

# MEMORANDUM

Milpitas Police Department



**DATE:** June 15, 2020

**TO:** Honorable Mayor and Councilmembers

**THROUGH:** Steve McHarris, City Manager *Steve McHarris*

**FROM:** Armando Corpuz, Chief of Police *Armando Corpuz*

**SUBJECT:** **Police Department Updates Over Recent National Concerns**

The death of George Floyd, three weeks ago, at the hands of a police officer that should have been protecting Mr. Floyd has stirred questions and concerns over police use of force, policies, practices, accountability and social racial disparities. Although our Milpitas Police Department has not had similar excessive force cases, I know it is important for you to know current police operations. I wish to share with you some statistics, information on policies, and steps we will be taking to respond to community questions and concerns.

## **Use of Force Policy and Statistics**

We are committed to the preservation of safety and life during our police contacts and under that principle there are interactions that result in injuries to citizens and officers. When needed, our policy and state statute allow our officers the ability to use force that is reasonably necessary to accomplish an objective of effecting an arrest, overcoming escape, or overcoming resistance. We take these actions extremely seriously and our goal is to carry out these responsibilities without harm to anyone. Unfortunately, our actions are often in response to violence towards others or officers and force is periodically required.

We critically review each use of force to ensure the officer's decision-making and actions were within policy, training, and law. Front line supervisors review the actions and the review is forwarded up to the chain of command to the Chief's Office. In reviewing the cases, we found the following:

Year	Use of Force Incidents
2020 (YTD)	0
2019	6
2018	12
2017	3

In reviewing the use of force events in the aforementioned years, we found that most instances involved individuals under the influence of drugs and alcohol or in a state of mental crisis. The uses of force ranged from using pepper spray, a baton, a Taser, or physical strikes. In our assessment, we can anecdotally contribute to the most recent reduction in use of force to ongoing de-escalation training and a reduction in arrests. To date, approximately 90% of our patrol staff has received training in de-escalation with the ongoing objective to train all staff. We have had numerous instances where officers could have justifiably used force but their recognition to create distance allowed them an opportunity to have individuals peacefully surrender.

The Milpitas Police Department's use of force policy includes a duty to intercede if officers witness others imposing unreasonable force and provides a requirement to report such actions to a supervisor.

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I have attached our use of force policy for your review, if necessary. You will find that this policy does not include a stand-alone section for de-escalation. The de-escalation remains in our training plans, a policy for conducted energy devices, and a policy on interacting with individuals in mental crisis. We will update our manual to include a stand-alone policy on de-escalation.

On June 9, 2020, I suspended the use of the Carotid Restraint, which is sometimes mistaken as a chokehold. This restraint restricts blood flow to the brain that can briefly incapacitate a violent individual. This policy is being evaluated and will be likely amended.

We maintain early warning system software to track our use of force cases. The software is limited in its ability and cannot publish online dashboards similar to the San Jose Police Department. For the amount of cases we experience, the software is sufficient.

### **8cantwait.org**

The 8cantwait campaign is a project sponsored by Campaign Zero to implement policy changes to reduce police use of force incidents. The 8cantwait campaign desires policy changes in banning chokeholds, requiring de-escalation, require warning before shooting, exhaust all alternatives before shooting, duty to intervene, ban shooting at moving vehicles, require use of force continuum, and comprehensive force reporting.

I reported to you, in my June 12, 2020 email, that the Milpitas Police Department is already aligned in the practices of the 8cantwait campaign. We are evaluating policies related to these areas and will be updating them so they are reflective of existing training plans and practice.

### **No-Knock Search Warrants**

No-Knock search warrants, although legal when approved by a judge, are controversial and can negatively impact the safety of community members and officers. In my time with the Milpitas Police Department, I cannot recall an instance where such a tactic was used. We do not use this search warrant method because the safety of all our stakeholders is paramount when carrying out a high-risk task. My staff will be evaluating the policy on this item to determine whether they should be permanently banned or restricted for use only under the most extreme circumstances where a life is in jeopardy.

### **1033 Program**

The Defense Logistics Agency provides unneeded excess equipment and furniture to many law enforcement agencies. The Milpitas Police Department has participated in this program, since 2013, and have obtained 15 rifles from the federal government. These rifles are used for our Honor Guard Team, front line officers assigned to our Traffic Safety Unit, and members of our SWAT team.

This equipment procurement allowed the Police Department to acquire needed equipment at a time when it was cost prohibitive because of budget restraints. The use of this equipment is not militarizing the Police Department. For example, our Traffic Safety Officers are first responders and are able to respond quickly to active violent incidents, including active shooters. The use of this equipment provides officers the necessary tools to protect the public at the most extreme times. I have no intention of accessing additional equipment under this program.

### **Citizen Complaints and Supervisory Investigations**

Our Police Department accepts written and verbal complaints from citizens and initiates supervisory investigations for policy violations related to performance and behavior. We thoroughly investigate each complaint through interviews, reviewing evidence, reviewing radio traffic, reviewing body-worn camera footage, and the evaluation of any other factor associated to the complaint. The final findings of all internal affairs investigations and imposed discipline rests with the Chief of Police.

From 2017 to 2020, our Police Department supervisory staff initiated (17) investigations over policy violations and 76% of the investigations resulted in sustained findings. A sustained finding usually results in a form of discipline from written reprimand to job loss. Our staff worked closely with the District Attorney's Office during one of these investigations to prosecute a former officer for filing a false police report.

During the same time frame, the Police Department has received (12) written citizen complaints with 8% resulting in sustained findings and 8% with inconclusive findings. At first glance, the sustained percentage could prompt questions as to why the sustained finding is not higher. In review of these complaints, we found the officer's actions to be in compliance with policy and law, we found that some complainants provided inaccurate information, and there are instances of individuals with mental illness filing complaints that have no merit. Regardless of the premise of the complaint, we are compelled to investigate each matter and we take each item seriously.

The Milpitas Police Department's process for handling complaints is effective and fair. We maintain an environment of high expectations and accountability. The final findings for all investigations will remain with the Chief of Police.

### **Public Safety and Emergency Preparedness Commission (PSEPC)**

We have previously taken developing critical police policies before the PSEPC. Now, I intend to begin a routine of bringing existing policies before the PSEPC to obtain feedback from the commission and our community. Critical policies involving use of force, detentions, search warrants, and others will be brought before the commission first.

Today, Attorney General Becerra released a statement on future changes in law enforcement practices. These practices include canine use, decertifying peace officers for serious conduct, expanding reviews of law enforcement policies, reexamining the use of police in addressing homelessness, and other previously mentioned items in the 8cantwait campaign. As statute or best practices change, we will update or policies and provide an opportunity for the PSEPC to provide input. I will provide the council with periodic updates from the PSEPC meetings.

### **Future Steps under Consideration**

If the community and / or City Council wishes to view timely updates and analysis of use of force cases similar to the San Jose Police Department, we can acquire the service. In 2018, we reviewed the service and, based on the existing circumstances, I opted to not acquire the service because of cost.

In early 2020, I intended to form a Chief's Citizen Advisory Board. I expected the board to consist with up to 20 community members that represent all aspects of our community, but the pandemic compelled me to pause on this item. The advisory board's purpose would be to provide feedback on items such as policy, service delivery, community quality of life issues, crime, and present new ideas. I will revisit this item as we progress through pandemic and other current events.

There is ongoing discussion over third-party review of citizen complaint investigations. I will have staff evaluate options for third-party investigation review.

The Police Department staff will coordinate community meetings to answer questions and be responsive to concerns. It is imperative, now more than ever, that we continue to strengthen our community relationships. The first meeting will be held tomorrow with the organizers of the June 7, 2020 protest and march.

As previously mentioned, the Police Department staff will continue to evaluate training standards and policy to ensure they remain consistent with best practices.

### **In Conclusion**

Members of the Milpitas Police Department pride themselves on providing responsive and fair police services to a supportive community. We value safety, the sanctity of life, and service. In the last two years, the Police Department received community satisfaction ratings of 85% and 84%. We continue to be referenced as a model agency as it relates to Principled Policing.

We will continue to strive to improve our operations, strengthen our community relationships, and hold ourselves accountable for mistakes. The desire for any recommended local changes should remain specific to building on the strengths and areas of needed improvement with the Milpitas Police Department and not reform specific to other cities.

Thank you for your ongoing support. The women and men of the Police Department appreciate it.

Encl: Milpitas Police Department Use of Force Policy

# Use of Force

## 300.1 PURPOSE AND SCOPE

This policy provides guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, every member of this department is expected to use these guidelines to make such decisions in a professional, impartial and reasonable manner.

### 300.1.1 DEFINITIONS

Definitions related to this policy include:

**Deadly force** - Any use of force that creates a substantial risk of causing death or serious bodily injury, including but not limited to the discharge of a firearm (Penal Code § 835a).

**Force** - The application of physical techniques or tactics, chemical agents, or weapons to another person. It is not a use of force when a person allows him/herself to be searched, escorted, handcuffed, or restrained.

## 300.2 POLICY

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, may use reasonable force in carrying out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

### 300.2.1 DUTY TO INTERCEDE

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.

## 300.3 USE OF FORCE

Officers shall use only that amount of force that reasonably appears necessary given the facts and totality of the circumstances known to or perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose (Penal Code § 835a).

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably

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appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain, and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons, or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be objectively reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

While the ultimate objective of every law enforcement encounter is to avoid or minimize injury, nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force.

#### **300.3.1 USE OF FORCE TO EFFECT AN ARREST**

Any peace officer may use objectively reasonable force to effect an arrest, to prevent escape, or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance on the part of the person being arrested; nor shall an officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or to overcome resistance. Retreat does not mean tactical repositioning or other de-escalation techniques (Penal Code § 835a).

#### **300.3.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE**

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include but are not limited to:

- (a) The apparent immediacy and severity of the threat to officers or others (Penal Code § 835a).
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The conduct of the involved officer (Penal Code § 835a).
- (e) The effects of drugs or alcohol.
- (f) The individual's apparent mental state or capacity (Penal Code § 835a).
- (g) The individual's apparent ability to understand and comply with officer commands (Penal Code § 835a).

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- (h) Proximity of weapons or dangerous improvised devices.
- (i) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (j) The availability of other reasonable and feasible options and their possible effectiveness (Penal Code § 835a).
- (k) Seriousness of the suspected offense or reason for contact with the individual.
- (l) Training and experience of the officer.
- (m) Potential for injury to officers, suspects, and others.
- (n) Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
- (o) The risk and reasonably foreseeable consequences of escape.
- (p) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (q) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (r) Prior contacts with the subject or awareness of any propensity for violence.
- (s) Any other exigent circumstances.

#### 300.3.3 PAIN COMPLIANCE TECHNIQUES

Pain compliance techniques may be effective in controlling a physically or actively resisting individual. Officers may only apply those pain compliance techniques for which they have successfully completed department-approved training. Officers utilizing any pain compliance technique should consider:

- (a) The degree to which the application of the technique may be controlled given the level of resistance.
- (b) Whether the person can comply with the direction or orders of the officer.
- (c) Whether the person has been given sufficient opportunity to comply.

The application of any pain compliance technique shall be discontinued once the officer determines that compliance has been achieved.

#### 300.3.4 CAROTID CONTROL HOLD

The proper application of the carotid control hold may be effective in restraining a violent or combative individual. However, due to the potential for injury, the use of the carotid control hold is subject to the following:

- (a) The officer shall have successfully completed department-approved training in the use and application of the carotid control hold.

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- (b) The carotid control hold may only be used when circumstances perceived by the officer at the time indicate that such application reasonably appears necessary to control a person in any of the following circumstances:
  1. The subject is violent or physically resisting.
  2. The subject, by words or actions, has demonstrated an intention to be violent and reasonably appears to have the potential to harm officers, him/herself or others.
- (c) The application of a carotid control hold on the following individuals should generally be avoided unless the totality of the circumstances indicates that other available options reasonably appear ineffective, or would present a greater danger to the officer, the subject or others, and the officer reasonably believes that the need to control the individual outweighs the risk of applying a carotid control hold:
  1. Females who are known to be pregnant
  2. Elderly individuals
  3. Obvious juveniles
  4. Individuals who appear to have Down syndrome or who appear to have obvious neck deformities or malformations, or visible neck injuries
- (d) Any individual who has had the carotid control hold applied, regardless of whether he/she was rendered unconscious, shall be promptly examined by paramedics or other qualified medical personnel and should be monitored until examined by paramedics or other appropriate medical personnel.
- (e) The officer shall inform any person receiving custody, or any person placed in a position of providing care, that the individual has been subjected to the carotid control hold and whether the subject lost consciousness as a result.
- (f) Any officer attempting or applying the carotid control hold shall promptly notify a supervisor of the use or attempted use of such hold.
- (g) The use or attempted use of the carotid control hold shall be thoroughly documented by the officer in any related reports.

#### 300.3.5 USE OF FORCE TO SEIZE EVIDENCE

In general, officers may use reasonable force to lawfully seize evidence and to prevent the destruction of evidence. However, officers are discouraged from using force solely to prevent a person from swallowing evidence or contraband. In the instance when force is used, officers should not intentionally use any technique that restricts blood flow to the head, restricts respiration or which creates a reasonable likelihood that blood flow to the head or respiration would be restricted. Officers are encouraged to use techniques and methods taught by the Milpitas Police Department for this specific purpose.

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In the event where a person has swallowed evidence or contraband, that person shall be promptly examined by paramedics or otherqualified medical personnel and should be monitored until examined by paramedics or other appropriate personnel.

### **300.4 DEADLY FORCE APPLICATIONS**

If an objectively reasonable officer would consider it safe and feasible to do so under the totality of the circumstances, officers should evaluate the use of other reasonably available resources and techniques when determining whether to use deadly force. The use of deadly force is only justified in the following circumstances (Penal Code § 835a):

- (a) An officer may use deadly force to protect him/herself or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury to the officer or another person.
- (b) An officer may use deadly force to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, the officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

Officers shall not use deadly force against a person based on the danger that person poses to him/ herself, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the officer or to another person (Penal Code § 835a).

An “imminent” threat of death or serious bodily injury exists when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the officer or another person. An officer’s subjective fear of future harm alone is insufficient as an imminent threat. An imminent threat is one that from appearances is reasonably believed to require instant attention (Penal Code § 835a).

#### **300.4.1 SHOOTING AT OR FROM MOVING VEHICLES**

Shots fired at or from a moving vehicle are rarely effective. Officers should move out of the path of an approaching vehicle instead of discharging their firearm at the vehicle or any of its occupants. An officer should only discharge a firearm at a moving vehicle or its occupants when the officer reasonably believes there are no other reasonable means available to avert the threat of the vehicle, or if deadly force other than the vehicle is directed at the officer or others.

Officers should not shoot at any part of a vehicle in an attempt to disable the vehicle.

### **300.5 REPORTING THE USE OF FORCE**

Any use of force by a member of this department shall be documented promptly, completely and accurately in an appropriate report, depending on the nature of the incident. The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. To collect data for purposes of training, resource allocation, analysis and related

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purposes, the Department may require the completion of additional report forms, as specified in department policy, procedure or law.

### 300.5.1 NOTIFICATION TO SUPERVISORS

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain.
- (d) The individual indicates intent to pursue litigation.
- (e) Any application of a TASER device or control device.
- (f) Any application of a restraint device other than handcuffs, shackles or belly chains.
- (g) The individual subjected to the force was rendered unconscious.
- (h) An individual was struck or kicked.
- (i) An individual alleges any of the above has occurred.

### 300.5.2 REPORTING TO CALIFORNIA DEPARTMENT OF JUSTICE

The Records Supervisor or the authorized designee shall ensure that statistical data required by the California Department of Justice (DOJ) regarding all officer-involved shootings and incidents involving use of force resulting in serious bodily injury is to be reported to the California Department of Justice as required by Government Code § 12525.2.

## **300.6 MEDICAL CONSIDERATION**

Prior to booking or release, medical assistance shall be obtained for any person who exhibits signs of physical distress, who has sustained visible injury, expresses a complaint of injury or continuing pain, or who was rendered unconscious. Any individual exhibiting signs of physical distress after an encounter should be continuously monitored until he/she can be medically assessed.

Based upon the officer's initial assessment of the nature and extent of the subject's injuries, medical assistance may consist of examination by fire personnel, paramedics, hospital staff or medical staff at the jail. If any such individual refuses medical attention, such a refusal shall be fully documented in related reports and, whenever practicable, should be witnessed by another officer and/or medical personnel. If a recording is made of the contact or an interview with the individual, any refusal should be included in the recording, if possible.

The on-scene supervisor or, if the on-scene supervisor is not available, the primary handling officer shall ensure that any person providing medical care or receiving custody of a person following any use of force is informed that the person was subjected to force. This notification shall include a description of the force used and any other circumstances the officer reasonably believes would

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be potential safety or medical risks to the subject (e.g., prolonged struggle, extreme agitation, impaired respiration).

Persons who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond their physical characteristics and imperviousness to pain (sometimes called “excited delirium”), or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. Calls involving these persons should be considered medical emergencies. Officers who reasonably suspect a medical emergency should request medical assistance as soon as practicable and have medical personnel stage away if appropriate.

### **300.7 SUPERVISOR RESPONSIBILITY**

When a supervisor is able to respond to an incident in which there has been a reported application of force, the supervisor is expected to:

- (a) Obtain the basic facts from the involved officers. Absent an allegation of misconduct or excessive force, this will be considered a routine contact in the normal course of duties.
- (b) Ensure that any injured parties are examined and treated.
- (c) When possible, separately obtain a recorded interview with the subject upon whom force was applied. If this interview is conducted without the person having voluntarily waived his/her *Miranda* rights, the following shall apply:
  1. The content of the interview should not be summarized or included in any related criminal charges.
  2. The fact that a recorded interview was conducted should be documented in a property or other report.
  3. The recording of the interview should be distinctly marked for retention until all potential for civil litigation has expired.
- (d) Once any initial medical assessment has been completed or first aid has been rendered, ensure that photographs have been taken of any areas involving visible injury or complaint of pain, as well as overall photographs of uninjured areas. These photographs should be retained until all potential for civil litigation has expired.
- (e) Identify any witnesses not already included in related reports.
- (f) Review and approve all related reports.
- (g) Determine if there is any indication that the subject may pursue civil litigation.
  1. If there is an indication of potential civil litigation, the supervisor should complete and route a notification of a potential claim through the appropriate channels.

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- (h) Evaluate the circumstances surrounding the incident and initiate an administrative investigation if there is a question of policy non-compliance or if for any reason further investigation may be appropriate.

In the event that a supervisor is unable to respond to the scene of an incident involving the reported application of force, the supervisor is still expected to complete as many of the above items as circumstances permit.

#### **300.7.1 WATCH COMMANDER RESPONSIBILITY**

The Watch Commander shall review each use of force by any personnel within his/her command to ensure compliance with this policy and to address any training issues.

#### **300.8 TRAINING**

Officers will receive periodic training on this policy and demonstrate their knowledge and understanding.

#### **300.9 USE OF FORCE ANALYSIS**

At least annually, the Field Services Division Captain should prepare an analysis report on use of force incidents. The report should be submitted to the Chief of Police. The report should not contain the names of officers, suspects or case numbers, and should include:

- (a) The identification of any trends in the use of force by members.
- (b) Training needs recommendations.
- (c) Equipment needs recommendations.
- (d) Policy revision recommendations.