

5.6 DEFENDANT'S RIGHT TO COUNSEL AT LINE-UP IDENTIFICATIONS

- A. If a suspect is taken into custody by virtue of a summary arrest (i.e. no arrest warrant, no accusatory instrument filed, no indictment, etc.) the police need not advise the defendant of his/her right to counsel at the line-up.
- B. A defendant does have a right to an attorney at a line-up identification if:
1. an accusatory instrument has been filed with the court, or the defendant has been arraigned on the criminal charge, or the case was commenced by indictment; or,
 2. the defendant specifically requests the presence of an attorney; or,
 3. the Police are aware that the suspect is represented by an attorney regarding the investigation for which the line-up is being conducted; or,
 4. the line-up is being held pursuant to an ex-parte court order (i.e. obtained by the Police or the DA's Office without notice to the defendant or his/her attorney) and involves a suspect who is incarcerated on an unrelated matter.
- C. If the defendant specifically requests an attorney the Detective shall:
1. make a reasonable effort to contact the attorney;
 2. allow the attorney a reasonable amount of time to appear (usually two (2) hours, except in unusual circumstances).
- D. An attorney is permitted to make limited suggestions as to the conduct of the line-up. It is up to the discretion of the Officer conducting the line-up whether any of the attorney's suggestions will be implemented. The Officer may consult with the DA's Office regarding any such suggestions. All suggestions made by an attorney will be duly noted.

6.0 USE OF FORCE

6.1 POLICY

It is the policy of the Buffalo Police Department to use only that amount of physical force that is reasonably necessary to achieve a legitimate law enforcement objective, including protecting a person from the imminent use of physical force, effecting an arrest or preventing an escape from custody. Any force used must be consistent with the Fourth Amendment of the United States Constitution and Article 35 of the New York State Penal Law. Excessive or unreasonable force shall not be used.

6.2 USE OF FORCE - GENERALLY

A. Members of the Department must be familiar with Article 35 of the NYS Penal Law which outlines the legal parameters for the use of physical force and the use of deadly physical force.

B. Physical force shall only be used when no other viable option is available.

- C. When force is used, only that amount of force that is reasonably necessary to overcome a subject's resistance or aggression shall be employed.
- D. The use of force must be reasonable and can never be reckless.
- E. During an encounter in which force has become necessary, the level of resistance or aggression displayed by the subject may vary at different points in the encounter. The level of force used by the Officer shall be adjusted to changes in the suspect's level of resistance or aggression.

6.3 USE OF FORCE CONTINUUM

- A. Members of the Department may use no more than the amount of force reasonably necessary to achieve a legitimate law enforcement objective. In most cases, the degree of resistance or aggression displayed by a subject will be the primary factor in determining what level(s) of force by the Officer is reasonable and authorized. A subject's reaction to an Officer's attempts at control or restraint may be broadly classified into five categories. Those categories, together with the generally authorized Officer force response options, are set forth below:

1. Compliant/ Cooperative

The subject generally complies with the commands of the Officer and offers no resistance. In this instance the use of force is not authorized, but customary handcuffing and escort techniques are authorized.

2. Passive/Verbal Resistance

The subject passively resists the Officer's attempts to gain compliance or is verbally abusive, insulting or taunting and refuses to comply with the Officer's commands, but is not verbally threatening to cause imminent physical harm to the Officer or another person. The Officer shall use verbal techniques to achieve compliance and if those techniques are unsuccessful, is authorized to take physical control of the subject by grabbing, holding, and /or using customary handcuffing techniques on the subject.

3. Active Resistance

The subject makes physically evasive movements to defeat an Officer's attempt at control (e.g. bracing, tensing, moving away) or verbally threatens imminent harm to the Officer or another person or **verbally signals** an intention not to be taken into or retained in custody, providing the subject's intent to physically resist is clear. The Officer is authorized to physically restrain and take control of the subject by grabbing, holding forcibly handcuffing and/or using pain compliance holds and/or chemical agent on the subject.

4. Physical Resistance

The subject engages in or is about to engage in resistance or aggression that is aimed directly at the Officer. This includes grabbing, pushing, punching, kicking, biting, throwing objects or any behavior in which the Officer

becomes the object of the subject's actions. Physical resistance also includes that situation in which an Officer reasonably believes that the subject is using or is about to use the above degree of physical force against another person. The Officer is authorized to use the amount of force reasonably necessary to overcome the resistance or aggression by using chemical agent, physical skills, physical tactics or impact weapons, or any appropriate lesser means of force.

5. Deadly Resistance

The subject engages or is about to engage in such an escalated level of resistance or aggression that the Officer reasonably believes the subject's actions constitute "deadly physical force." "Deadly physical force" means physical force that, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury. It may include attempts to render the Officer unconscious, grabbing for the Officer's service firearm, blows to vital organs, stabbing, shooting, or any other action that would create a likelihood of causing the Officers serious physical injury or death. This category also includes a subject who an Officer reasonably believes is using or is about to use deadly physical force on another person. This level of resistance or aggression authorizes the Officer to use the amount of force reasonably necessary to preserve life or prevent serious physical injury and includes the use of deadly physical force.

B. Although a subject's level of resistance or aggression is usually the primary factor that determines what level of force is reasonable and authorized, there may be other factors present that may reasonably cause an Officer to escalate or de-escalate the level of force used during an encounter. These factors include, but are not limited to:

1. Officer/Subject Factors (e.g. relative age, size, strength, skill level, injury/exhaustion, number of Officers versus number of subjects);
2. Influence of drugs or alcohol;
3. Presence/proximity of weapons;
4. Other tactical factors (e.g. position of advantage, cover, time for decision);
5. Availability of other viable force options.

6.4 USE OF DEADLY PHYSICAL FORCE

A. Members of the Department may use deadly physical force but only when it is necessary to defend the Officer or third person from what the Officer reasonably believes to be the use or imminent use of deadly physical force.

B. Even if the use of deadly physical force is authorized, the Officer may not be reckless in its use.

C. Depending upon the circumstances in which they are utilized, the use of the night stick, restraining holds, police vehicles, as well as service firearms, may be construed as the use of deadly physical force.

6.5 USE OF FIREARMS

- A. Members of the Department shall discharge their firearms at a person only in those circumstances in which it is necessary to defend the Officer or another person from what the Officer reasonably believes to be the imminent use of deadly physical force. In attempting to take a suspect into custody, members of the Department shall discharge their firearms only in those circumstances in which the member reasonably believes that the use of deadly physical force by the suspect is imminent.
- B. Members shall not discharge a firearm or shoulder weapon from or at a moving vehicle or its occupants unless the occupants of the other vehicle are using deadly physical force against you or another person by means other than the vehicle. Members shall not discharge their firearms at or from a moving vehicle when the consequences of so doing will jeopardize the safety of other members of the Department or innocent bystanders.
- C. In those circumstances in which members of the Department are justified in discharging their firearms, they are not allowed to do so recklessly.
- D. Warning shots are prohibited.
- E. Members of the Department may use their firearms for target practice or competition at an approved range. Dry firing or other forms of practice on any Departmental property, except under the personal direction of a firearms instructor, is strictly prohibited.
- F. Members of the Department may use their firearms to incapacitate wild, vicious or rabid animals consistent with the guidelines set forth in M.O.P. Chapter 2.

6.6 DRAWING WEAPONS

- A. A member of the Department is authorized to remove his/her firearm from its holster or gun mount and have it ready for immediate use, in any circumstance in which the member reasonably believes his/her life or safety may be in danger.
- B. A member of the Department may point his/her firearm at a person when the officer reasonably believes that the person poses an immediate risk of death or serious physical injury to any other person.

6.7 REPORTING REQUIREMENTS – USE OF FORCE OR INJURIES TO CIVILIANS

- A. Reporting requirements shall apply whether an incident occurred on or off-duty. A member of the Department shall prepare a Use of Force Report (via Blue Team) when (s)he:

1. applies any level of physical force as defined in Section 6.3 A3, A4 or A5 above on a person;
or
2. uses chemical spray on or affecting a person;
3. charges a subject with resisting arrest in violation of the NYS Penal Law Section 205.30.
 - a. When a member of the Department charges a subject with resisting arrest in violation of the NYS Penal Law Section 205.30, that member shall promptly notify their immediate on duty supervisor. The on-duty Supervisor shall as soon as practical, and in any event prior to the end of their tour of duty, conduct an investigation into the circumstances of the arrest and enter their findings on the subordinate's Use of Force Report (via Blue Team).
 - b. If more than one officer is involved and uses any level force as defined above, each officer shall prepare a Use of Force Report Use of Force Report (via Blue Team).

B. In addition to a Use of Force Report, a member of the Department shall prepare a written report on an Intra-Departmental Memorandum (form P-73) whenever the member:

1. discharges his/her firearm for other than training or recreational purposes (refer to M.O.P. Chapter 3) (also see M.O.P. Chapter 8);
2. takes any law enforcement action that results in, or is alleged to have resulted in, serious physical injury or death to another person.

C. All reports submitted pursuant to subdivision "A" and "B" above shall be completed prior to the officer's tour of duty and forwarded through the chain of command to the Internal Affairs Division. The Use of Force Report shall be submitted (via Blue Team). Each member in the chain of command shall review the report for completeness, accuracy and conformity with the Department's use of force policy (via Blue Team). Each member in the chain of command shall enter their comments on the Use of Force Report (via Blue Team). The final approved report shall be completed **within 10 days** of the incident.

In the event the Use of Force Report (via Blue Team) cannot be utilized the following procedures will be followed:

The hard copy P-1374 will be completed. The on duty supervisor shall fax the P-1374 to the Internal Affairs Division at extension [REDACTED] prior to the end of their tour of duty. If a fax is not possible, the on duty supervisor shall immediately send an email the IAD Inspector. The email shall contain an explanation for the inability to fax the report, the involved officer(s) name(s), the subject's name, and the incident number.

D. In the event an officer is incapacitated and unable to prepare the proper reports, the member's immediate Supervisor shall cause the reports to be prepared on the member's behalf (via Blue Team).

- E. The Internal Affairs Division shall review all such reports and make recommendations to the Commissioner. In addition, the Internal Affairs Division shall make an annual review of all such incidents and report any patterns or trends that may necessitate additional or modified training or that may require alterations in policy.
- F. The Training Academy Captain shall access Blue Team to determine if there are any training issues needing to be addressed

6.8 PERSONS INJURED RESULTING FROM THE USE OF FORCE

In all circumstances in which a person is injured by a member of the Department as a result of the use of force other than deadly physical force:

- A. the member shall have the injured person taken for medical treatment to the Erie County Medical Center, ECMC;
- B. notify his/her immediate supervisor;
- C. prepare form P-1261 (Request For Medical Attention of Injured Prisoner).

6.9 USE OF CHEMICAL SPRAY

A. The Product

The only chemical agent projector (C.A.P.) to be used by an on duty member of the Buffalo Police Department is the Department issued.

B. Issuance

The Department issues authorized chemical agent projectors to those Officers trained in its use. The chemical agent projector issued by the Department is for on duty use only and it is not to be used or carried while the member is off-duty or while employed outside the Department.

C. Replacement

Requests for replacement of empty or malfunctioning chemical agent projectors shall be submitted to the Police Academy on an Intra-Departmental Memorandum (P-73), which shall include an explanation of the necessity for the replacement. When an Officer requests replacement of an empty container, a check will be made to determine if the appropriate number of reports (P-1174) have been submitted to reflect why the chemical agent container is empty. If an appropriate number of reports have not been submitted, the Officer will not be issued a replacement chemical agent.

1. Although chemical agent containers are stamped with a date on the canister, the chemical agent is effective as long as the product is able to be discharged from the canister.
2. If an issued chemical agent projector is lost by any member of the Department, the member must immediately report the loss in writing. The report shall detail the circumstances of the incident and shall be forwarded to the Training Academy through the chain of command.

D. Use

1. In General

Chemical agent projector spray is a use of force and shall be used only in conformity with the Departmental policy on use of force. Accordingly, chemical agent projector spray may be used only when its use is reasonably necessary to achieve a legitimate law enforcement objective. As a general rule, chemical agent projector spray is authorized for use on a subject when an Officer encounters "Active Resistance" or "Physical Resistance", as those terms are defined in the Department's Use of Force Continuum.

E. Officer Accidentally Sprayed With A Chemical Agent

In the event that an Officer is accidentally sprayed with a chemical agent, or is intentionally sprayed by another person, the safety of that Officer becomes paramount. The attempted apprehension of the suspect must be abandoned if the safety of the sprayed Officer is unduly jeopardized.

F. Decontamination

1. The arresting Officer is responsible for the decontamination of any prisoner sprayed with a chemical agent. Decontamination will be accomplished in accordance with procedures and regulations at the City Court Lock-up.
2. If the chemical agent is used indoors, occupants are to be advised to air out the room where the chemical agent was used, for at least one hour before using the room.

G. Reporting

1. A Use of Force Report (via Blue Team) must be completed any time a member of the Department discharges a chemical agent, except those discharges occurring during testing, training, a malfunction, a use against an animal or an accidental discharge with no person affected. A Use of Force Report (via Blue Team) shall be completed by each Officer using the chemical agent.
2. Accidental discharges with no person affected or uses against animals require an Intra- Departmental Memorandum with explanation directed to the Training Academy.

6.10 PERSONS KILLED OR SERIOUSLY INJURED AS A RESULT OF THE USE OF DEADLY PHYSICAL FORCE

A. While on duty

In all circumstances in which a person is killed or seriously injured by an on duty member of the Department and is the result of the use of deadly physical force:

1. the member shall call for medical attention if the person is still alive;

2. the member shall immediately notify his/her immediate supervisor who shall notify the 911 Communications Lieutenant, whom will notify the Commissioner
3. the Homicide Squad shall conduct the investigation.
4. members shall follow the guidelines set out in M.O.P. Chapter 17.

B. While off duty

In all circumstances in which a person is killed or seriously injured by an off duty member of the Department and is the result of the use of deadly physical force:

1. the member shall immediately notify the law enforcement agency in the jurisdiction in which the incident occurred and shall request medical attention if the person is still alive;
2. the member shall immediately notify his/her commanding officer, or in the commanding officer's absence, the 911 Communications Lieutenant;
3. the member shall follow the guidelines set out in M.O.P. Chapter 17;
4. and if the incident occurred outside of the city, the 911 Communications Lieutenant shall send Buffalo Police personnel to investigate.

6.11 DISCHARGE OF FIREARMS - REPORTING REQUIREMENTS

A. BPD Firearms Report - Intra-Departmental Memorandum - E-Mail Message

Whenever a member discharges a firearm(s) while on duty, other than in practice or at a firearms range, (s)he shall immediately report the incident to the Supervisor on duty in the District in which the incident occurred, except that if the discharge occurred in the headquarters building, the 911 Communications Lieutenant shall be notified. The member must also immediately report the incident to his/her own Supervisor. The member's command will be responsible for obtaining an event number and transmitting an E-Mail message reporting the incident. The member shall prepare a report on an Intra-Departmental Memorandum prior to reporting off duty, relating the details of the incident. The Intra-Departmental Memorandum shall be addressed to the Commissioner, attention to the appropriate Commanding Officers in the chain of command. The member shall also prepare a Firearms Use Report (BPD-1) according to the instructions on that form and before the member reports off duty.

B. Investigation by Commanding Officer - Intra-Departmental Memorandum

The Commanding Officer of the member discharging the firearm shall conduct a complete investigation of the incident and file a report on an Intra-Departmental Memorandum. The report shall be addressed to the Commissioner, attention the appropriate District/Division Commanding Officer in the chain of command.

Distribution: Original and copy of form BPD-1, the member's Intra-Departmental Memorandum and the Commanding Officer's Investigation Report on an Intra-Departmental Memorandum shall be sent to the appropriate District/Division Chief; third copy to command files.

C. Action by the District/Division Chief

The District/Division Chief shall carefully examine all reports. They shall make further inquiry as they deem appropriate. The Chief shall make recommendations

concerning training, discipline, approval of the member's action, or other appropriate action on an Intra-Departmental Memorandum.

D. Incidents Occurring While Off Duty

1. If a member discharges a firearm while off duty, whether intentionally or accidentally, the member shall notify the police authorities in the jurisdiction in which the incident occurred, and (s)he shall also be responsible for submitting a Firearms Use Report (Form BPD-1) and an Intra-Departmental Memorandum to his/her commanding officer, except that no such notification or report need be made if the officer was legitimately engaged in target practice or hunting.
2. If a member intentionally or accidentally discharges a firearm while off duty and the result is an injury to himself/herself, or injury or death to another, the member shall immediately contact the law enforcement authorities in the jurisdiction in which the incident occurred. Medical attention shall be requested and the scene of the incident preserved (refer M.O.P. Chapter 17). The member must immediately contact his/her Commanding Officer, or in the Commanding Officer's absence, the 911 Communications Lieutenant, and shall as soon as practicable there after, complete a Firearms Use Report and an Intra- Departmental Memorandum.

E. Investigating Incidents Occurring Outside the City

Whenever a member of the Department intentionally or accidentally discharges their firearm while outside the city, other than when legitimately involved in hunting or target practice, the 911 Communications Lieutenant or the Duty Inspector will determine whether a member of the Buffalo Police Department will respond to the incident based on the following:

1. the apparent surrounding circumstances;
2. the severity of the injuries, if any;
3. the possibility of criminal conduct by the member;
4. the distance from the City.

6.12 ADMINISTRATIVE DUTY

At the discretion of the Police Commissioner or his/her designee, any member involved in a shooting or any other incident resulting in death or serious physical injury to another, may be temporarily assigned to administrative duty. Administrative duty, for purposes of this section, is any assignment that does not ordinarily require the making of arrests. Assignment to administrative duty is in no way a punitive measure and shall be used when it tends to advance the mission and goals of the Department.

6.13 ANNUAL INSTRUCTION ON USE OF FORCE

All members of the Department authorized to carry weapons shall receive a copy of the Department's use of force policies as established in this section and shall receive instruction on these policies during their annual firearms qualification at the Firearms Unit.

- B. The Duty Officer shall respond to the scene of each high risk incident and assume overall command of the operation. During the negotiation phase, when the CMT is attempting to peacefully resolve the incident, the CMT Commander shall be in charge of negotiations and related components of the operation. During the SWAT phase, the SWAT Commander shall be in charge of the SWAT operation and related components.
- C. Before the arrival of the CMT Unit, the Duty Officer shall supervise attempts by Officers to initiate communication with the armed subject or attempts at preliminary dialogue.
- D. The Duty Officer shall determine the need for any specialized equipment.
- E. The Duty Officer shall cooperate with other agencies or jurisdictions and coordinate operations of specialized units.
- F. The Duty Officer shall order unneeded personnel back to their regular assignments.
- G. In high risk incidents in which the suspect is killed or seriously wounded, the Duty Officer shall order the Homicide Squad to conduct a follow up investigation.
- H. The Duty Officer shall request the assistance of the Internal Affairs Division at the scene of any high risk incident in which (s)he believes there exists the possibility that Departmental Rules or Regulations have been transgressed or that Department members have violated any criminal statutes stemming from the incident.

13.10 REPORTS REQUIRED

- A. After each high risk incident in which they were involved, the following members shall submit reports to the Commissioner's Officer through the chain of command:
 - 1. CMT Commander
 - 2. SWAT Commander
 - 3. District Supervisor
 - 4. the initial responding officers.
- B. The CMT Commander and the SWAT Commander will critique each high risk incident with members of their respective units as well as with the DPC and the District Chief, and make recommendations for handling future high risk incidents.

1. a P-10A shall be prepared,
2. the weapons turned over to the member's Superior Officer, and
3. the weapons safeguarded in the Property Office.

9.0 RESTRAINING EQUIPMENT

9.1 AUTHORIZED RESTRAINING EQUIPMENT

Members of the Department shall use only that type of restraining equipment specifically authorized by the Department and for which they have received proper training. Any other type of restraining equipment is prohibited (e.g. metal knuckles, blackjacks, saps, sap gloves, stun guns, etc.), except with the written approval of the Commissioner.

A. The Department has authorized the following types of restraining equipment:

1. metal handcuffs and Department issued plastic type restraining cuffs;
2. Department issued police baton and/or ASP;
3. Department issued chemical spray.



BUFFALO POLICE DEPARTMENT TRAINING BULLETIN

DANIEL DERENDA
Commissioner of Police

October 2, 2015

TRAINING BULLETIN – 2015- 33 USE OF FORCE- REPORTING REQUIREMENTS

PURPOSE: TO REMIND OFFICERS OF THE BUFFALO POLICE DEPARTMENT'S MANUAL OF PROCEDURE CHAPTER 3/6.7 USE OF FORCE REPORTING REQUIREMENTS- "BLUE TEAM"

Buffalo Police Department Manual of Procedure Chapter 3

6.7 REPORTING REQUIREMENTS – USE OF FORCE OR INJURIES TO CIVILIANS

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or
 2. uses chemical spray on or affecting a person;
 3. charges a subject with resisting arrest in violation of the NYS Penal Law Section 205.30.
 - a. When a member of the Department charges a subject with resisting arrest in violation of the NYS Penal Law Section 205.30, that member shall promptly notify their immediate on duty supervisor. The on-duty Supervisor shall as soon as practical, and in any event prior to the end of their tour of duty, conduct an investigation into the circumstances of the arrest and enter their findings on the subordinate's Use of Force Report (via Blue Team).
 - b. If more than one officer is involved and uses any level force as defined above, each officer shall prepare a Use of Force Report Use of Force Report (via Blue Team).
- B. In addition to a Use of Force Report, a member of the Department shall prepare a written report on an Intra-Departmental Memorandum (form P-73) whenever the member:
1. discharges his/her firearm for other than training or recreational purposes (refer to M.O.P. Chapter 3) (also see M.O.P. Chapter 8);
 2. takes any law enforcement action that results in, or is alleged to have resulted in, serious physical injury or death to another person.
- C. All reports submitted pursuant to subdivision "A" and "B" above shall be completed prior to the officer's tour of duty and forwarded through the chain of command to the Internal Affairs Division. The Use of Force Report shall be submitted (via Blue Team). Each member in the chain of



BUFFALO POLICE DEPARTMENT TRAINING BULLETIN

command shall review the report for completeness, accuracy and conformity with the Department's use of force policy (via Blue Team). Each member in the chain of command shall enter their comments on the Use of Force Report (via Blue Team). The final approved report shall be completed **within 10 days** of the incident.

In the event the Use of Force Report (via Blue Team) cannot be utilized the following procedures will be followed:

The hard copy P-1374 will be completed. The on duty supervisor shall fax the P-1374 to the Internal Affairs Division at extension 5229 prior to the end of their tour of duty. If a fax is not possible, the on duty supervisor shall immediately send an email the IAD Inspector. The email shall contain an explanation for the inability to fax the report, the involved officer(s) name(s), the subject's name, and the incident number.

- D. In the event an officer is incapacitated and unable to prepare the proper reports, the member's immediate Supervisor shall cause the reports to be prepared on the member's behalf (via Blue Team).
- E. The Internal Affairs Division shall review all such reports and make recommendations to the Commissioner. In addition, the Internal Affairs Division shall make an annual review of all such incidents and report any patterns or trends that may necessitate additional or modified training or that may require alterations in policy.
- F. The Training Academy Captain shall access Blue Team to determine if there are training issues needing to be addressed