

ANALYSIS AND COMMENTARY ON THE DENVER POLICE DEPARTMENT

PROPOSED REVISIONS TO OPERATIONS MANUAL SECTION 105.00

USE OF FORCE (Revised 12/19/2016)

The following is offered by the Denver Police Protective Association (DPPA) by way of analysis and commentary on the proposed revisions to the Denver Police Department Operations Manual (Section 105.00) relating to the Use of Force. In so doing, the DPPA recognizes that the development of a viable Use of Force Policy must meet both the needs of departmental personnel as well as the public. For purposes of clarity, reference will be made to the specific topical areas discussed. Favorable language or phrases will be identified in **blue**; adverse comments and/or proposed deletions identified in **red**, and suggested additions highlighted in **bold**.

Section 105.01(1) Purpose:

By virtue of this section, the general framework of the policy is established. The DPPA applauds the straight forward statement expressed by the administration in recognizing that **“...Denver Police Officers may at times be required to make forcible arrests, overcome resistance and assaultive behavior to protect the public, other officers, and themselves”**, and that **“officers have the right to self-defense ...to avoid injury while discharging their duties.”** Such recognition is a clear and correct statement of law which applies to the use of force by law enforcement officers, and is the foundation upon which any use of force policy is to be based. The equilibrium to be struck is the proper level of force to be utilized by officers in protection of themselves or others balanced against the right of the public and offenders to be free from excessive or inappropriate force.

This necessary balance was best articulated by the United States Supreme Court in its decision in *Graham v. Connor*, 490 US 386 (1989). There the Court directed that the level of force available to officers was only that force which was **“...objectively reasonable” under the totality of circumstances.** No longer was the use of force by officers without limitation based solely on the perspective of the involved officer. Rather, the appropriate use of force by officers was to be measured against that which a reasonable officer would have used under the same or similar circumstances. It was upon this basis that the current Use of Force Policy of the Denver Police Department was developed.

It is respectfully submitted that the proposed policy deviates from this standard by defining “inappropriate force” as that force which fails to meet the requirements of that which is **“...necessary, reasonable and appropriate”**. In so doing, the standard of measure is not that which an **“objectively reasonable officer”** would have utilized under all attendant circumstances, but rather a wholly **subjective** standard dependent upon either the perspective of the officer or his/her critic. To allow **“...necessary, reasonable and appropriate”** to remain within policy leaves officers without guidance or direction. Simply, what may be **“necessary and appropriate”** to one may be **unnecessary and inappropriate** to another or to the public. For this reason, the DPPA respectfully suggest that the phrase **“necessary and appropriate”** be deleted from the definition of inappropriate force, and that the language of the *Graham* Court be returned. To do otherwise allows the evaluation of force to turn on the whim of “20/20 hindsight” rejected by *Graham*.

It is further noted that the proposed draft suggests that “de-escalation” (when circumstance may permit) is intended to be a core component of the philosophy of the department. Certainly the DPPA takes no exception to this statement as a matter of focus. Never, however, should a tactical error be

determinative of whether the force utilized is appropriate. As such, Officers should be “**encouraged**” to avoid demeanor, tactics and actions which jeopardize their safety or that of the public, but the use of force should be measured solely by that which is “**objectively reasonable.**”

Section 105.01(2) Reasonable and Necessary Force

Outlined within this section of the policy are necessary definitions to be applied. The DPPA notes with approval that in establishing the proper standard to be applied the administration cites the language of the *Graham* decision in substantial form. Specifically, the only force which is authorized is that which is “reasonable under the totality of the circumstances.” Indeed, as did the *Graham* Court, the administration notes that the use of **hindsight** should not be allowed.

By way of revision, the DPPA suggests again that the term “**necessary**” be removed from the definition of authorized force. Inclusion of this term only confuses the direction provided to officers, and creates subjectivity. As noted above, what may be seen as “necessary” to some may be “unnecessary” to others. As directed by *Graham*, all use of force should be viewed through the eyes of a **reasonable** officer confronted with the same or similar circumstances.

Section 105.01(4) Force Guiding Principles/Guidelines (a)(1):

By virtue of this subsection, the policy establishes “guidelines” to be followed in the assessment of the use of force. The DPPA again notes with approval the clear language used by the administration in this section in recognizing that Officers may be required to “**decisively intervene and/or use force**” in the performance of their duties. To be deleted, again, is the reference to the subjective standards of “**...appropriate and necessary**”. Instead, and as directed by the Supreme Court in *Graham*, the appropriate standard is that which is “**...reasonable under the totality of the circumstances.**” In addition, and so as to eliminate confusion and/or uncertainty, the DPPA would propose that the phrase “**...to safely accomplish a legitimate law enforcement function**” be removed.

Section 105.01(4) Force Guiding Principles/Considerations(b)(1) and (2):

As all agree, in the interest of safety to both the officer and the public, the use of force should be avoided if at all possible. As such, proper consideration should be given by officers to alternative tactics which may result in a peaceful resolution. This section of the proposed policy properly identifies available alternatives to include “**de-escalation, command presence, advisements, warnings, or even tactical withdrawal.**”

In revision, the DPPA suggest only that the language of this section be tempered and that the term “**...will use tactical options**”, be revised to “**...should consider.**” Such revision is wholly consistent with training received by officers, and allows officers the flexibility needed in the rapidly evolving circumstances recognized by *Graham*. A mandatory checklist to be reviewed and completed prior to the application of authorized force only fosters hesitation and confusion.

Similarly, as suggested in **Subsection (b)(2)** Officers should always “**evaluate**” whether they have placed themselves in a jeopardizing situation such that the use of force becomes necessary. Given, however, the rapidly evolving circumstances recognized by *Graham*, the potential may exist for jeopardy notwithstanding the well-intended actions of the officer. Never should an officer “**ensure**” or guarantee an outcome. Rather, and as they are trained, officers should constantly “**assess and reevaluate**” their circumstances so as to create a positive outcome for both themselves and those who are the focus of their response.

Section 105.01(5) Factors to Consider in Determining Whether to Use Force

Itemized within this section of the proposed policy are those factors to be considered by officers in determining whether to utilize force in an arrest. The DPPA applauds the itemization of factors to be considered in making this determination. It is noted with approval that many of these factors were similarly reviewed by the *Graham* court in determining whether the actions of the officer were **reasonable under the totality of circumstances**. Again, and as noted above, the clear direction of the *Graham* Court was to evaluate the actions of an officer on the sole basis of “**objective reasonableness**” as seen through the eyes of a reasonable officer under similar circumstances. The continual inclusion of “**...necessary and appropriate**” to the measure to be applied provides clarity to neither the officer or the community. Rather, by inclusion the objective standard sought to be achieved is transformed into a purely subjective standard dependent on the bias or purposes of the evaluator.

It should be noted that for purposes of civil liability, the City and its officers are held to the **objective** standard of “**reasonableness**” established in *Graham*. The deviation from that standard as suggested by the current proposal not only creates an atmosphere of uncertainty, but also has the potential of creating unnecessary exposure to the City to civil damages.

Most assuredly, those who seek compensation from the City would relish in the opportunity to have an officer’s use of force be subjectively evaluated. With the utilization of a subjective standard, a proper level of force would be determined by the purpose sought to be achieved. One can only imagine the confusion of a jury charged with the responsibility to determine liability against the City or its officers when the officer’s conduct was subjectively determined to be in violation of policy as “**necessary or appropriate**” when measured against the objective standard measured by a reasonable officer as mandated by *Graham*.

DPPA further applauds the clear statement contained within this Section directing that an officer, when confronted with a use of force circumstance, need not “**...select or exhaust each option before moving to the next level of force so long as the force employed is reasonable...**”. In addition, the DPPA applauds the recognition provided by the administration that that the itemization of practical consideration noted is not intended to be exhaustive. Again, the subjectivity of “**...necessary and appropriate**” must be removed from this section for the reasons previously addressed.

Section 105.01(11) Deadly Force:

It is noted with approval that in addressing the issue of deadly force by officers, the proposed draft authorizes officers to use force precisely as directed by the *Graham* Court, and as allowed by Colorado law but for the inclusion of the word “**necessary**”. With the removal of “**necessary**”, the intent and direction of the language becomes clear and unambiguous.

Section 105.01(13) Motor vehicles:

By virtue of this directive, officers are prohibited under **all** circumstances from the discharge their firearms at a moving or fleeing vehicle. Such prohibition is unwavering, and includes instances even when the vehicle itself is utilized as a deadly weapon against the officer or others. While this restriction mirrors current policy, the DPPA respectfully suggests that recent local and international events necessitate that this strict prohibition be revisited.

Regrettably, we have most recently learned that terrorism has neither bounds nor boundaries, and that motor vehicles can be and have been used as an instrument of destruction against the police and/or the public. In these instances, we have further learned that the use of firearms may provide the only available safeguard against a terrorizing motorist intent on causing injury and death.

The DPPA respectfully suggests that the strict prohibition against the discharge of firearms toward moving vehicles be softened by deletion of “...will not be discharged”, and that instead officers be “discouraged” from firing upon a moving vehicle, but are “authorized” to do so if, and only if, either the officer or members of the public are in imminent risk of either death or serious bodily injury, and only after full assessment of all “...attendant and surround circumstances.” While the use of firearms against motor vehicles may at times be unreasonable under the totality of circumstances, an absolute prohibition may well produce an opposite result to that intended to be addressed.

Section 105.01(15) Responsibility to Provide Medical Attention:

By virtue of this section, the administration establishes a hierarchy of priorities to be followed by officers in scene management. The DPPA applauds the administration in its recognition that the “first priority” of officers is “...scene safety”, and that medical attention is to be provided by the officer only after the scene is secure. This prioritization, however, is seemingly lost when dealing with suspects who have ingested narcotics in an effort to avoid detection. As written, the proposed policy suggests that an officer believing that narcotics have been ingested should refrain from rendering aid to the suspect by removal of the contraband from his mouth. Rather, the officers are directed merely report the potential ingestion to responding medical personnel.

To remain idle as directed seemingly would subject the suspect to a far greater risk of either death or serious bodily injury, and violate departmental policy mandating that the arresting officer safeguard the health and wellbeing of their arrestees. Rather, the officer should be encouraged to remove the ingested contraband so long removal can be accomplished without injury. Clearly, the wellbeing of the suspect is paramount to the retrieval of evidence.

Conclusion:

Certainly the DPPA is mindful that the establishment of a viable Use of Force policy must, of necessity, have a twofold objective. First and foremost, officers must be provided clear, certain and unambiguous direction as to how and when force may be utilized. The establishment of that directive must be uniform in application regardless of the level of force to be applied. Secondly, the public must be confident that its members will be free from the arbitrary use of force by its officers, and that the amount of force utilized will be dictated by the circumstances presented rather than by the individual actors involved. In satisfaction of these dual purposes, the mandates of *Graham* were established.

As noted by the *Graham* Court, the evaluation of the use of force may not be subject to whim, prejudice or bias allowing the subjective opinions of one to be freely substituted for those of another. Rather, the standard must be uniform in application and look neither to the interests of the officer or those of the suspect. Instead, all force must be viewed **objectively** through the eyes of a **reasonable officer** faced with **the totality of circumstances**. With this guidance in mind, the above is respectfully submitted.