

REID J. ELKUS
DONALD C. SISSON
MICHAEL L. CHEROUTES
SCOTT D. MCLEOD
STEVEN T. MANDELARIS
ZACHARY D. WAGNER
LUCAS LORENZ
LAWRENCE A. ATLER



501 S. CHERRY STREET
SUITE 920
DENVER, CO 80246
PHONE 303-587-7981
FAX 303-431-3753
WWW.ELKUSANDSISSON.COM

January 27, 2017

Via email to DPDPlanning@denvergov.org

Robert C. White, Chief of Police
Denver Police Department
Office of the Chief of Police
1331 Cherokee Street, Room #402
Denver, CO 80204

Via US Mail:

Michael Hancock, Mayor
Denver City Council
1437 Bannock Street, #350
Denver, CO 80202

Via US Mail:

Beth McCann
Denver District Attorney
201 W. Colfax Avenue
Denver, CO 80202

Via US Mail:

Denver City Council
City and County Building
1437 Bannock Street
Denver, CO 80202

Via US Mail:

Stephanie O' Malley
Executive Director of Safety
Department of Public Safety
1331 Cherokee Street, Rm. 301
Denver, CO 80204

Re: *Proposed Changes to Denver Police Department's 105.00 - Use of Force Policy*

Dear Sirs and Madams:

Please be advised that this law firm, Elkus & Sisson, P.C., has been retained to represent Fraternal Order of Police, Lodge 41 (hereinafter "FOP 41") regarding proposed changes to the Denver Police Department's (hereinafter "DPD") 105.00 - Use of Force (hereinafter "UOF") Policy. I want to start by thanking you for your January 4, 2017, letter, wherein you solicited the input from community members regarding the proposed changes to the UOF Policy.

As you may know, the Fraternal Order of Police (hereinafter the "FOP") is Colorado's and the Nation's largest, most influential voice for law enforcement officers with approximately 6,000 members in Colorado and 325,000 members Nationwide. The FOP works tirelessly to ensure the safety of all law enforcement officers and the communities they serve. The FOP recognizes that central to an effective UOF Policy is the sanctity of life of those we serve, balanced against the need to use force to ensure crime prevention and the safety of all concerned. To that end, the FOP

is in a unique position to provide valuable input on your proposed changes to the DPD's 105.00—UOF Policy.

After reviewing the draft of the proposed changes to the UOF Policy, the FOP and, specifically, Lodge 41 respectfully advance for your consideration the following comments and concerns:

#1-Negative Impact on Officer Reaction Time

The proposed policy is heavily weighted on de-escalation and tactics that have been codified in 105.01(4) b 1 and 2. By delineating the considerations and tactics an officer has to consider (seven by our count) while under the stress of a UOF incident, the department is adding dangerously to the decisions an officer has to make prior to defending himself or a citizen. This contrasts sharply with the current policy that (appropriately) encouraged officers, in broad terms, to consider other tactical options that could lead to de-escalation. Outlined in this manner, it did not become a tactical continuum (as in the new policy) that officers will be required to utilize under stress.

The detrimental effects of extreme stress on cognitive ability and reaction time are well documented. The codified steps (to include the “list” of responses to Aggravated Active Aggression) and tactics outlined in this policy, viewed through the science of human reaction under stress, are wholly unreasonable and will cause an increase in the already existing gap between action vs. reaction. With the significant increase in ambush attacks on officers (over 150%), adding to the time it takes to react to a threat is unconscionable and will only serve to increase the danger to the officers.

#2-Current Existence of Department Wide De-Escalation

As stated in the draft, de-escalation is a “core component and philosophy” of the Policy. This is a laudable goal that the FOP and FOP Lodge 41 fully supports. Although the importance of de-escalation is a driving theme in this policy; it should be made clear to the public that this is **not** a new direction for DPD officers and does not require this new UOF Policy for implementation. On a daily basis, DPD officers are utilizing de-escalation skills – supported by the widespread Crisis Intervention Team (CIT) training that has been provided.

#3-Tactical Standard

The apparent formalization (105.01(4)(b)(2)) of tactics in the new UOF Policy also leads us to ask what will be the tactical standard officers will be judged by? The tactics of each encounter are clearly subjective beyond a few well-established fundamentals and invariably lead to different opinions from the officers that are present. This was widely recognized in the existing Policy where officers were encouraged to consider various tactical options. The FOP and FOP Lodge 41 respectfully requests who within DPD will be utilized to review officer tactics? Further, what will be the UOF background of this reviewing body? Finally, what, if any, training will be provided to DPD officers to ensure that a clear objective (not subjective) tactical standard is applied?

#4-Moving Vehicles

Although the current policy prohibited officers from firing at vehicles, it did recognize that the policy “may not cover every situation” (105.05(5)(d)). Clearly, the department recognized that there may be circumstances where it may be required to fire at a vehicle and that decision could subsequently be reviewed. The new draft has removed this provision and now leaves no option to fire at a vehicle. This blanket prohibition fails to recognize the reality of modern policing and the number of times that vehicles are used as deadly weapons. As you probably know, as recently as June 16, 2016, at approximately 4:30 p.m., at 86th and Sheridan, Westminster officers attempted to arrest a suspect who was wanted on multiple felony warrants. The suspect sped away in his car and ran over the officer. At that point, other officers opened fire and killed the suspect, which resulted in saving the officer’s life who was being dragged by the suspect’s moving vehicle.

Surely, it cannot be the UOF Policy of the DPD to expect its officers to sit idly by while one of their fellow officers is dragged to their death by a suspect that is using a moving vehicle as a deadly weapon. Despite the best efforts at tactically avoiding a vehicle assault, there may be a time when an officer is placed in a situation that leaves only one option to try and save his/her life – or the life of another. The FOP and FOP Lodge 41 strongly oppose this policy and respectfully remind you that there is case law that recognizes the legality of officers firing at vehicles.¹ This proposed Policy sends a clear message to the officers of the DPD that, in deadly vehicle situations, their lives are expendable.

Another question raised by this Policy is the response the DPD recommends for officers faced with a situation such as Nice France, Berlin Germany, Ohio State University, Israel, and most recently Rosarito, Mexico – where a vehicle is used as a weapon of mass destruction against the citizens of Denver. As repugnant as it sounds – as written in this draft, an officer would be violating the UOF Policy if he or she fired to defend the victims of this type of attack. This policy is clearly out of touch with the public safety issues that American police officers are faced with and is recklessly inflexible as it concerns these type of attacks.

#5-Policy and Training Program

The FOP and FOP Lodge 41 strongly supports the overriding goals of this proposed Policy: de-escalation and better officer tactics. With that said, these issues should not be included in the UOF Policy in this complex, continuum type fashion. The over-complication of this Policy can have dangerous ramifications for officers who have to apply it under extreme stress.

If this Policy and its strict inclusion of tactics are adopted, it must be accompanied by extensive tactical and UOF decision-making training. This type of training should have been started years ago, but it was not and the current program is woefully lacking to prepare officers for the type of tactics development that will be legally necessary.

¹ Rachel Brosseau v. Kenneth J. Haugen No. 03-1261. Decided December 13, 2004

Since the *Zuchel v. City and County of Denver* case,² the DPD has been notified that the UOF decision-making/tactics training was inadequate. The 1983 letter from then District Attorney, Norm Early (included in the case), asking that officers receive more “strategic skills training”, “shoot-don’t shoot training, live fire training under street conditions” and “stress testing” (in addition to other skills)³ has in essence been disregarded. This issue resurfaced following the shooting of Paul Childs in 2003 and Frank Lobato in 2004.

In a 2007 Denver Post article, then Chief of Police Whitman recognized the need for additional training and stated the goal was “one-week in service training for every officer.”⁴

The current training program has no organized, ongoing tactical skills development and, despite case law to the contrary, counts firearms qualification as training. The DPD has also put UOF classes such as arrest control and vehicle avoidance in an online classroom forum. This is clearly inadequate training for concepts that require decision-making under stress and is contrary to the recommendations of law enforcement training experts and organizations such as the Police Executive Research Forum.

The FOP believes that this proposed UOF Policy requires the DPD to begin and maintain a modern in-service UOF decision-making training program, which meets national and area standards, prior to implementation. Anything short of that will only lead to claims against the City & County of Denver and DPD for failure to properly train and supervise its officers, which, in turn, will significantly increase its liability and jeopardize the safety of its officers.

The FOP and the FOP Lodge 41 leadership would welcome the opportunity to sit down with you, and openly and respectfully discuss these very important issues. Finally, I want to thank you again for the opportunity to provide you with the FOP’s input and comments regarding the proposed changes to the UOF Policy.

If you have any questions about this letter or if you are willing to meet with us, please give me a call. We look forward to working with you.

Very truly yours,

ELKUS & SISSON, P.C.

By:

Donald C. Sisson

Attorney for the FOP and FOP Lodge 41

² Leo and Arlene Zuchel v. The City and County of Denver, Colorado 997 F.2d 730; 1993 U.S. App. Lexis 15142

³ Leo and Arlene Zuchel v. The City and County of Denver, Colorado 997 F.2d 730; 1993 U.S. App. Lexis 15142

⁴ Denver Post “Under Fire for 24 Years” April 23, 2007