



Lemonade

The Police Commission handed officers a lemon in November of 2015 when newly appointed Police Commission President Matt Johnson decided that uses of force must go down and changing our policy was the way to accomplish that goal. The Inspector General filed a report in March of 2016 that recommended incorporating de-escalation into the Use of Force Policy, among many other things. So, how do we turn a lemon into lemonade?

The fact is that the Police Commission has the power to set policies for use of force as part of their role as the head of the Department. Yes, if they decided that squirt guns were better than the Glock pistol, they have the power to impose that on you. Fortunately, however, state law requires them to meet and confer with the League on things that affect our working conditions. Use of Force Policy changes do that, and so the meet and confer process had to be vetted before the policy change could be implemented.

Unfortunately, the meet and confer process is not the panacea that you may think. It requires that the parties (League and Department) meet in good faith and try to resolve their differences. There is no requirement that those differences be actually resolved. If agreement cannot be reached, an impasse is declared. A Fact-Finder is then appointed and listens to evidence presented by both sides. The Fact-Finder issues a decision based on this evidence, but the Department is not bound by that decision. After the hearing, the Department can unilaterally implement their last best offer. In other words, no matter how the Fact-Finder ruled, squirt guns could replace Glock pistols.

This is exactly what happened to the League when we went through the meet and confer process over the Penalty Guide. We won the Fact-Finder hearing after an impasse was declared, but the Department imposed its last best offer, and the guide came out with the Department's language despite the Fact-Finder's decision. So, with that specter hanging over our head, we went through the meet and confer on the effects of changing the Use of Force Policy.

After a lot of head banging, arm wrestling and wordsmithery from both sides, we hammered out changes in the policy and safeguards in the use of force adjudication process that both sides could live with. Assistant Chief Jorge Villegas and President Matt Johnson both exhibited an

understanding and concern for the League's positions, and Inspector General Alex Bustamante was instrumental in smoothing out some of the bumps in the road. Retired Commander Rick Webb, who wrote the original 2009 Use of Force Policy, was also a big help. That being said, what did we end up with?

There are two aspects to the change in policy. The first is the change in the Use of Force Policy itself. One phrase was added and one phrase was modified. The second is the change in the adjudication policy of uses of force used by the Department in Use of Force Boards. Several modifications were made to make the process fairer for the officer.

The change in the Use of Force Policy

The adding of specific language relating to de-escalation to the Use of Force Policy was the main issue for the Police Commission and the Department. The League's view was that de-escalation was something that LAPD officers had always done and there was no need for change. The two changes finally agreed upon are as follows.

This language was added to the preamble to the Use of Force Policy.

“Officers shall attempt to control an incident by using time, distance, communications and available resources in an effort to de-escalate the situation, whenever it is safe and reasonable to do so.” Note that you need not jeopardize your safety or the safety of others to comply with this section.

Under the “Factors Used to Determine Reasonableness” section, the phrase *“The time available to an officer to make a decision”* was changed to *“The amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be reasonable.”*

That is it in terms of changes to the Use of Force Policy. As you can see, and as you have already felt, there is a new emphasis on de-escalation as previously highlighted in previous *Warning Bells* articles.

The change in the adjudication process

Although LAPD officers have practiced de-escalation for decades, our fear was that changing the Use of Force Policy would result in increased disciplinary actions against officers. We wanted an improved adjudication process that brought more balance to the process. The Commission and the Department were responsive to our concerns. Several changes were made.

The basic system, in brief, that has been in place since 1979 is that after Force Investigation Division (FID) finishes its report, it is submitted to a Use of Force Board. The Board is comprised of four staff officers and a peer member. The Board conducts a hearing and reviews the FID report and takes recommendations from the officer's commanding officer after an FID Power Point presentation on the details of the use of force. The Board then makes a recommendation that goes to the Chief of Police. The Chief of Police then reviews that recommendation and makes his own recommendation to the Police Commission. The Commission then makes the final adjudication on the use of force.

Through the negotiation process, the League and the Department agreed to make the following changes in the use of force adjudication procedure.

First, clarification was made to the Hayes language in the adjudication process. The Hayes language was added to the Use of Force Policy in 2014 and says this: *“The reasonableness of an officer’s use of deadly force includes consideration of the officer’s tactical conduct and decisions leading up to the use of deadly force.”*

Adjudication confusion resulted. For instance, in one case, the failure to discuss edged weapon tactics and the failure to remove a beanbag shotgun from the trunk prior to responding to a female with a knife call were tactical elements that made a use of force out of policy. We agreed to clarification language in the adjudication documents to more specifically determine when the Hayes language should apply. It states: *“In all categorical use of force incidents involving deadly force, the CO should consider, as part of the totality of the circumstances, the officer’s pre-force conduct in evaluating the reasonableness of the officer’s ultimate use of deadly force. Pre-Force conduct may render a use of deadly force unreasonable in those instances where the tactical conduct and decisions leading up to the use of force are directly connected with the use of force **and** unreasonably created the need for the use of force.”* Emphasis added. From now on, tactical mistakes must not only be directly connected with the use of force, but must also have unreasonably created the need to use the force to make that use of force out of policy because of faulty tactics.

Second, the peer member participation was expanded. Peer members of the same rank as the officer being reviewed are to provide the Board with insight at a level of expertise equal to the rank of the officer who is being judged. It seemed fair to establish a list of peer members that was static and from which the next person up on the list was assigned to the next Board without favoritism. This was meant to protect those who might have a different view from being eliminated from future Boards. Twice a year the Department will request new peer volunteers, train them and provide them with the literature needed to participate in the Board. They can only be removed from the list for cause. **PLEASE**, get on this list. Your fellow officers need your input, and you will gain valuable experience about uses of force. Participation should also look great in your package for promotional orals.

Third, any documents that go to one Board member must go to all Board members with sufficient time to review them prior to the Board convening. This will ensure that all members have access to all the documents distributed.

Fourth, an officer who receives a recommendation by the Board of Administrative Disapproval (out of policy) will have the ability to prepare a response that will go to the Chief of Police for review prior to his recommendation to the Police Commission. The officer’s response will also be supplied to the Commission. To assist with this, a member of the Officer Representation Section will attend all Use of Force Boards. Access to the entire FID investigation and PowerPoint will be made available to the officer and his/her representative to prepare this response. The officer’s viewpoint and arguments can, therefore, be presented to the Chief and to the Police Commission if desired.

Fifth, no last-minute changes to the FID PowerPoint can be made without the commanding officer of FID's approval.

Sixth, if there is a minority opinion, the author or authors of the minority opinion have the option to personally appear at the time of the presentation of the recommendations to the Chief of Police so that they may explain their reasons and answer any questions the Chief may have.

Conclusion

Once given the mandate by the Police Commission in March of 2016, the Department was tasked with carrying out the Commission's directions. A year of negotiations with the League has taken place. We now have the result. Overall, the two changes in the policy and the six changes in adjudication policy balance out to be a net gain for the street officer. The key is to realize how de-escalation has risen in importance in the adjudication of a use of force.

As *Warning Bells* has previously pointed out, you have been engaging in de-escalation your entire career. Now it is vital that you articulate it. More than articulate it, brag about it! In your interviews, describe in detail everything that you did to avoid using force. Memorize the Tactical De-escalation Techniques (Directive No. 16, October 2016) and the Use of Force Policy. Be sure to address as many points as possible in your interviews. Show them you know what you are doing, and...

Be legally careful out there.

Links to various things in this article are at www.warningbells.com.