agarano* 08-35526

[15] Ibid.

[16] Ibid

[17] Auditor's Report, p. 31

The audit group found Portland Police Bureau's policies on ECWs to be more permissive than PERF recommendations and several of the comparable agencies:

> PERF guidelines say that a Taser should be used only on subjects who are actively resisting, being actively aggressive, or to prevent the subject from harming themselves or others. Portland policy is more permissive than PERF guidelines in that it allows Taser use when the subject shows only the intent to resist lawful police action. In addition, we found that five of the eight other agencies whose Taser policies we reviewed have thresholds on subject resistance at least as strict as those recommended by PERF.[18]

Tasers – Risk Management

During the period between the Bureau's implementation of the Taser system in 2006 and the end of 2008, the City of Portland paid at least $673,125 in settlement costs and an additional $409,991 in legal costs for tort claims filed involving Taser use.[19]

Discussion – Bureau Policy and Procedure

In *1051.00 Policy*, the Bureau states:

> The taser is … used against subjects who are placing themselves or others in danger of physical injury and/or death. The taser is designed to incapacitate a person rather than injure him/her. This allows members to take a combative person into custody with a minimum risk of injury to all of the parties involved.[20]

However, in another portion of the Police Bureau Policies and Procedures, *1051.00 Authorized Use of the Taser*, the Police Bureau allows officers to use a Taser when:

1. A person engages in or displays the intent to engage in physical resistance to a lawful police action. Physical resistance is actions that prevent or attempt to

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[18] Ibid.

[19] City of Portland, Office of Management and Finance, Bureau of Internal Business Practices, Risk Management.

[20] Tasers, Policy 1051.00, , Manual of Policy and Procedure, Portland Police Bureau, Online version updated 1/2010

prevent a member's attempt to control a subject, but do not involve attempts to harm the member.

2. A person engages in or displays the intent to engage in aggressive physical resistance to a lawful police action. Aggressive physical resistance is physical actions of attack or threat of attack, coupled with the ability to carry out the attack, which may cause physical injury.[21]

The policy portion of Tasers seems to indicate that the Bureau seeks to limit the use of ECWs to use on a person placing him or herself or others in danger of physical injury or death; however the procedure allows an officer to use the taser against a person showing the intent to display physical resistance. We find the conflict between the two policies and procedures to be confusing.

The PERF model policy is very clear:

> CEDs should only be used against persons who are actively resisting or exhibiting active aggression, or to prevent individuals from harming themselves or others. CEDs should not be used against a passive suspect. [22]

The PERF model policy is mirrored by that of the Legal and Liability Risk Management Institute's model policy on ECWs:

> Electronic Control Device deployment shall not be considered for the passively resistant subject. Active resistance or active aggression shall be required.[23]

Evolving trends in legal restrictions on the use of Taser based on the Graham Standard lead us to agree with PERF and LLRMI that ECWs should only be deployed when an officer encounters active resistance or active physical aggression. The City Auditor noted that Portland police policies on the use of ECWs was more lax than five of eight comparable agencies. The City of Portland paid over a million dollars in settlements and legal costs for claims of excessive force involving the Taser within a three year period. Because of these factors, the CRC recommends:

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[21] *Authorized Use of the Taser, 1051.00, ,* Manual of Policy and Procedure, Portland Police Bureau, Online version updated 1/2010

[22] PERF Model Policy

[23] LLRMI model policy

CRC Recommendation 2012.1: To eliminate confusion and minimize questionable use of ECWs, the phrase "or displays the intent to engage in" should be removed from Directive 1051.00 (Authorized Use of the Taser). Police Bureau members should be retrained in the appropriate level of force through annual in-service training and roll call updates.

Number of Taser Cycles

New York Police Department limits the number of taser cycles to three. "When a [Taser] is used against a subject it shall be for one (1) standard discharge cycle and the member using the [Taser] must then reassess the situation. Only the minimum number of cycles necessary to place the subject in custody shall be used. In no situation will more than three (3) standard discharge cycles be used against any subject. Officers are reminded of other appropriate force options should the [Taser] fail." (NYPD P.G. 212, Interim Order 20 (June 4, 2008)).

In its third follow-up report to the Portland Police Bureau, PARC recommends:

> Recommendation 2008.3 - PPB policy should dictate that when a Taser is used against a subject it shall be for one standard discharge cycle and the member using the Taser must then reassess the situation. Only the minimum number of cycles necessary to place the subject in custody shall be used. The Bureau should strongly advise officers against using more than three standard discharge cycles against any subject such that, if the third cycle does not make contact or is ineffective, the officer considers other options. The Bureau should automatically, systematically, and critically examine all after instances in which the Taser has been cycled for more than three standard cycles.

The Portland City Audit of Police Taser Use also suggested the Police Bureau closely monitor multiple cycles or uses on the same subject.

CRC Recommendation 2012.2: The Police Bureau should limit the use of ECWs to three cycles unless exigent circumstances exist. Further the Police Bureau should automatically, systematically, and critically examine all after action reports in which the ECW has been cycled for more than three standard cycles.

Medical Aid after Taser Deployment

Portland's policy required medical evaluation after every ECW deployment during the 6-month pilot testing of the devices in 2002. The policy was rewritten after deployments

and evaluations from the testing phase were critically analyzed by the Bureau. Officers are now directed to summon medical treatment after Taser deployment on a generally restricted class (over 60, under 12, pregnant, etc.), whenever probes need to be removed, or if any number of different medical conditions are present including severe agitation, paranoia, confusion, tremors, vomiting, heart issues, etc. (see Directive 1051.00).

PERF, the National Institute of Justice (NIJ), and other groups have recommended that all subjects exposed to ECW application should receive a medical evaluation by emergency medical responders in the field or at a medical facility. In the Auditor's Office review of Tasers (2010), policies in 3 out of 8 comparator jurisdictions required medical evaluation after every use.

PERF recommends:

> "All subjects who have been exposed to ECW application should receive a medical evaluation by emergency medical responders in the field or at a medical facility. Subjects who have been exposed to prolonged applications (i.e., more than 15 seconds) should be transported to an emergency department for evaluation. Personnel conducting the medical evaluation should be made aware that the suspect has experienced ECW activation, so they can better evaluate the need further medical treatment.
>
> All subjects who have received an ECW application should be monitored regularly while in police custody even if they received medical care. Documentation of the ECW exposure should accompany the subject when transferred to jail personnel or until the subject is released from police custody"

While studying various aspects of ECWs, the workgroup became aware of nationwide incidents of serious medical injury, including death, following exposure to an ECW. The workgroup believes that a primary concern in police actions is health and lives of involved persons, thus we recommend that emergency medical responders be summoned whenever a person is exposed to the application of an ECW.

CRC Recommendation 2012.3: Police Bureau policy should require an evaluation by emergency medical responders in the field or at a medical facility for all subjects exposed to the application of an ECW either in drive stun and probe mode.

Data Collection on Tasers

PERF recommends that among other statistical data on ECW use agencies collect: "The use of the laser dot or display of the [ECW] that deterred a subject and gained compliance. " Others have echoed this recommendation, including the City of Portland's Human Rights Commission's Community and Police Relations Committee. The workgroup believes the collection of this data would give the Bureau and the community a better understanding of ECW effectiveness and a more accurate sense of usage levels.

CRC Recommendation 2012.4: The Police Bureau should collect data on 'laser dot only' uses of ECWs on its Use of Force reports. Force data from those reports should be publicly released on a regular basis.

Less Lethal Munitions (Bean Bag Shotguns)

Bean bag rounds, also known as flexible baton rounds or impact munitions are small nylon sacks filled with lead bird shot or a similar material. In the Portland Police Bureau, these rounds are fired from a 12 gauge shotgun.

A NIJ study (Oct. 2004) reported that in 969 reported discharges of impact munitions, 782 resulted in injuries. Of those, more than 80 percent were bruises and abrasions, both relatively minor injuries. Bruises accounted for 51 percent of the injuries, and abrasions added another 31 percent. More serious lacerations accounted for 5.5 percent of the injuries; broken bones accounted for 3.5 percent.

A young man was seriously injured in Portland during the summer of 2011 when an officer shot him with a less-lethal shotgun that had been loaded with lethal ammunition. The officer was indicted on assault charges and the case is still pending. In our interviews with the Training Division, they indicated that the Portland Police Bureau had updated their policies in the handling of less-lethal ammunition:

> **1050.00 LESS LETHAL WEAPONS AND MUNITIONS**
> **Less Lethal Weapons, Standard Shotguns and Ammunition (1050.00)**
> With the exception of supervisors, Bureau members are not authorized to possess additional or replacement less lethal specialty impact munitions. Bureau less lethal shotguns shall be stored in the armory with Bureau issued less lethal specialty impact rounds stored in the Bureau issued side saddle carrier and/or butt stock carrier. The guns will be loaded in the police vehicle, per procedure, from this supply only. Certified operators are required to visually and physically

> inspect each round as they load and are encouraged to have another Bureau member view and confirm this. Supervisors are authorized to carry additional and replacement less lethal specialty munitions. All such additional and replacement less lethal specialty ammunition carried by supervisors will be carried only in its original factory packaging.

While we applaud this first step, The CRC feels it is not sufficient to completely prevent a reoccurrence. Research reveals several other jurisdictions including both Clackamas County and Washington County Sheriffs Offices do not permit the use of less-lethal weapons that can chamber the same ammunition as the shotguns carried by patrol officers.[24] We feel this is the proper course.

CRC Recommendation 2012.5: The Police Bureau's less-lethal weapon systems should not be capable of firing lethal ammunition.

<u>Aerosol Sprays</u>

With the advent of ECWs and less lethal munitions, the use of aerosol sprays has decreased and they are now most commonly used in crowd control situations. Pepper spray has generally proven to be effective with some reservations. There is a possibility of blow back to officers and there is possibility of affecting bystanders in enclosed areas.[25] In *Headwaters Forest Defense v. County of Humboldt*[26], the 9th Circuit of Appeals found that spray is still a use of force that needs to be evaluated by the Graham Standard.

> "[T]he essence of the Graham objective reasonableness analysis" is that " '[t]he force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the Graham factors.' " Liston v. County of Riverside, 120 F.3d 965, 976 (9th Cir.1997) (quoting Alexander v. City and County of San Francisco, 29 F.3d 1355, 1367 (9th Cir.1994)) (emphasis in

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[24] The Oregonian, September 23, 2011, http://www.oregonlive.com/portland/index.ssf/2011/09/months_after_portland_cop_acci.html

[25] Evaluation of Pepper Spray, National Institute of Justice, Feb. 1997

[26] *Headwaters Forest Defense v. County of Humboldt*, No. 98-17250.

> original). The facts reflect that: (1) the pepper spray was unnecessary to subdue, remove, or arrest the protestors; (2) the officers could safely and quickly remove the protestors, while in "black bears," from protest sites; and (3) the officers could remove the "black bears" with electric grinders in a matter of minutes and without causing pain or injury to the protestors.[27]

The Bureau's pepper spray (aerosol restraint) policy currently contains similar language to the Taser policy. The workgroup has similar concerns that use on non-compliant, but not actively resisting subjects might be considered within policy.

CRC Recommendation 2012.6: The Police Bureau's pepper spray policy should mirror the proposed ECW policy with tighter use restrictions in regard to noncompliant subjects. The Bureau should remove the phase 'intent to resist' and consider additional, similar revisions.

<u>Recertification on ECWs</u>

The Bureau Training Division indicates that they do not certify officers in the use of the Taser, but they do update the training on a periodic basis. The last update in the Advanced Academy occurred over two years. PERF recommends an annual certification as does the Taser Corporation:

> TASER recommends that user certification be valid for 1 year. Yearly re-certification consists of firing at least two live cartridges in addition to any departmental mandated training. [28]

A General Accounting Office study on Taser Weapons (2005) found that 6 of seven agencies they reviewed required annual recertification:

> Furthermore, six of the seven agencies required yearly recertification in the use of Tasers. One agency—the San Jose Police Department—does not require yearly recertification for Tasers and is not currently considering the establishment of such recertification. However, an official from the San Jose Police Department told us that the department includes Tasers in its annual use-of-force simulations

[27] Ibid

[28] Taser Cooperation, http://www.taser.com/training/training-faqs

training in which officers are trained in the use of Tasers that would be considered appropriate in various law enforcement scenarios.[29]

Best practice indicates that ECWs should be recertified annually.

CRC Recommendation 2012.7: ECW training and recertification should be conducted annually during in-service training and should be scenario-based. As with any use of force training, presentations should stress extra patience, de-escalation techniques, and the totality of the circumstances.

Review of Less-Lethal Complaint Files

File Review Methodology

IPR staff assembled a set of 21 closed complaint files for the two-year period from April 1, 2008 – March 31, 2010. The set included five cases with allegations of pepper spray, two with allegations of bean bag round deployment, and 14 of the 17 (randomly selected) complaints of ECW use that closed during the period.

The 21 case files were broken down into three separate groups of seven each. The three members of the workgroup each reviewed two of the groupings. Later, all three workgroup members reviewed and discussed one particular investigation in more detail and reviewed three additional complaints that IPR opened upon review of tort notices received by the City of Portland. Finally, the members took a second look at all five pepper spray cases before considering possible recommendations.

Workgroup members took detailed notes as they reviewed the complaint files. Each case was also graded on a checklist (see Appendix A), which allowed for tallied 'votes' on a series of review questions. Reviewers spent about 35 minutes with each case (on average); with some reviews taking between 60 and 90 minutes.

The selection of cases provided workgroup members with a broad understanding of less-lethal force complaints received by IPR. Most observations made about complaint intake or the oversight system should validly generalize to the full population of complaints. Generalizing a conclusion beyond the framework of the oversight system,

[29] Taser Weapons: Use of Taser Weapons by Selected Law Enforcement Agencies, General Accounting Office, May 2005, p. 11

however, is much more tenuous. For example, less than 5% of ECW uses result in a formal complaint. While the case review provided understanding of those particular uses, reviewers did not evaluate the 95% of uses that did not result in a formal complaint.

File Review Results

Below are some common observations about the complaint/oversight system based on the review of cases:

1) IPR's initial intake on complaints is solid. Reviewers made a few minor suggestions, but were quite positive in their reviews of how IPR staff interacts with complainants and formulates allegations.

2) Complainants suffering with mental illness may require help accessing the police oversight system. How could the oversight system be less imposing to complainants suffering with mental illness from start to finish?

3) Opinions on case-handling decisions vary. In about a fourth of the cases reviewed, the workgroup member expressed lingering questions/concerns about the case-handling decision. For example: When personal accounts of the same interaction differ, how are judgments of credibility weighed? How much complainant involvement/'engagement' is required for a case to move forward?

4) The overall time that elapses before a case is fully investigated (and findings are recommended) may serve as a deterrent for those considering filing a complaint and/or appeal.

File Review Recommendations

IPR recently received intercultural competence training aimed at improving the initial interactions in the complaint process. Staff members report that the training was effective in helping to understand different perspectives. The file review points to a similar need in the area of mental health.

CRC Recommendation 2012.8: IPR should seek out staff training from professionals in the mental health field.

Because two or three people within IPR make case-handling decisions, the office needs to work to more completely document the reasons decisions are made. The CRC

Recurring Audit Workgroup Report on Service Improvement Opportunities also discussed this issue.

CRC Recommendation 2012.9: IPR should enhance its documentation of case-handling decisions.

A Case Study

One particular case we reviewed caught the attention of the workgroup members. In 2008, an African-American juvenile carrying a bag of groceries happened upon a Bureau Transit Division team interviewing another person on a light rail platform. The young man began advising the person as to the legality of the situation. The officers told the juvenile to leave. He left, muttering expletives and jaywalked against a "Wait" traffic signal. One of the officers told the juvenile to stop, that he was to be cited for jaywalking. Instead, the young man fled, was pursued on foot and subdued by the use of the ECW. The young man was handcuffed and transported to the local precinct. He was cited and released to his mother several hours later. His mother later filed a complaint of excessive force with IPR. The complaint was investigated by Internal Affairs and held to be within policy by the RU Commander in their findings.

The PPB Use of Force policy (1010.00) appears to take the Graham Standard into consideration when officers use force:

> When determining if a member has used only the force reasonably necessary to perform their duties and resolve confrontations effectively and safely, the Bureau will consider the totality of circumstances faced by the member, including the following:
>
> 1. The severity of the crime.
> 2. The impact of the person's behavior on the public.
> 3. The extent to which the person posed an immediate threat to the safety of officers, self or others.
> 4. The extent to which the person actively resisted efforts at control.
> 5. Whether the person attempted to avoid control by flight.
> 6. The time, tactics and resources available.
> 7. Any circumstance that affects the balance of interests between the government and the person.
>
> The Bureau's levels of control model describes a range of effective tactical options and identifies an upper limit on the force that may potentially be used

given a particular level of threat. However, authority to use force under this policy is determined by the totality of circumstances at a scene rather than any mechanical model.

The RU Commander may have found the action to be within policy, but the workgroup believes the result was inaccurate. If evaluated by the Graham Standard, we find the use of force tenuous at best. The original offense was minor: jaywalking. The juvenile posed no threat to the officers and had left the scene of the verbal dispute at their direction. Though verbally abusive, he did not show active aggression to the officers. He did flee the scene, but the decision to engage in a dangerous foot pursuit. Although Bureau policy adheres to the Graham Standard, the CRC questions the interpretation by the RU Commander. The CRC has also noticed this problem in appeals it has reviewed. Findings need to be consistent throughout the various RU managers. To alleviate this issue, IPR should educate Command Staff on the Graham Standard and the proper formulation of findings.

CRC Recommendation 2012.10: IPR Staff in conjunction with the City Attorney's Office and the Portland Police Bureau of Professional Standards should prepare a training course for command staff on current policies on the use of force, including but not limited to, the use of the Graham Standard in reviewing force complaints and in preparing findings in general.

Officer Supervision

The City Auditor's Audit group found some deficiencies in the documentation and review of ECW use.[30] Though it is difficult to generalize from a limited sample, the workgroup's case file review indicated that use of force reports were not reviewed as closely as they should have been. Several Taser reports failed to document if a warning was given before deployment (or why a warning was not possible).

CRC Recommendation 2012.11: Police Bureau managers need to accept greater responsibility for the use of force decisions made by officers under their supervision.

Beginning with East Precinct, the Police Bureau has started rolling out a new policy that sends supervisors to the scene of most uses of force. The CRC applauds the Bureau for this step in the right direction and hope they will continue this process.

[30] Auditors Report, p. 26.

Appendix A

IPR Case Number: _____

CRC Reviewer: _____

Date of Review: _____

Checklist for CRC Review of Taser and Less-Lethal Force Complaints

1. **Does the written Intake Summary accurately reflect the recorded intake interview of the complainant and any written complaint materials?**

   ☐ Yes

   ☐ No (explain)

   _____
   _____
   _____
   _____

2. **Did IPR correctly identify and categorize the complainant's force allegations?**

   ☐ Yes

   ☐ No (explain)

   _____
   _____
   _____
   _____

3. **What was the primary alleged force (check or list all that apply as primary)?**

   ☐ Taser

   ☐ Bean Bag

☐ Pepper Spray

☐ Other (please identify) _____

4. List any secondary uses of force alleged.

☐ No secondary uses, just those listed above

☐ There were secondary uses (please identify) _____

_____

5. Were there multiple uses of the same primary force instrument alleged?

☐ No

☐ Yes (please list times allegedly used) _____

6. Does the case file include a Use of Force Report (copy)?

☐ Yes ☐ No

If 'yes', does the report document the circumstances as required in policy (for example, see 1051.00, page 555)

☐ Yes ☐ No

Explain:

7. **If required for use of the particular instrument, was the subject warned by the officer prior to its use?**

☐ No

☐ Yes

☐ Maybe – that's a question of fact

8. **What was the case-handling decision?**

☐ IPR Dismissal ☐ IPR Dismissal with Precinct Referral

☐ IAD Decline ☐ Full IAD Investigation

☐ Other (please identify) _____

9. **Do you feel like this was a justified case-handling decision?**

☐ Yes, justified by the facts of the case (after initial review)

☐ No, the case-handling decision was not justified (please explain)

Please answer #10-13 for fully investigated cases:

10. **Did IAD conduct an adequate investigation of the force allegations assigned for full investigation?**

☐ Yes

☐ No (Please explain what additional investigation should have been conducted)

11. What were precinct commander's recommended findings on the force allegations?

☐ Sustained ☐ Not sustained

☐ Not sustained with debriefing ☐ Split (please explain)

12. In your opinion, were the investigation finding(s) justified by the facts?

☐ Yes

☐ No (please explain)

13. Did the complainant appeal the investigation finding(s)?

☐ Yes

☐ No

14. Did the complainant express satisfaction with the outcome?

☐ Satisfied

☐ Dissatisfied

☐ No clear evidence in the file

15. How long did the complaint process take start to finish?

_____ months and _____ days (roughly)

16. Was there additional (or follow-up action) taken on the case?

☐ No (if you feel more should have been done, please explain)

☐ Yes (please describe the follow-up and whether it seems adequate)

17. In your opinion, was the use of force in or out of policy? (please explain)

☐ In Policy

☐ Out of Policy

18. Does this case raise IPR or PPB policy issues you wish to identify for future consideration?

a. Policy or procedural issues for IPR:

b. Policy, supervision, or training issues for PPB:

19. Other comments, if any:

20. Total time to review this file: _____ minutes

RESPONSES TO THE REPORT

CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

Independent Police Review
Mary-Beth Baptista, Director
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503-823-0146
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September 5, 2012

Taser/Less-lethal Workgroup and Citizen Review Committee Members

RE: Less-Lethal Force Recommendations - A Policy and Case File Review Conducted by the Taser/Less-Lethal Workgroup of the Citizen Review Committee – Independent Police Review Division Response

Thank you for taking on this difficult research task and analysis of the use of less-lethal law enforcement tools. After a reading your policy and case file review, including recommendations, IPR has the following responses to recommendations pertaining to the division.

CRC Recommendation 2012.8: IPR should seek out staff training from professionals in the mental health field.

> In process. At the annual IPR staff retreat held in February of this year IPR staff requested training from professionals in mental health field. Outreach Coordinator Irene Konev will make the necessary arrangements to fulfill this request by the end of the year.

CRC Recommendation 2012.9: IPR should enhance its documentation of case-handling decisions.

> Current practice. IPR hired a management assistant in March 2012 to assist with case handling responsibilities. As a result, new case handling processes were developed internally that require a more detailed explanation from management regarding case handling decisions.

CRC Recommendation 2012.10: IPR staff in conjunction with the City Attorney's Office and the Portland Police Bureau Professional Standards should prepare a training course for command staff on the implementation of the Graham Standard in reviewing force complaints and in preparing findings.

> Disagree. The City Attorney's Office is responsible for providing legal advice to their clients based on their area of expertise and is the more appropriate City agency to conduct training for command staff regarding relevant legal standards.

Sincerely,

Mary-Beth Baptista
Director

CITY OF PORTLAND, OREGON

Bureau of Police
Sam Adams, Mayor
Michael Reese, Chief of Police
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Integrity • Compassion • Accountability • Respect • Excellence • Service

September 4, 2012

TO: Jaime Troy, Chairperson
Citizen Review Committee
Taser/Less-Lethal Workgroup

SUBJ: Responses to CRC's Taser/Less-Lethal Workgroup's Recommendations

Dear Mr. Troy:

I want to thank you and the CRC members who participated in the Citizen Review Committee's Taser/Less Lethal Workgroup. I appreciate the time, effort and thoughtful review all of you put into this project.

As Chief, I am committed to building trust between the Portland Police Bureau and the community we serve. The Bureau has taken many positive steps in recent years toward managing its use of force; currently force is used in only about three percent of all arrests. There is always room for additional enhancements, and I believe that continued discussion on uses of force, including less lethal tools, is beneficial to all.

Our responses to the workgroup's recommendations are on the following pages. These recommendations were discussed by members of the Bureau's Less-Lethal Review Committee, which is chaired by Assistant Chief Larry O'Dea. This group includes staff from the Training Division, Professional Standards and East Precinct instructors. Our responses were not developed lightly, but reviewed thoroughly with much discussion. In most matters, we have come to an agreement; on a few, we agree in part and have taken every effort to explain the Bureau's position.

I look forward to a continued partnership between the Police Bureau and the Citizens Review Committee, as we each work to keep Portland a safe and peaceful city.

Michael Reese

MICHAEL REESE
Chief of Police

MWR/tws

August 30, 2012

RESPONSES TO THE LESS LETHAL FORCE RECOMMENDATIONS FROM THE CITIZEN REVIEW COMMITTEE REGARDING

CRC Recommendation 2012.1: To eliminate confusion and minimize questionable ECW uses the phrase "or displays the intent to engage in" should be removed from Directive 1051.00 (Authorized Use of the Taser). Police Bureau members should be retrained in the appropriate level of force through annual in-service training and roll call updates.

Agree. The PPB Less Lethal Review Committee reviewed the language in the directive and unanimously agreed that it should be removed. This Directive will be amended and the Bureau has hired a technical writer to go through and revise Directives. This will also require changing the language on the Force report. Police Bureau members received training in the 2011 in-service that specifically addressed the use of the Taser and recent court cases. In addition, this will require labor input.

CRC Recommendation 2012.2: The Police Bureau should limit the use of the Taser to three cycles unless exigent circumstances exist. Further the Bureau should automatically, systematically, and critically examine instances in which the Taser has been cycled for more than three standard cycles.

Agree. Officers are required to articulate the reasonableness of each and every cycle on its own. The Police Bureau now requires a supervisor's after action investigative report to be written anytime a Taser is deployed, regardless of the number of cycles.

CRC Recommendation 2012.3: Police Bureau policy should require an evaluation by emergency medical responders in the field or at a medical facility for all subjects exposed to the application of an ECW.

Agree in part. Currently, medical personnel are requested when the darts enter a subject's skin and need to be removed. Medical personnel are also called if the subject is showing symptoms of a medical crisis or meets the criteria outlined in the "Prohibited Use of the Taser" section of the Directive. This is the same criteria other local law enforcement agencies use. Officers are trained to observe the subject on a regular basis. During the PPB initial field deployment and testing of Taser, all subjects were transported to a hospital. It was the medical community that determined that this was unnecessary. Similarly, following the period of mandatory transport, there was a mandatory field medical evaluation regardless of probe placement and this too was deemed unnecessary by medical professionals.

CRC Recommendation 2012.4: The Police Bureau should collect data on "laser dot only" uses of ECW's on its Use of Force reports. Force data from those reports should be publicly released on a regular basis.

Agree. The Bureau is in the process of re-designing the Force Data Collection Report to more accurately reflect force and control, including simply pointing a Taser or a less-lethal shotgun to gain compliance. This will be part of the Force Data Collection Report when REGJIN (Regional Justice Information Network, a new electronic report writing and records management system) comes online.

CRC Recommendation 2012.5: The Police Bureau's less-lethal weapon systems should not be capable of firing lethal ammunition.

Agree. However, the PPB Less Lethal Review Committee has looked at other less-lethal options extensively starting in September 2010. These options have serious drawbacks including accuracy. No other less lethal system has the ease of functionality, reliability, and cost effectiveness of our current system. As a result, the Police Bureau will continue carrying the 12-gauge less lethal shotguns; however, the Bureau has changed less-lethal policy to one that restricts officers who are 12-gauge less-lethal certified from carrying a lethal shotgun. The new policy also restricts officers who carry a less-lethal shotgun from having lethal 12-gauge rounds with them.

Additionally, precinct armories are also undergoing renovation to maintain separation of lethal shotgun rounds from less-lethal shotguns. North Precinct's renovation is already complete.

CRC Recommendation 2012.6: The Police Bureau's pepper spray policy should mirror the proposed ECW policy with tighter use restrictions in regard to noncompliant subjects. The Bureau should remove the phrase "intent to resist" and consider additional, similar revision.

Agree. See recommendation 2012. 1. PPB is reviewing language that would refer members to the Physical Force Directive (1010.20) and Deadly Physical Force Directive (1010.10) in regard to the use of all less-lethal and impact weapons. We are striving to simplify the Directives and not have a separate force policy for each tool, but an overall policy. We will continue to have specific procedures for each tool, i.e. pepper spray, ASP baton, Taser, etc…

CRC Recommendation 2012.7: ECW training and recertification should be conducted annually during in-service training and should be scenario based. As with any use of force training, presentations should stress extra patience, de-escalation techniques, and the totality of the circumstances.

*Agree in part: The question of **when** to use the Taser is much more critical than **how** to use it. The Training Division does not recommend mandatory annual Taser training regarding functioning of the Taser. It is the Bureau's desire that officers continue to refine decision-making vs. the mechanics of operating the equipment. The establishment of such a requirement would not be the most effective method of managing Taser application and standards. Instead, the Training Division recommends annual refresher training for the use of force that would be incorporated into in-service via classroom and/or scenario based training. This methodology is more comprehensive as it allows the Bureau more flexibility in developing curriculum, as well as a mechanism to assimilate Taser into other areas of training such as; use of force decision making and technical proficiency.*

CRC Recommendation 2012.8: IPR should seek out staff training from professional in the mental health field. *This applies to IPR.*

CRC Recommendation 2012.9: IPR should enhance its documentation of case-handling decisions. *This applies to IPR.*

CRC Recommendation 2012.10: IPR Staff in conjunction with the City Attorney's Office and the Portland Police Bureau of Professional Standards should prepare a training course for command staff on the implementation of the Graham Standard in reviewing force complaints and in preparing findings in general.

Agree. The City Attorney's Office provides legal advice to the Portland Police Bureau. Senior Deputy City Attorney David Woboril provides training related to the Graham Standard to Portland Police Officers including command staff annually during in-service. The Inspector from Professional Standards and other Command Staff are conducting a two-hour class on use of force reviews for this fall's Supervisors' In-service. This will be provided to all Sergeants and above. IPR staff are encouraged to attend in-service and provide feedback and suggestions.

CRC Recommendation 2012.11: Police Bureau managers need to accept greater responsibility for the use of force decisions made by officers under their supervision.

*This is currently in place. Since the CRC recommendations were drafted, the Police Bureau now requires supervisors to conduct a written review of **all** incidents involving Use of Force (except simply pointing a firearm at someone to gain compliance). Each incident is reviewed by the officer's command staff and by the Professional Standards Division Inspector, who also reviews all Use of Force reports and after-action reports Bureau wide.*