

Review of DOJ Report on Cleveland Division of Police

By Sal Culosi

The “*Joint Statement of Principles by the United States Department of Justice and the City of Cleveland Regarding the Cleveland Division of Police*” states that DOJ “concluded there is reasonable cause to believe that CDP engages in a pattern or practice of using excessive force in violation of the Fourth Amendment and also identified concerns about certain search and seizure practices.”

There are many examples and concerns presented in the report that relate to the following findings extracted verbatim from the report:

- The unnecessary and excessive use of deadly force, including shootings and head strikes with impact weapons;
- The unnecessary, excessive or retaliatory use of less lethal force including tasers, chemical spray and fists;
- Excessive force against persons who are mentally ill or in crisis, including in cases where the officers were called exclusively for a welfare check; and
- The employment of poor and dangerous tactics that place officers in situations where avoidable force becomes inevitable and places officers and civilians at unnecessary risk.

Detailing all instances that support the above findings is prohibitive for the Subcommittee. The attached Appendix A gives a good synopsis of the report but a presentation of even that outline may also be prohibitive for the Subcommittee. It may be easier to distribute that outline summary.

In any event, the main question is how the DOJ findings relate to FCPD. My personal experience indicates that the following extracts from the report may apply to FCPD regarding FCPD policy and practice for pointing weapons.

Report Extract #1 – the red is my emphasis

Page 13 Section IV. A.

CDP officers engage in a pattern or practice of unconstitutional force.

The most significant and “intrusive” use of force is the use of deadly force, which can result in the taking of human life, “frustrat[ing] the interest of . . . society . . . in judicial determination of guilt and punishment.” *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Use of deadly force (whether or not it actually causes a death) is permissible only when an officer has probable cause to believe that a suspect poses an immediate threat of serious physical harm to the officer or another person. *Id.* at 11. A police officer may not use deadly force against an unarmed and otherwise non-dangerous subject, *see Garner*, 471 U.S. at 11, and the use

of deadly force is not justified in every situation involving an armed subject. *Graham*, 490 U.S. at 386. The Sixth Circuit has recognized that “even when a suspect has a weapon, but the officer has no reasonable belief that the suspect poses a danger of serious physical harm to him or others, deadly force is *not* justified.” *Bougress v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007) (emphasis in original). **In order to justify the use of deadly force, an officer’s “sense of serious danger about a particular confrontation” must be both “particularized and supported.”**

We determined that, as part of the pattern or practice of excessive force, officers fire their guns in circumstances where the use of deadly force is not justified, including against unarmed or fleeing suspects who do not pose a threat of serious harm to officers or others. **We also discovered incidents in which CDP officers draw their firearms and even point them at suspects too readily and in circumstances in which it is inappropriate.**

Comment: My experience shows that prior practice was that SWAT officers traditionally drew their weapons to high ready (center of mass), which was counter to 2006 policy. We need clarification of current FCPD policy and practice of “ready gun” aimed at “center of mass”. The following documents suggest strongly that for safety of police and civilians pointing at “center of mass” is only justified when an officer is in the act of shooting.

<http://www.spartancops.com/target-habitation-law-enforcement-firearms-training/>
<https://www.swatmag.com/articles/the-low-ready-position>
<http://www.lawofficer.com/articles/print/volume-8/issue-2/training/ready-or-not.html>
http://www.theppsc.org/Staff_Views/DuVernay/covering%20suspects.htm

Report Extract #2 –

Page 45-46 Section IV.C.5.

CDP’s Use of Force Policy is Still Deficient.

The revised force policy also lacks sufficient guidance as to how force should be reported. It does not require specificity in officers’ descriptions of the force used and resistance encountered. Instead, it directs officers to describe the force and resistance by checking boxes in the “Action Response section” on the related form. There is no requirement in the policy that an additional explanation of each of these actions be included in a narrative. **The revised force policy still does not include the pointing of a firearm at a person in the definition of force, and does not require officers to report having pointed a firearm at a person. The dangers inherent in such a policy choice have played themselves out in Cleveland—officers draw and/or point their firearms too quickly, perhaps because they do not think of it as something that must be justified by the circumstances they are facing. As we have**

seen, officers' decisions to draw their firearms have resulted in unnecessary escalations of force, accidental discharges, and dangerous hands-on encounters with suspects while officers are holding their guns. Another consequence of failing to include this action as a reportable use of force is that supervisors do not even know that it has occurred unless it resulted in the use of force or occurred in conjunction with other types of force. Even in these instances, investigators do not investigate the propriety of the officer's decision to have drawn the gun in the first place and instead make conclusory statements about it being done "for officer safety." As a result, no one in CDP knows how often officers are pointing their firearms or under what circumstances, and the Division is unable to identify and rectify training and tactical concerns that this behavior may raise.

Comment: FCPD General Order 540.1 does address the issue of pointing weapons on page 3, which is quoted below. This policy needs clarification and possible revision in light of the DOJ Cleveland Report

Bottom of page 3 of Use of Force General Order 540.1

2. If feasible, when using a firearm for the purpose of deadly force, officers shall give the verbal warning, "Police, don't move!" prior to using deadly force. The pointing of a firearm in response to the actions of a subject to establish control and gain compliance shall be considered non-deadly use of force.

Report Extract #3 – (More appropriate to the Independent Oversight and Investigations Subcommittee).

Page 34: Section IV.C.3.a

CDP Fails to Adequately Investigate and Hold Officers Accountable for Misconduct.

Our review found that several of CDP's systems for investigating and holding officers accountable for the use of excessive force are flawed, including Internal Affairs, the Use of Deadly Force Investigation Team, and the Tactical Review Committee. In some cases, these flaws prevented the Division from holding officers accountable for serious misconduct. **The deficiencies were apparent in both the quality of the investigations and the outcome of those investigations. The quality of the investigations is compromised by investigators' apparent bias in favor of clearing the officer instead of objectively pursuing all of the available facts – a bias that more than one investigator actually admitted to our team.** Many investigations also lacked key documents and appeared incomplete, further undermining their quality. And CDP's improper use of *Garrity* warnings may severely interfere with investigations and prosecutions of criminal misconduct by officers.

Report Extract #4 –

55. Officers will not unholster and display a firearm unless the circumstances create a reasonable belief that lethal force may become necessary. CDP's policies will require and training will teach proper techniques for unholstering, displaying, pointing, and aiming a firearm, and for determining when it is appropriate to do so. The Monitor will review CDP's policies and training to ensure that they comply with this paragraph. If an officer unholsters a firearm during an incident, interaction, or event that would otherwise trigger a reporting or data collection requirement, officers will document that a firearm was unholstered. CDP will annually collect and analyze this data.

56. Unholstering a firearm and pointing it at a subject constitutes a Level 1 reportable use of force and will be reported and investigated as such. The following exceptions to this reporting requirement will apply:

- a. SWAT Team Officers will not be required to report the pointing of a firearm at a subject as a use of force during the execution of SWAT Team duties;
- b. officers who are deputized and assigned to a Federal Task Force will not be required to report the pointing of a firearm at a subject as a use of force when conducting federal task force operations during which a supervisor is present. Reports or forms regarding any such incidents that are otherwise prepared by a Task Force supervisor will be provided to CDP;
- c. officers assigned to the Gang Impact, Narcotics, Homicide, Sex Crimes, Domestic Violence, and Financial Crimes Units will not be required to report the pointing of a firearm at a subject as a use of force if done solely while entering and securing a building in connection with the execution of an arrest or search warrant and a supervisor prepares a report detailing the incident.

Appendix A – Outline of DOJ Cleveland Report

I. FINDINGS

II. BACKGROUND

III. METHODOLOGY

IV. FINDINGS

A. CDP officers engage in a pattern or practice of unconstitutional force.

1. CDP officers shoot at people who do not pose an imminent threat of serious bodily harm or death to the officers or others.
2. CDP officers hit people in the head with their guns in situations where the use of deadly force is not justified.
3. CDP officers use less lethal force that is disproportionate to the resistance or threat encountered.
 - a. Head and body strikes.
 - b. Tasers and OC Spray.
4. CDP officers use unreasonable force, including Tasers, against individuals with mental illness, individuals in medical crisis, and individuals with impaired faculties.

B. CDP officers commit tactical errors that endanger the Cleveland Community and reduce officer safety as well.

1. CDP officers carelessly fire their weapons, placing themselves, subjects, and bystanders at unwarranted risk of serious injury or death.
2. CDP officers use other dangerous and poor tactics, placing members of the Cleveland community at risk.

C. Systemic Deficiencies Cause or Contribute to the Excessive Use of Force.

1. CDP Does Not Ensure that Officers Adequately Report the Force they Use.
2. Supervisory Investigations of Force are Inadequate.
3. CDP's Internal Review Mechanisms are Inadequate.
 - a. CDP Fails to Adequately Investigate and Hold Officers Accountable for Misconduct.
 - i. The Internal Affairs Unit and the Use of Deadly Force Investigation Team do not conduct thorough and objective investigations of alleged officer misconduct.
 - ii. CDP applies Garrity protections too broadly.
 - iii. CDP does not implement appropriate corrective measures.
 - b. CDP Fails to Adequately Investigate Civilian Complaints of Officer Misconduct.
4. CDP Officers are Inadequately Supported and Trained.
5. CDP's Use of Force Policy is Still Deficient.
6. CDP's Early Intervention System is Inadequate.
7. CDP Is Not Engaging in Community Policing Effectively at All Levels of the Division.
8. CDP's Approach to Individuals in Crisis Is Underdeveloped.
9. CDP Equipment, Technology, and Staff Planning are Inadequate.

V. CONCLUSION