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Policy Number: 20.2
Policy Name: Penal Law Article 35
Contact Officer: Chief D. T. Burch



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Rescind Date:
Date of Review:
Date of Amendment:

September 28th, 2020

Related Policies: Use of Force

20.2 Penal Law Article 35

All officers will be familiar with Article 35 of the New York State Penal Law.

Non-Deadly Force

Prior to engaging in non-deadly force on a person, the officer should, in the initial stages of the confrontation attempt to resolve the matter by the use of verbal persuasion. If the situation escalates further, officers should limit their responses to what is reasonable to accomplish their lawful objectives. This would include verbalizing at a safe distance until reinforcements or specialists could arrive on the scene. In any event, officers should use discretion when using non-deadly force and reference the escalation of force chart used by the Cuba Police Department and taught at yearly in-service trainings. We recognize that escalation and de-escalation is fluid and we specifically teach that we do not need to go through set levels of force. The subject is the one who dictates our immediate level of force by their actions.

1. Definitions

- A. Non-Deadly Force – force which is not likely to cause death or great bodily harm.
 - B. Physical Force – the necessary application of submission holds to overcome resistance.
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- C. Objectively Reasonable – An objective standard used to judge an officer’s actions. Under this standard, a particular application of force must be judged through the perspective of a reasonable officer facing the same set of circumstances, without the benefit of 20/20 hindsight, and be based on the totality of the facts that are known to that officer at the time that the force was used.
- D. Physical Injury – Impairment of physical condition or substantial pain.
- E. Serious Physical Injury – Physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted impairment of the function any bodily organ.

USE OF FORCE

- A. In general terms, force is authorized to be used when reasonably believed to be necessary to effect a lawful arrest or detention, prevent the escape of a person from custody, or in defense of one’s self or another.
- B. Under the 4th Amendment, a police officer may use only such force as is “objectively reasonable” under the circumstances. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene

DETERMINING THE OBJECTIVE REASONABLENESS OF FORCE

- A. When used, force should be only that which is objectively reasonable given the circumstances perceived by the officer at the time of the event.
 - B. Factors that may be used in determining the reasonableness of force include, but are not limited to:
 - 1. The severity of the crime or circumstance;
 - 2. The level and immediacy of threat or resistance posed by the suspect;
 - 3. The potential for injury to citizens, officers, and suspects;
 - 4. The risk or attempt of the suspect to escape;
 - 5. The knowledge, training, and experience of the officer;
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6. Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion, and the number of officers or subjects;

7. Other environmental conditions or exigent circumstances.

DUTY TO INTERVENE

A. Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.

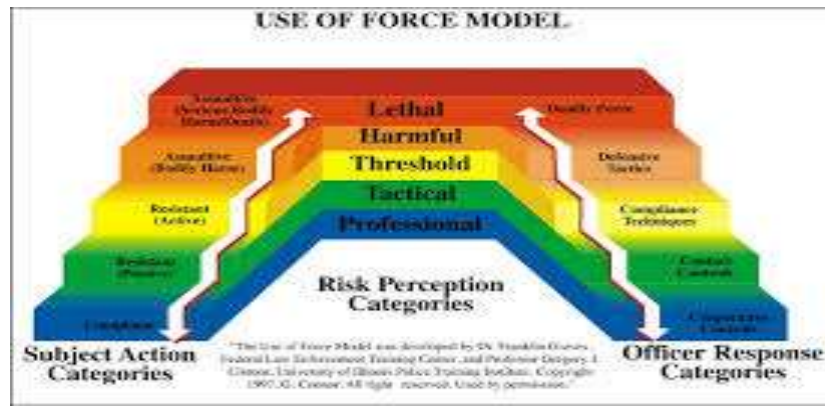
B. An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.

2. Escalation of Force Chart

We recognize that escalation and de-escalation is fluid and we specifically teach that we do not need to go through set levels of force. The subject is the one who dictates our immediate level of force by their actions. Below is the escalation of force chart currently used by the Cuba Police Department. This chart will be taught yearly at in-service training.



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- A. Verbalization – that verbal persuasion used by the officer in an attempt to defuse the situation.
- B. Restraint Techniques – those techniques an officer feels necessary to use to effect “Take down and pressure point control holds” by using his hands, OC Spray, police baton and/or handcuffs.
- C. Personal Weapons – the punching, kicking, etc. and officer may resort to in accomplishing lawful objectives.
- D. Pepperball Gun – a high-pressure air launcher that delivers a plastic projectile capable of subduing a subject with kinetic energy (impact) and/or OC powder
- E. Impact Weapons – the police baton when used as an impact instrument by the officer.
- F. Chemical Weapons – mace (CS, CN, Gas) when used as a subservient.
- G. Firearms – the ultimate use of force when the officer is compelled to use his sidearm, or any other firearm authorized by the Cuba Police Department.

CAROTID CONTROL HOLD

The carotid control hold is not a hold that is used or trained by members of the Cuba Police Department. However, nothing in this policy shall prevent an officer from taking whatever steps are reasonably necessary to protect their life or the lives of others in certain extreme circumstances.

3. **Procedure**

- A. Any employee using Deadly Physical Force or Defensive Force pursuant to his duties as a police officer (whether on or off duty) shall

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report or cause to be reported, all facts relative to the incident on a Use of Deadly Physical Force Report Form .

- 1) Reporting Restraining Force will be left to the discretion of the arrest officer(s) and supervisor(s).
- B. Only issued or approved equipment will be carried on duty and used when applying any level of Non-Deadly Force, except in emergency situations when an employee must use any resources at his disposal. The use of the police baton is considered a use of force, and as such, necessary reports must be completed. All equipment will be inspected at yearly in-service training and any defective, expired or non-approved equipment will be replaced or removed by the Cuba Police Department so as to not create an unsafe working environment for the Officer.
- C. Use of restraining devices is mandatory in all prisoners, unless in the employee's judgment unusual circumstances exist which make the use of restraining devices impossible or unnecessary (e.g.: prisoner is very elderly or handicapped, etc.) The mere placing of handcuffs on a prisoner will not be construed to be a use of Physical Force. In situations where the suspect physically resists the application of handcuffs, a use of Physical Force has occurred, and the necessary reports must be completed.
- D. After any level of Non-Deadly Force is used, an employee shall immediately evaluate the need for medical attention or treatment for that person upon whom the force was used and arrange for such treatment when:
- 1) That person has a visible injury;
 - 2) Person complains of injury or discomfort, or requests medical attention.
 - a) Persons having visible injuries, complaining of injury or discomfort and then refuses medical treatment, must still be evaluated on scene or at the Police Station by ambulance staff or transported to a hospital where the refusal will be witnessed by hospital personnel and noted on incident report. If they refuse then the Officer must obtain a copy of the refusal form from the ambulance personnel. Before obtaining this form, Officers should confer with the District Attorney about the necessity of a subpoena for the records.

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- E. The employee shall immediately notify his immediate supervisor of the incident. In case of off duty incidents, the employee shall notify (in person or via phone) the on duty shift supervisor as soon as possible, and the local authority, (if necessary) if the incident occurred in another jurisdiction.
 - F. The employee shall attempt to locate and identify any witnesses, documenting their statements.
 - G. The employee shall prepare and submit the reports required by current directives. If more than one employee is involved in a Use of Force incident, each employee shall complete an incident report outlining their actions and observations in the incident. All copies of the report(s) will then be forwarded together, along with other applicable reports to the shift supervisor for approval.
 - H. The Supervisor shall respond to the scene of the incident immediately if available. If a first line supervisor is not available then they should be made aware via a phone call giving the supervisor all of the pertinent information of the use of force.
 - I. The Supervisor shall insure that employees receive any necessary assistance, including medical treatment. He shall also insure that any injuries to employees are properly documented.
 - J. The Supervisor shall insure the medical treatment for the defendant is evaluated.
 - K. The supervisor shall determine if an investigator should respond to the scene and the level of investigation warranted (including photos, measurements, and diagrams). If an injury or complaint of pain exists, supervisors are encouraged to obtain photographs.
 - 1) A photograph showing no injury may be as important as one which shows injury.
 - L. If determined that Restraining Force was used by subordinate personnel, the Supervisor shall investigate the incident. When use of Restraining Force has been made necessary by resistance without violence, reports of the use of restraining force shall not be mandatory. The arrest incident and resisting arrest charges shall be left to the discretion of the arresting officer and Supervisor.
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- M. Upon notification of the use of Physical or Defensive Force by subordinate personnel, the supervisor shall initiate and investigation into the incident.
1. He shall determine if the need exists to immediately notify the Chief of Police.
 2. He shall review the report(s) describing the use of force, and all other relative reports.
 3. The supervisor shall address a memo to the Chief of Police, advising of any facts not covered in the official report(s).
 4. In the absence of discrepancies or additional facts, the supervisor shall submit a supplemental police report, stating that the investigation has been conducted and that the facts are as reported in the official police report, and Use of Deadly/Physical Force Report.
 5. When the Supplemental Report and pertinent reports cannot be routed through the Chain of Command immediately, the Supplemental Report and pertinent reports will be routed directly to the Chief of Police and the incident shall be verbally reported through the Chain of Command at first opportunity.
 6. The supplemental Report shall be captioned with the type of force used (Restraining, Physical or Defensive).

Deadly Force

1. **Definitions**

- A. Deadly Physical Force – “Deadly Physical Force” as used in this policy is defined as that force which is intended to cause death or serious physical injury or which creates some specified degree of risk that a reasonable and prudent person would consider it likely to cause death or serious physical injury.
 - B. Serious Physical Injury – means physical injury which creates a substantial risk of death, which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.
 - C. Reasonable Cause to Believe – Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable, discloses facts or circumstances which are collectively of
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such weight and persuasiveness as to convince a person that it is reasonably likely that such offense was committed and that such person committed it. Except as Procedure Law, such apparently reliable evidence may include or consist of hearsay.

2. **Background**

The value of human life is immeasurable in our society. Police Officers have been delegated the awesome responsibility to protect life and property and apprehend criminal offenders. The apprehension of criminal offenders and protection of property must at all times be subservient to the protection of life. The officer's responsibility for protecting life must include his own.

The fact that a police officer is justified in using deadly physical force does not allow reckless conduct by the police officer if the use of deadly physical force may injure innocent persons whom he is not seeking to arrest or retain in custody.

3. **Policy**

An officer may discharge a firearm under the following situations:

A. Confrontation Situations

To defend the officer or another from what the officer reasonably perceives as an immediate threat of death or serious physical injury.

B. Apprehension and Pursuit Situations

- 1) When an officer acting on personally known information has reasonable cause to believe that an armed or dangerous subject has committed a felony which involved the use or attempted use, or threatened immediate use of Deadly Physical Force against a person; and
- 2) There is substantial risk that the fleeing subject will cause death or serious physical injury if not immediately apprehended; and other reasonable means have been considered to effect the arrest; and
- 3) The discharge does not appear likely to injure innocent bystanders.

The foundation of this policy is found in Section 35.30 of the Penal Law as modified by the recent holding of the (and based on decisions by the) United States Supreme Court in Tennessee v. Garner and Graham V. Connor

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C. Injured Animal

To kill a dangerous animal or an animal so badly injured that it should be destroyed to prevent further suffering. All other options shall be exhausted; however, other options should be considered before shooting the animal. All other departmental procedures governing same must be adhered to.

The supervisor on duty shall be notified whenever possible before the discharge of a weapon. If a supervisor is not available then a phone call should be made to the first line supervisor briefing him or her that a discharge of an Officer's weapon is necessary.

5. Procedures and Prohibitions

A. Juveniles

No distinction shall be made relative to the age of the intended target of Deadly Physical Force. Self defense and imminent threat shall be the only procedural guidelines for employing Deadly Physical Force.

B. Moving Vehicles

Discharging a firearm at or from a moving vehicle is prohibited unless the occupants of the same are using Deadly Physical Force against the officer, or another and the officer reasonably believes that he will not endanger innocent persons.

6.

The following are prohibited in the CPD use of force policy:

- A. To extract an item from the anus or vagina of a subject without a warrant, except where exigent circumstances are present;
 - B. To coerce a confession from a subject in custody;
 - C. To obtain blood, saliva, urine, or other bodily fluid or cells, from an individual for the purposes of scientific testing in lieu of a court order where required;
 - D. Against persons who are handcuffed or restrained unless it is used to prevent injury, escape, or otherwise overcome active or passive resistance posed by the subject.
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TRAINING

A. All officers should receive training and demonstrate their understanding on the proper application of force.

B. Training topics will include use of force, conflict prevention, conflict resolution and negotiation, and de-escalation techniques and strategies, including, but not limited to, interacting with persons presenting in an agitated condition as well as duty to intervene and prohibited conduct.

D. This policy is not intended to be a substitute for proper training in the use of force. Comprehensive training is the key to the real-world application of the concepts discussed within this policy.

7. Review

This policy establishes a process for the Cuba Police Department to review the use of force by its members.

This review process shall be in addition to any other review or investigation that may be conducted by any outside or multi-agency entity having jurisdiction over the investigation or the evaluation of the use of force.

A. The Cuba Police Department will objectively evaluate the use of force by its members to ensure that their authority is used appropriately and consistent with training and policy.

B. Generally, whenever a member's actions or use of force in an official capacity, or while using department equipment, results in death or very serious injury to another, that member will be placed in a temporary administrative assignment pending an administrative review. The Chief of Police may exercise discretion and choose not to place a member in an administrative assignment.

COMPOSITION OF THE BOARD

The Chief of Police should staff the Use of Force Review Board with five individuals from the following, as appropriate:

- Representatives of each officer
 - Command staff representative from the involved member's chain of command
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- Training Officer
- Non administrative supervisor
- A peer officer/department member
- A law enforcement officer from an outside law enforcement agency, as appropriate
- Department instructor for the type of weapon, device or technique used

The Chief of Police will appoint a member of the Command Staff who is not involved in the incident to serve as chairperson.

RESPONSIBILITIES OF THE BOARD

The Use of Force Review Board is empowered to conduct an administrative review and inquiry into the circumstances of an incident.

The board members may request further investigation, request reports be submitted for the board's review, call persons to present information and request the involved member to appear. The involved member will be notified of the meeting of the board and may choose to have a representative through all phases of the review process.

The board does not have the authority to recommend discipline.

The Chief of Police will determine whether the board should delay its review until after completion of any criminal investigation, review by any prosecutorial body, filing of criminal charges, the decision not to file criminal charges or any other action. The board should be provided all relevant available material from these proceedings for its consideration.

Absent an express waiver from the involved member, no more than two designated board members may ask questions of the involved member. Other board members may provide questions to the designated board members.

The review shall be based upon those facts, which were reasonably believed or known by the officer at the time of the incident, applying any legal requirements, department policies, procedures and approved training to those facts. Facts later discovered but unknown to the involved member at the time shall neither justify nor call into question a member's decision regarding the use of force.

Any questioning of the involved member conducted by the board will be in accordance with the Cuba Police Department disciplinary procedures, the Personnel Complaints Policy, the current collective bargaining agreement and any applicable state or federal law. The board shall make one of the following recommended findings:

- (a) The member's actions were within department policy and procedure.
 - (b) The member's actions were in violation of department policy and procedure.
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A recommended finding requires a majority vote of the board. The board may also recommend additional investigations or reviews, such as disciplinary investigations, training reviews to consider whether training should be developed or revised, and policy reviews, as may be appropriate. The board chairperson will submit the written recommendation to the Chief of Police.

The Chief of Police shall review the recommendation, make a final determination as to whether the member's actions were within policy and procedure, and determine whether any additional actions, investigations or reviews are appropriate. Those findings will be forwarded to the Sergeant for review and appropriate action. If the Chief of Police concludes that discipline should be considered, a disciplinary process will be initiated.

At the conclusion of any additional reviews, copies of all relevant reports and information will be filed with the Chief of Police.

PUBLICATION OF POLICY

This policy shall be readily available to the public upon request and shall be posted on the department website (Executive Law § 840).

