AMERICAN CIVIL LIBERTIES UNION of OREGON

TO: Chief Mike Reese, Portland Police Bureau
FROM: David Fidanque, Executive Director
Becky Straus, Legislative Director
CC: Mayor Sam Adams, Clay Neal, Mike Kuykendall, Eric Hendricks, Larry O'Dea, Jim Van Dyke, David Woboril, Tom Perez, Michelle Jones, Jonas Geisslar, Adrian Brown
RE: Draft Policies on Application of Force; Taser, Less Lethal Weapon System; and Deadly Physical Force
DATE: October 19, 2012

Thank you for the opportunity to comment on draft Bureau policies relating to Use of Force, Use of Deadly Force, and Tasers.

1010.00 Application of Force

The policy should state more clearly that, although it is never permissible for an officer to use more force on a subject than the Constitution allows, the Bureau's policy is more restrictive than what is constitutionally permissible and requires the officer to use the least amount of force necessary in each instance. While we believe this is already the effect of the current policy, it could be made more clear. We therefore urge that you make the changes to the introductory section we have attached. Additional modifications may be required to the remainder of the policy if you accept our suggestions.

1051.00 Taser, Less Lethal Weapon System

General Comments

At its broadest parameters, the proposed Taser policy would permit an officer to discharge his/her Taser, in probe mode, in response to "active resistance" by a subject that may result in "physical injury" to the officer or another. Because the definition of "active resistance" in the proposed policy includes static resistance, such as "tensing," and because the definition of "physical injury" under Oregon law is extremely broad and includes "substantial pain,"[1] this proposal gives too much discretion to officers.

The 9th Circuit U.S. Court of Appeals has held that one effect of a Taser is to cause "an excruciating pain that radiates throughout the body."[2] An officer should not inflict "excruciating pain" on a subject that is engaging in static resistance unless there is a risk of greater injury to the officer or another person.

---

1 "Physical injury" means impairment of physical condition or substantial pain. (ORS 161.015(7))

2 *Bryan v. McPherson*, 590 F.3d 767 (2009).

We believe the principal justification for deploying a Taser is to prevent a situation from spiraling out of control to the point that the officer or another person may face an imminent risk of "serious physical injury" – and therefore need to resort to the use of deadly force.[3]

Inconsistent with this purpose, we have seen too many departments rely on Tasers as a tool to avoid any hands-on contact with subjects. While we recognize that under the proposed policies officers will also be required to use the least force "practical", or "necessary" if you adopt our first recommendation, we strongly urge you to tighten the proposed Taser policy further.

For these reasons, we urge you to remove the authority to use a Taser on a subject engaging in "active resistance" so that Taser use is only permitted in response to "active aggression."

Policy (1051.00):
The policy states that "The Taser is not meant to take the place of deadly force options" and, while this statement is true in the most literal sense, the policy should state that Tasers are meant to prevent situations from escalating to the point that deadly force would be required. Hundreds of unintended deaths have been associated with the use of Tasers, and any policy authorizing their use must acknowledge this risk.

Considerations for Less Lethal Force Applications (1051.00):
"Members shall consider the current mental health condition of the subject as a factor in determining whether Taser is the appropriate tool to resolve a confrontation with as little reliance on force as practical." The policy should replace "practical" with "necessary" as the appropriate standard. Since the overuse of Tasers by the Bureau on persons in mental health crisis was a major focus of the Department of Justice investigation, the standard should be one based on necessity rather than practicality.

The policy states that "Members should evaluate their force options and give strong consideration to other force options, if the Taser is not effective after two applications on the same person." This portion of the policy should be clearer and more restrictive: it should restrict discharge of a Taser on a person to no more than 3 cycles of no more than 5 seconds each. Members should evaluate their force options, however, and give strong consideration to force options not only after two applications on the same person, but before and after *any* use of the Taser on a subject. After each cycle the officer should evaluate whether another cycle is likely to be effective and is necessary.

The "Considerations for Less Lethal Force Applications" replaces the "Authorized Use of Taser" section from the prior policy. In addition to the comments we made above regarding the breadth of the definitions of "active resistance" and "physical injury," this change of heading may create unnecessary ambiguity about when use of the Taser is permitted. The final three paragraphs in this section appear to govern when Taser use is authorized, but should be made clearer:

---

[3] "Serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. (ORS 161.015(8))

1. While the Policy section includes general language noting that the Application of Force policy (DIR 1010.00) applies, the most critical principle needs to be reiterated here: The Bureau expects its members to resolve confrontations effectively and safely while relying on the least use of force necessary. [4]
2. Because the policy says that "members are authorized to use Taser in probe mode only in response to active aggression or active resistance…" (underline added). It is unclear whether this provision is limiting "probe mode only" use to these instances and leaving the "stun" mode use of the Taser open to a different standard, or whether this provision is referring to all use of the Taser and specifying that "probe mode only" is generally the only permissible mode for the Taser to be used – except in the specific paragraph addressing "drive stun" mode.

Prohibited Use of the Taser (1051.00):
The term "medically fragile" should be defined for purposes of the entire policy. The closest the policy comes currently to defining this term is in the section regarding required mental treatment after a Taser is deployed. In addition, persons experiencing a mental health crisis should be included in the definition of medically fragile.

The following change to the policy makes Taser use on passive subjects more likely and conflicts with limitations on authorized use described in prior sections: "Taser shall not be used on subjects engaging in passive resistance in an apparent act of civil disobedience who display no indication they might take action against members or others if not controlled" (underline added). The underlined segment of the sentence should be removed from the policy because the policy already prohibits the use of a Taser on anyone engaging only in passive resistance. If our interpretation of the current draft is incorrect on this point, the policy should state explicitly that the Taser shall not be used in *any* cases of passive resistance.

1010.10 Deadly Physical Force

General Comments
The policy recognizes that, in any instance of use of deadly force by an officer, competing policy interests are at play: dissemination of "timely and complete… [and] accurate information"[5] versus the "integrity of the investigation or information needed to complete the criminal investigation or any pending prosecution."[6] The officer who used deadly force may be subject to criminal investigation and that officer has a right against self-incrimination under the United States and Oregon Constitutions.[7] If the Bureau requires a mandatory on-scene interview of this

[4] The language, as drafted, says that the standard is the level of force that is "practical" but, per our recommendation above, the standard ought to be what is "necessary."

[5] Release of Information (1010.10)

[6] Ibid.

[7] See *Garrity v.New Jersey*, 385 US 493 (1967) and *State v. Beugli*, 126 Or App 290 (1994); but compare *State v. Soriano*, 298 Or 392 (1984). The Oregon Court of Appeals has interpreted the Oregon constitutional right against self-incrimination regarding investigation of a law enforcement officer consistent with the U.S. Supreme Court's holding in *Garrity*. However, the Oregon Supreme Court has not heard a case regarding "use" or "derivative use" immunity involving a police officer. In *Soriano*, which did not involve a police officer, the Court held that only transactional immunity meets the constitutional requirements under Article I, section 12 of the Oregon Bill of Rights.

officer, doing so may foreclose the possibility of criminal prosecution and, while the Bureau and the City may decide that this risk is outweighed by the value of having accurate information in a timely manner, they should make this decision intentionally. In balancing these interests, the Bureau and the City should also consider that a policy that makes an on-scene interview of the officer voluntary will make it less likely that he/she will participate.

Thank you again for the opportunity to comment and for your consideration of our recommendations. Please do not hesitate to contact us at bstraus@aclu-or.org with any questions or for clarification.