



**DEPARTMENT OF PUBLIC SAFETY
POLICIES & PROCEDURES**



POLICY NUMBER	
OPR: 01	
EFFECTIVE DATE: 10/07/2021	ORIGINAL ISSUED ON: 09/25/2017
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SUBJECT: USE OF FORCE

1.0 PURPOSE

The purpose of this policy is to provide commissioned officers of the New Mexico Department of Public Safety with guidelines for the use of force.

2.0 POLICY

It is the policy of the Department of Public Safety that commissioned personnel only use force that is objectively reasonable under the totality of the circumstances to effectively bring an incident under control while protecting the lives of the officer and others; and while accomplishing lawful objectives, in accordance with statute, case law, the U.S. Constitution, and the officer's training.

The Fourth Amendment of the US Constitution recognizes the right for police officers "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." - Graham v. Connor.

The officer "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." - Graham v. Connor and Tennessee v. Garner

The proper application of force "requires careful attention to the facts and circumstances of each particular case, including (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." (The 3 Graham Factors) - Graham v. Connor.

Additional considerations for use of force include whether the suspect is violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time. - Sharrar v. Felsing

A seizure (use of force) occurs "when there is a governmental termination of freedom of movement through means intentionally applied." - Brower v. County of Inyo

USE OF FORCE

"The Fourth Amendment does not require officers to use the least intrusive or even less intrusive alternatives". The only test is whether what the police officers actually did was reasonable." - Plakas v. Drinski

"In justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." - Terry v. Ohio

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." - Graham v. Connor

"A detainee's mental health must be taken into account when considering the officer's use of force." - Gianetti v. Stillwater

Officers should ensure that they do not engage in unreasonable actions that create the need for the use of force because of tactical, strategic, and procedural errors that place themselves or others in jeopardy. - Allen v. Muskogee, Ok.

It is "clearly established that officers may not continue to use force against a suspect who is effectively subdued." - Perea v. Baca

An officer who fails to intervene to prevent another law enforcement official's use of excessive force may face both criminal and civil liability. - Casey v. City of Federal Heights

Policy questions can be referred to the Use of Force Advisory Group or the Standards Bureau Use of Force Subject Matter Expert.

3.0 APPLICABILITY

This policy applies to all commissioned personnel of the New Mexico Department of Public Safety.

4.0 REFERENCES

- A. Graham v. Connor, 490 U.S. 386 (US Supreme Court, 1989)**
- B. Tennessee vs. Garner 471 U.S. 1 (US Supreme Court, 1985)**
- C. Brower v. County of Inyo 489 U.S. 593 (US Supreme Court, 1989)**
- D. Plakas vs. Drinski , 19 F.3d, 1143 (7th Circ. 1994)**
- E. Terry v. Ohio, 392 U.S. 1 (1968)**
- F. Allen v. Muskogee, Ok, 119 F.3d 387 (10th Circ. 1997)**
- G. Gianetti v. Stillwater 06-6085 (10th Circ. 2007)**

- H. **Perea v. Baca 14-2214 (10th Circ. 2016)**
- I. **Casey v. City of Federal Heights 06-1426 (10th Circ. 2007)**
- J. **Sharrar v. Felsing 128 f.3d 810 (3rd Circ.1997)**
- K. **McDonald v Haskins 966 F .2d 292, 294 (7th Cir. 1992)**
- L. **United States v. Cortez, 449 U.S. 411 (1981)**
- M. **Armstrong v. Village of Pinehurst 15-1191 (4th Cir. 2016)**
- N. **Escobedo v. Martin 11-2426 (7th Circ. 2012)**
- O. **Dalrymple v. US 05-14375 (11th Circ. 2006)**
- P. **Milan v. Bolin 15-1207 (8th Circ. 2015)**
- Q. **Brown v. City of Colorado Springs 16-1206 (10th Circ. 2017)**
- R. **Fisher v. City of Las Cruces 07-2294 (10th Circ. 2009)**
- S. **Reavis v. Frost 19-7042 (10th Circ. 2020)**
- T. **Scott v. Harris 550 U.S. 372 (US Supreme Court, 2007)**
- U. **Procedural references are listed in the OPR 01a Procedure Manual**

5.0 DEFINITIONS

- A. **Active Resistance** – Physically evasive movements to defeat an officer's attempt to control, including bracing, tensing, pulling away, running away, or physically displaying an intent to avoid being taken into custody.
- B. **Area Denial** – Intent to prevent a person from occupying or traversing a certain area, whether that space is inside or outside.
- C. **Assaultive** – An attempt to commit a battery upon the person of another. Any unlawful act, threatening or menacing conduct, which causes another person to reasonably believe that he is in danger of receiving an immediate battery (30-3-1 NMSA 1978).
- D. **Canine or K-9** – A specially trained dog assigned to a DPS commissioned officer.
- E. **Chemical Agents** – Chemical agents designed and manufactured for law enforcement purposes, which are approved and issued by the Department of Public Safety.

USE OF FORCE

- F. Deadly Force** – The degree of force which is likely to cause death or great bodily harm.
- G. De Minimis Force** – The use of such a small amount of force that it creates a minimal risk of injury when used in an objectively reasonable manner.
- H. Clearly Established Law** – Statute or clearly established constitutional rights by the New Mexico Court of Appeals, the New Mexico Supreme Court, the United States Supreme Court, the 10th Circuit Court of Appeals, the United States District Court for the District of New Mexico, or a right that is clearly established by the "weight of authority from other courts." A "reasonable official would understand that what he is doing violates that right." - Fisher v. City of Las Cruces.
- I. Excited Delirium** – Excited Delirium is a descriptive phrase used by medical researchers to describe the extreme end of a continuum of drug abuse effects, which normally manifests itself in violent behavior of an individual, who is likely to act in a bizarre and manic way.
- J. Great Bodily Harm** – An injury to a person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body.
- K. Imminent** – Likely to occur at any time in the immediate future and often without warning.
- L. Intermediate Force** – Force with a significant risk of injury, without causing great bodily harm or death.
- M. Less-Lethal Force** – Any use of force other than that which is considered deadly force. This includes the use of any weaponless physical force or use of the less-lethal tool. Less lethal force is not intended or expected to cause death or great bodily harm; but intended to control, restrain another, or to overcome resistance.
- N. Less-Lethal Devices** – A less-lethal device has the potential for causing tissue damage but a low potential of resulting in great bodily harm or death when used properly. Less-lethal devices include, but are not limited to chemical agents, conducted energy weapons (CEW), department-approved expandable baton, straight baton, canine, beanbag shotguns, or other tools that use less-lethal munitions, weapons of opportunity, or vehicles.
- O. Less-Lethal Munitions** – Munitions including, but not limited to bean bag rounds, rubber pellet rounds, rubber slug rounds, wooden baton rounds, foam projectiles, stinger balls, and pepper balls, which are designed to incapacitate without causing death or great bodily harm.
- P. Objectively Reasonable** – A reasonable amount of force used to bring a situation or resistive subject under control, given the totality of the circumstances,

USE OF FORCE

and considering that officers are often forced to make split-second decisions in situations that are tense, uncertain, and rapidly evolving.

The officer has a reasonable belief, based on articulable facts, that the subject displays the intent, ability, means, and opportunity to be actively resistant, assaultive, or otherwise endanger someone.

Reasonableness “must be assessed in light of the particular circumstances against the standard of whether a man of reasonable caution is warranted in believing that the action taken was appropriate.” - Terry v. Ohio. Pp. 21-22

Q. Passive Resistance – Non-compliant behavior that offers no form of active physical resistance, including but not limited to verbal resistance, unresponsiveness to directions, sitting, laying down, or allowing the body to go limp.

R. Probable Cause – Facts or circumstances that would lead a reasonable person to believe a crime has been committed, is being committed, or is about to be committed.

"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." - Brinegar v. United States, 338 U.S. 160, 175, cited in Terry v. Ohio.

S. Reasonable Suspicion – Individualized suspicion that would lead a reasonable person to suspect that a crime has been committed, is being committed, or is about to be committed. The degree of suspicion of criminal activity that justifies an investigative detention

T. Show of Force – Presentation of any tool, either less-lethal or lethal, used with intent to bring a situation or resistive subject under control. A show of force is not a use of force, but it must be objectively reasonable under the totality of the circumstances, considering that officers are often forced to make split-second decisions in situations that are tense, uncertain, and rapidly evolving. - McDonald v. Haskins.

U. Totality of Circumstances – Assessment of the whole picture that gives the officer an individualized suspicion, based on all the circumstances. The officer draws inferences and makes deductions - inferences and deductions that might well elude an untrained person, to make an assessment that the individual being stopped is engaged in wrongdoing. - US v Cortez

6.0 USING FORCE

A. Refer to the OPR 01a Procedural Manual, for guidance on techniques for the application of force, equipment procedures, and reporting procedures.

B. General

1. Any use of force must be objectively reasonable under the totality of the circumstances.
2. Officers are allowed to use objectively reasonable force when the officer has probable cause to make an arrest.
3. Officers are allowed to use objectively reasonable force when the officer has reasonable suspicion to justify investigative detention.
4. If feasible, the officer should give a warning prior to using force.
5. The officer evaluates the suspect's response to applications of force and determines what other objectively reasonable actions are required under the totality of the circumstances.
6. Duty to Intervene: If the officer has time to do so, an officer shall intervene to prevent another law enforcement officer's use of excessive force.

C. De-escalation

1. Prior to using force, when safe and reasonable, the officer should use de-escalation techniques to slow down and stabilize a situation, to allow for more time, for more options, and for more resources to resolve the situation.

D. Less Lethal Force

1. Less lethal force includes two types of force:
 - a. Any force that is greater than de minimis force, which includes tools and techniques intended to control or restrain another, or to overcome resistance, without a significant risk of injury.
 - b. Intermediate Force, which includes tools or techniques that have a significant risk of causing injury but are not intended to cause death or great bodily harm.
2. Less Lethal force may be used on subjects who are passively resisting, actively resisting, or assaultive, if the use of force is objectively reasonable under the totality of the circumstances.

E. Intermediate Use of Force

1. Officers may use intermediate force to secure compliance and ultimately gain control of a subject who is assaultive; or who is actively resisting - when that active resistance includes an immediate safety risk (immediate danger) to the

USE OF FORCE

officer, to the subject, or to another individual, if that use of force is objectively reasonable under the totality of the circumstances.

2. A less lethal tool of intermediate force, like a TASER (CEW), is a reasonable force option on someone who is actively resisting "only when deployed in response to a situation in which a reasonable officer would perceive some immediate danger (immediate safety risk) that could be mitigated by using the taser." - *Armstrong v. Village of Pinehurst*
 - a. A mental health concern (mental illness), by itself, is not an immediate safety risk.
3. The use of any less-lethal tool of intermediate force, including CEW's, batons, chemical agents, or less-lethal munitions, must be objectively reasonable under the totality of the circumstances, if used on a handcuffed prisoner who is assaultive, or actively resisting with an immediate safety risk (immediate danger) to the officer, to the prisoner, or to another individual.

F. Handcuffing

1. Handcuffing itself is a de minimis use of force.
2. Handcuffing is a level of force greater than de minimus force if the officer uses them for additional leverage or pain compliance.
3. Handcuffing is unreasonable use of force if, "officers employed greater force than would have been reasonably necessary under the circumstances." - *Fisher v. City of Las Cruces*.
4. Refer to OPR 33 – *Arrests* for departmental procedures on handcuffing.
5. "Unduly tight handcuffing can constitute excessive force where a plaintiff alleges some actual injury from the handcuffing and alleges that an officer ignored a plaintiff's timely complaints (or was otherwise made aware) that the handcuffs were too tight. " - *Fisher v. City of Las Cruces*

G. Control Holds and Weaponless Techniques

1. Escort positions by themselves are de minimus uses of force unless the amount of resistance from the subject requires the officer to utilize additional force, such as additional leverage or pain compliance.
2. Less lethal force includes weaponless techniques that utilize leverage or pain compliance to control, restrain, or overcome resistance, and that force must be objectively reasonable under the totality of circumstances.

3. Any weaponless techniques used on subjects who are passively resisting, handcuffed, or otherwise restrained, must be objectively reasonable under the totality of circumstances.
4. Subjects who are restrained/handcuffed and who may be actively resisting or assaultive may require application(s) of physical force. The level and type of force used must be objectively reasonable under the totality of circumstances.
5. Weaponless techniques that involve blunt trauma, such as elbow strikes, knee strikes, hand strikes, and foot strikes, are intermediate force.
 - a. Intentionally applied weaponless techniques that involve blunt trauma to the head, neck, spine, and groin have an elevated risk of great bodily harm; and must be objectively reasonable under the totality of circumstances.

H. Conducted Energy Weapons (CEW-TASER)

1. CEW's are an intermediate force.
2. CEW use with elevated risk factors for injury or great bodily harm must be objectively reasonable under the totality of circumstances.

I. Chemical Agents

1. Chemical agents, including pepper spray, are intermediate force.

J. Baton strikes

1. The baton strike to a subject's limbs is an intermediate use of force.
2. Intentional baton strikes above the shoulders, to the torso along the spine, and to the groin could be considered deadly force, due to the risk of great bodily harm.

K. Less Lethal Munitions

1. Less lethal munitions are intermediate force.
2. Use of Less Lethal Munitions has a greater risk of death or great bodily harm than other less-lethal devices, even when properly deployed. The use of these munitions must be objectively reasonable under the totality of the circumstances.

3. Less lethal munitions that use projectiles may be deadly force when intentionally aimed at the head, upper chest, or spine unless the specific munition is designed to allow for its use on any of these areas.

L. Less Lethal Force: Vehicle-To-Vehicle Contact

1. Any intentional vehicle-to-vehicle contact, including but not limited to the P.I.T. Maneuver, is an intermediate force due to the risk of causing injury when the officer has a reasonable belief that the vehicle-to-vehicle contact will not cause death or great bodily harm.
2. Any intentional vehicle-to-vehicle contact must be objectively reasonable under the totality of circumstances.
3. Refer to DPS policy OPR: 05 Hollow Spike Belt, Stop Sticks, The P.I.T. Maneuver and Other Forcible Stops, and OPR: 08 Vehicular Pursuits for further information. - Scott v. Harris, Brower v. County of Inyo

M. Specialized Intermediate Force Tools and Munitions

1. Specialized intermediate force tools and munitions include K9s, Noise Flash Diversionary Devices (NFDD's or "Flash Bangs"), and chemical agents for area denial.
2. Chemical agents used for area denial are a use of intermediate force. - Escobedo v. Martin, Derlymple v. US
3. Less lethal devices including Noise Flash Diversionary Devices (NFDD'S or "Flashbangs") are intermediate force, when used (1) for situations with a dangerous person, (2) at or near a dangerous point of entry or contact, (3) when the officer has ensured no innocent individuals are close to the flashbang location, (4) and devices for fire prevention are on hand. - Milan v. Bolin
4. Tools that contain explosives and that may create projectiles from the use of those explosives, are also considered to be an intermediate force when used for area denial, and in locations where there is an intent to take someone into custody. - Brown v. City of Colorado Springs

N. Weapons of Opportunity

1. If a confrontation suddenly escalates and an officer has no time to draw and/or use a department-approved weapon to defend the officer's self or others, the officer may;

USE OF FORCE

- a. Use an empty hand technique not included in department-approved training, for defense or control, provided that the force is objectively reasonable under the totality of the circumstances.
- b. Use any object or tool at hand for defense or control, provided that the use of force is objectively reasonable under the totality of the circumstances.

O. Use of Deadly Force

1. The Department respects the value of human life. Officers are authorized to use deadly force to stop the action when they have probable cause to:
 - a. Protect their own lives and the lives of others from what is reasonably believed to be an imminent threat of death or great bodily harm, or
 - b. To prevent the escape of a fleeing felon who the officer has probable cause to believe poses an imminent threat of death or great bodily harm to the officer or others
2. In evaluating probable cause to use deadly force, including shooting at a motor vehicle, the officer must determine if there is no threat, an immediate deadly threat, or if that the threat has passed; because "circumstances may change within seconds eliminating the justification for deadly force." "Deadly Force is unreasonable when a reasonable officer would have perceived that the threat had passed." - Reavis v. Frost
3. The following force options are deadly force:
 - a. Intentional discharge of firearms
 - b. Any intentional vehicle-to-vehicle contact, including but not limited to the P.I.T. Maneuver and Class C Roadblocks, when the officer has a reasonable belief that there is a risk of death or great bodily harm; Refer to DPS policy OPR: 05 Hollow Spike Belt, Stop Sticks, The P.I.T. Maneuver and Other Forcible Stops, and OPR: 08 Vehicular Pursuits for further information. - Scott v. Harris, Brower v. County of Inyo
 - c. Less Lethal tools and weapons of opportunity used with the intent to cause death or great bodily harm.
 - d. A vascular neck restraint is the temporary disruption of blood flow to the brain for incapacitation. The use of a vascular neck restraint or any other type of chokehold is a weapon of opportunity and must meet this policy's guidelines for the use of deadly force.

7.0 USE OF FORCE ADVISORY GROUP

A. Mission:

1. The Use of Force Advisory Group is a resource that advises the department on questionable force incidents, other matters related to use of force policy and procedures, clearly established use of force case law, and use of force related training - including but not limited to defensive tactics, firearms, and patrol operations. The Advisory Group answers to the Office of the Chief.
2. The Advisory Group reviews questionable force incidents brought to the group by the Office of the Chief, the Standards Bureau Commander, Investigations Bureau Major, or the Standards Bureau Use of Force Subject Matter Expert.
3. Refer to the OPR 01a Procedural Manual for the Advisory Group's mission, duties, and selection criteria.

8.0 ATTACHMENTS

NONE

9.0 APPROVAL

APPROVED BY: s/ Jason R. Bowie **DATE:** 10-07-21
DPS Cabinet Secretary