



State of Vermont
Department of Public Safety
45 State Drive
Waterbury, Vermont 05671-1300
<http://dps.vermont.gov/>

To: House & Senate Committees on Judiciary
House & Senate Committees on Government Operations

From: Michael Schirling, Commissioner, Department of Public Safety
Xusana Davis, Director of Racial Equity

Re: S.119 Update - "Report on Model Statewide Policy for Law Enforcement Use of Force"

Date: January 29, 2021

Charge pursuant to S.119 / Act 165

On or before February 2, 2021, the Department of Public Safety and the Executive Director of Racial Equity shall report to the House and Senate Committees on Judiciary and on Government Operations regarding the development of a uniform statewide model policy on the use of force for all law enforcement agencies and officers as directed by Executive Order No. 03- 20 (Governor's Public Safety Reform Initiative). The report shall include: (1) the process undertaken by the Department, including a list of the community representatives and other stakeholders that were included in the development of the policy, the number of times the stakeholders met, and any opportunities given for public comment and the participation in and outcome of that public comment; and (2) the final proposed policy.

The following work and process has occurred as we work to develop the statewide use of force policy:

Process undertaken:

1. Relevant source documents gathered include:
 - a. Relevant legislation in VT and similar from other states
 - b. Existing case laws
 - c. Policies from numerous police agencies
 - d. Review of the process used in Burlington (robust public engagement) to create June 2020 UOF policy.
 - e. Other source documents such as CALEA standards, President's 21st Century Policing Report, PERF guiding principles on UOF, 8 Can't Wait from Campaign Zero, etc.
2. Subject matter experts consulted:
 - a. Use of Force Instructors and national experts
 - b. Attorneys from Vermont and beyond
 - c. Legislators
 - d. Seattle Police Department and Washington State Training Academy



3. Opportunities for stakeholder and public input, model policies, and guiding principles prior to creating first draft of the policy.
 - a. A press release was sent out on November 12th asking for input and directing the public to DPS's modernization website (dps.vermont.gov/modernization).
4. A spreadsheet was created to track all input received.
5. Input received (late October to early December) was reviewed and incorporated in to working drafts.
6. A first draft of Statewide Use Of Force policy developed on December 17, 2020. This draft sent to key legislators, law enforcement leaders and stakeholder groups (listed below) on December 17.
7. On December 22, 2020 a press release was issued announcing the draft had been posted to the DPS modernization website with a request to receive feedback by January 6, 2021. Channel 22/44 ran a story about the draft policy on 12/28/20.
8. Input received and recorded on spreadsheet. 2nd draft currently in process.

List of community representatives and others involved - See Appendix A:

See Appendix A for a list of all persons and stakeholder groups that were specifically invited to offer input into the policy. These individuals and groups listed in Appendix A were asked to further disseminate the invitation to offer input and feedback to local leaders, local stakeholders and anyone else who may have an interest in this work.

In addition, the draft policy was circulated to the leadership of all VT Law Enforcement Associations such as the VT Association of Chiefs of Police, the Sheriffs' Association, the Troopers Association, and the VT Police Association.

Number of times stakeholders met:

Due to COVID-19 all communication has been through email or virtual meetings and calls.

Opportunities for public input: Please refer to the sections above for full detail.

Participation in and outcome of that public comment: The feedback on guiding principles as well as the drafts of policies received prior to December 1st was reviewed and several suggestions were incorporated into the first draft. Feedback received since the first draft was released has been reviewed and much of it incorporated into the working draft. We are tracking which input is used or used in part in the updated draft. The spreadsheet showing input received to date is attached as Appendix B.

The current draft policy is also attached. Please note this is a working draft that is not yet complete. We anticipate releasing a revised draft once we assess any new legislative language that modifies Act 165.



APPENDIX A - UOF POLICY FEEDBACK EMAIL GROUP

Members:

AALV info@aalv-vt.org
ACLU VT info@acluvt.org
ACT for Social Justice info@act4socialjustice.com
Asian Cultural Center of VT adamsilvervt@gmail.com
Becca beccabalint@gmail.com
Bill Lippert billlippert@gmavt.net
BLM Greater Burlington jabarijones33@gmail.com
Brattleboro Solidarity brattleborosolidarity@gmail.com
Brenda Churchill brendachurchill@lgbtqiaallianceofvermont.com

Center for Cultural Pluralism ccp@uvm.edu
Comm. Council of Accountability LE ccalevt@gmail.com
D Baker dbaker@uvm.edu
David Scherr david.scherr@vermont.gov
Deb Ingram dingram@leg.state.vt.us
Diane Derby diane_derby@leahy.senate.gov
Ed Grossman edgrossman@hotmail.com
Ellen Bettmann ellen.bettman@gmail.com
Families First VT julie@familiesfirstvt.com
Geoffrey Jones geoffreyjpjones@gmail.com
Islam Fitness islamfitness@gmail.com
Islamic Society of VT salam@isvt.org
Jameson Davis jamesondavis@vermontlaw.edu
Jay Diaz (jdiaz@acluvt.org) jdiaz@acluvt.org
Jewish Communities of VT susan@jcv.org
Joanna Colwell joanna@ottercreekyoga.org
John Brooks johnbrooks@vermontlaw.edu
Julia Torti julia.torti@usdoj.gov
Justice for All info@justiceforall.org
K Goslant kgoslant@hotmail.com
Karen CRG karen@crgvt.org
Kelly Dolan kelly.dolan@uvm.edu
Kraig Laporte kraig.laporte@usdoj.gov
Luther luther76@comcast.net
M Mohamedou mmohamedou@vermontlaw.edu
Mad Freedom Org info@madfreedom.org
Migrant Justice info@migrantjustice.net
Mike - Pride Center mike@pridecentervt.org
Milton Inclusion & Diversity connect@midivt.org
Mosaic Center asc@uvm.edu
NAACP - Champlain Area ChamplainAreaNAACP@gmail.com
NAACP Rutland naacprutland@gmail.com
Nader Hashim nhashim@leg.state.vt.us
Out in the Open hb@weareoutintheopen.org
Outright VT dana@outrightvt.org
Pablo Bose Pablo.Bose@uvm.edu
Padula, Domenica Domenica.Padula@vermont.gov
Pastor Arnold Thomas pastor@goodshepherdjericho.org
Pat patbw@hotmail.com
Patrick Fraser Patrick.c.fraser@gmail.com
Pride Center VT skylar@pridecentervt.org
Queer Connect queerconnect@yahoo.com



Rabbi Amy
Randall Harp
RayAnn802
Raynald Carre
Robert Appel
Somali Bantu Comm Assoc of VT
Stephanie Sequino
Sudanese Foundation
Sudanese Foundation of Vermont
The Root Social Justice Center
Transcultural Awareness Institute
UNK
UNK
UNK
UNK
UNK
UNK
UNK
UNK
UNK
Vermonters for CJ Reform
VT Educational Consultants
VT Network
VT Partnership for Fairness & Diversity
VT Refugee Resettlement
Wilda White
Windham Co NAACP Organizing Committee

rabbiamy@ohavizedek.org
Randall.Harp@uvm.edu
rayann802@gmail.com
raynaldcarre@gmail.com
rappel@robertappellaw.com
sbcavt@somalibantu.org
stephanie.sequino@uvm.edu
sudanese.foundation.vt@gmail.com
info@sudfundvt.org
programs@therootsjc.org
itxinc@yahoo.com
tratsebe@aalv-vt.org
tdmartin2@myfairpoint.net
sean@sargeantappraisal.com
nulhegan@abenakitribe.com
marzel1951@gmail.com
jbogre@aalv-vt.org
tabithaannjulie77@gmail.com
nandonaputi@gmavt.net
anns@svcable.net
nedzad208@comcast.net
mouliert@vtlink.net
phurley@vtedconsultants.org
karents@vtnetwork.org
creed@vermontpartnership.org
vrrp@uscrvt.org
wilda@madfreedom.org
steffen.gillom@sit.edu



APPENDIX B – Spreadsheet tracking feedback on UOF policy - see attachment to email

Date Input Received	Method of Input	Describe input	Person or Group	Outcome	Received by
10/31/20	Email	United Nations principles on LEO use of force	Jason Gibbs, Gov's office	reviewed, relevant content is covered	Morrison
11/02/20	Email	Concerns wording section (b) (3) of S.119 conflicts with Graham v Connor	Mark Carignan, Brattleboro PD	will be considered by legal team for lob	Morrison
11/02/20	Email	PERF's 30 principles on UOF	Tony Facos, Dir of DMV	already on resource list	Morrison
11/02/20	Email	policies issued to DMV Sept 2020, as written & reviewed by Jack Ryan (Duty to Intervene, UOF & Ethics)	Tony Facos, Dir of DMV	reviewed, used some content	Morrison
11/02/20	Email	4 documents - "UOF Myths", policy from CCSD written by D. Bloom, National Consensus Policy, Updated UOF dashboard	Chief Chris Brickell	reviewed,	Morrison
11/03/20	Email	four documents, exact same as ones submitted by Chief Brickell	VCJTC - Cindy & Drew	duplicates	Morrison
11/03/20	Email	Concerns on wording of numerous sections of S.119 as passed	Chief John Helfant	reviewed	Morrison
11/04/20	Email	3 policies from SBPD	Chief Shawn Burke	reviewed/used some content	Morrison
11/05/20	Email	"Shoot or don't" - video demonstrating OODA loop decision making process	Drew Bloom	context/education	Morrison
11/08/20	Email	numerous recommendations on language and reinforcing language in current S.119	Wilda White obo MadFreedom	reviewed, language used	Morrison
11/09/20	Email	VT Warden Service UOF and firearms policy	Colonel Batchelder	context/education	Morrison
12/03/20	Email	Opposes further centralization of policing policies	Chris P	N/A	Morrison
12/04/20	Email	Does not support statewide control of police or policy; laments that "bureaucrats" don't understand the job of police	Kathleen Wagner	N/A	Morrison
12/10/20	Email	Should consider disarming officers or issuing rubber bullets; wants to see shift of mentality from "power" officers to "peace" officers;	Bonnie Kinney	feedback reviewed	Morrison
12/15/20	Email	Supports modernization initiative, believes officer licensing and higher pay could help, notes it important to develop officer morale and esprit de corps, not just put limitations on officers	Richard Munson	N/A	Morrison
12/24/20	Email	gender pronoun use; question on protecting K9; wording change; suggestion that internal compelled statement should be allowed in criminal investigation of a lethal force incident	Ed Czuchrey	gender pronoun suggestion adopted, re	Morrison
12/31/20	email	Believes policy is too detailed and officers won't be able to remember all of it and we will lose officers	Carol duPont	shared with Commissioner	Morrison
12/29/20	Email	Two points of feedback on procedure following lethal force incident	Chief Bombadier	small edit anticipated	Morrison
12/29/20	Email	Multiple questions and wording suggestions	Chief Peete	to be considered in 2nd draft	Morrison
01/04/21	Email	concern with length of time officer may be on admin duty if SAO and AGO take months to decide in wake of a lethal force incident	Chief Bingham	same concern as Chief Bombadier	Morrison
01/04/21	Other	MASS state law definition of chokehold - clearly says with intention to block breathing, etc	definitions section of MA law	context/education	Morrison

Date Input Received	Method of Input	Describe input	Person or Group	Outcome	Received by
01/05/21	Email	Objects to continued use of Graham v Connor standard and provides suggestions for improvement	Marcia Daoudi	shared with Comm & Leg Counsel	Bryn Morrison
01/05/21	Email	Likes what he sees in draft policy - recommends using social workers/crisis resources as able	Paul Erlbaum	N/A	Morrison
01/06/21	Email	Extensive input from Disability Rights Vermont	Zachary Hozid, attorney	to be considered in 2nd draft	Morrison
01/06/21	Email	Extensive input from MadFreedom	Wilda White	to be considered in 2nd draft	Morrison
01/06/21	Email	Extensive input from ACLU VT	F Schilling	to be considered in 2nd draft	Morrison
01/06/21	Email	Numerous suggestions on wording and reinforcing concept of "imminent" need to use force	Allen Gilbert	to be considered in 2nd draft	Morrison
UNK	Website	Difficult to understand most feedback provided, wants people with disabilities involved in policy drafts	Matthew Lefluer obo Grn Mtn Self-Advocates		Morrison
UNK	Website	Definitely a way forward to operationalize Act 165, language suggestion on UOF can be perceived as punitive	Robert Oeser obo Bratt Community Safety Review Committee		Morrison

Statewide Policy on Police Use of Force

Draft only December 2020

NOTE TO NON-LAW ENFORCEMENT READERS: This policy draft exists as one policy among many that, together with training, rules, federal and state statutes and case law, and other guiding documents and principles that, woven together, create the full operating landscape.

INTRODUCTION:

Every law enforcement officer in Vermont is committed to upholding the Constitution, as well as the laws of the United States and Vermont, while defending the civil rights and dignity of all persons. Whenever possible, police seek to accomplish lawful objectives through cooperation with the public and with minimal reliance on physical force to overcome resistance.

There are times when use of force against a citizen is unavoidable. In these cases, the decision to use force should not be undertaken lightly and the facts and circumstances of each case must be evaluated carefully and thoroughly. Many times, this analysis must be made in a split second under tense and rapidly evolving circumstances.

While force is used in response to a subject's behavior, officers should recognize that their own conduct can contribute to the need to use force. Whenever feasible and safe for all involved, officers should seek to use de-escalation techniques, which include effective communication skills and use of available resources to reduce the need to use force.

Nothing in this policy should be construed to require officers to assume unreasonable risks in the performance of their duties. The safety of the officer(s) and the public is paramount. Officers who fail to use timely and adequate force when it is necessary may endanger themselves, the community and fellow officers. Conversely, officers who use unreasonable force degrade the community's confidence in the police and expose themselves and the agency to legal risks.

POLICY STATEMENT:

This agency believes in the sanctity of every human life and in the value of de-escalation and effective communication. When force is necessary to bring an event or incident under control, officers will use only objectively reasonable force to accomplish lawful objectives.

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9. Training
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12. Appendix C – Minimum requirements for Use of Force Reporting
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SECTION 1: DEFINITIONS

Active resistance - A subject using physical activity to resist or take affirmative action to defeat an officer's ability to take him/her into custody or to seize him/her, but the subject's actions would not lead a reasonable officer to perceive a risk of physical injury to him/herself, the subject, or a third person. Examples of active resistance include pulling away, escaping or fleeing, struggling and not complying on physical contact.

Passive resistance – A subject who takes no affirmative action to defeat police efforts to make an arrest but who does not respond to verbal commands and may refuse to move by sitting down, acting as “dead weight” or similar.

Active aggression - Behavior that an objectively reasonable officer would believe creates an imminent risk of physical injury to the subject, officer, or third party, but would not lead a reasonable officer to perceive a risk of death or serious bodily injury. Examples include an attack on an officer, strikes, wrestling, undirected strikes with injury potential, kicking, shoving, punching, and other words or behavior indicating that such actions are imminent.

Deadly force – Any force that creates a substantial likelihood of causing serious bodily injury or death.¹ Also referred to as lethal force.

De-escalation - Actions used by officers, when safe and feasible without compromising law-enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of gaining voluntary compliance from a subject. Common de-escalation techniques include deliberately slowing the progression of law enforcement actions, using barriers, cover and distance, as well as communicating in a calm, clear manner.

¹ ACT 165 language (a)(1)

Force – Physical coercion employed by a law enforcement officer to compel a person’s compliance with the officer’s instructions.² For the purpose of this policy, this includes all law enforcement actions beyond compliant handcuffing.

Imminent threat of death or serious bodily injury – 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 law enforcement officer or another person. An imminent threat is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of harm, but is one that, from appearances, must be immediately addressed and confronted.³

Intervene – To come between, whether physically or verbally, to prevent or alter a result or course of events.

Law enforcement officer – shall have the same meaning as 20 VSA 2351a⁴, used interchangeably with “officer.”

Necessary - When a reasonable officer with the same information and in the same situation would conclude that no reasonably effective alternative appears to exist.

Objectively reasonable - The reasonableness of a particular use of force is based on the totality of circumstances known by the officer at the time of the use of force and weighs the actions of the officer against the rights of the subject, in light of the circumstances surrounding the event. It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must allow for the fact that police officers are often forced to make split-second decisions—in circumstances that are tense, uncertain, dynamic and rapidly evolving—about the amount of force that is necessary in a particular situation.

Factors to be considered in determining the objective reasonableness of force include, but are not limited to:

- The seriousness of the crime or suspected offense;
- The level of threat or resistance presented by the subject(s) (i.e. proximity to weapons, potential for escape, availability of other resources or officer backup);
- Whether the subject was posing an immediate threat to officers or a danger to the community;
- The potential for injury to citizens, officers or subjects (i.e. levels of exhaustion, relative size, strength, skill level, age of suspect versus officer as well as number of officers versus subject(s)).

² ACT 165 language (a)(2)

³ ACT 165 language (a)(3)

⁴ ACT 165 language (a)(4)

Prohibited restraint – means the use of any maneuver on a person that applies pressure to the neck, throat, windpipe, or carotid artery that directly prevents or hinders breathing, reduces intake of air, or impedes the flow of blood or oxygen to the brain.⁵

Proportional - The level of force applied reflecting the totality of circumstances surrounding the situation, including the presence of imminent danger to the officers or others. Proportional force does not require officers to use the same type or amount of force as the subject. The more immediate the threat and the more likely that the threat will result in death or serious physical injury, the greater the level of force that may be objectively reasonable and necessary to counter it.

Totality of the circumstances – means the conduct and decisions of the officer, the person(s) and bystanders leading up to the use of force and all facts known to the officer at the time force is employed.⁶

SECTION 2: CONSIDERATIONS PRIOR TO FORCE BEING USED

The authority of law enforcement to use physical force is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and with sanctity for every human life. Every person has a right to be free from excessive force by officers acting under authority of the State.⁷ The decision by an officer to use force shall be evaluated carefully and thoroughly in a manner that reflects the gravity of that authority and the serious consequences of the use of force. Agencies shall provide officers with training, clear policy guidelines and supervision to ensure that officers' use of force is consistent with law and policy.⁸

Use of force is intended only to control behaviors and situations while accomplishing a lawful purpose. It is never intended to be punitive. Officers must constantly re-assess the totality of the circumstances in any encounter where force is necessary to gain compliance from an individual.

A law enforcement officer shall use only the force objectively reasonable, necessary and proportional to effect an arrest, to prevent escape or to overcome resistance of a person the officer has reasonable cause to believe has committed a crime or to achieve any other lawful law enforcement objective.⁹ Whenever feasible, officers shall allow individuals time to submit to arrest or detention before force is used.

When possible, officers shall use de-escalation tactics. This includes taking action or communicating verbally or non-verbally during a potential force encounter in an attempt to

⁵ ACT 165 language with “may” changed to “directly” (a)(5)

⁶ ACT 165 language (a)(6)

⁷ ACT 165 language (b)(1)

⁸ ACT 165 language (b)(3) slightly modified

⁹ ACT 165 language (b)(2)

stabilize the situation, reduce the likelihood that force will be necessary and increase the likelihood of cooperation from the person. The goal of de-escalation is to reduce the immediacy of a threat so that more time, options, and resources can be called upon to resolve the situation without force or with a reduction in the amount of force necessary. This commitment to de-escalation means that officers should not knowingly create exigency or take actions that may increase the likelihood of force becoming necessary.

De-escalation may include the use of such techniques as scene management; calm, respectful and clear communication; use of warnings; verbal persuasion; deliberately slowing the progression of law enforcement actions; creating more space between the officer and person; using cover or barriers; and team tactics. De-escalation must also happen during use of force encounters. As the level of resistance offered by the subject goes down, so should the officer's response.

Special populations: Agencies should have a separate policy for interacting with persons experiencing mental impairment. [A model policy is found in Appendix D] Individuals with physical, mental health, developmental, or intellectual disabilities may be more likely to resist police during police interactions, because their disability may affect their ability to understand or comply with commands from police. Intoxicated or otherwise impaired individuals may also have a compromised ability to understand or comply with commands from police. When officers have knowledge of these disabilities or conditions, they should factor this knowledge into their response to these individuals, so long as it is safe to do so. When time allows during interactions with such persons, officers should emphasize de-escalation and time/distance in order to reduce the likelihood of force being necessary.

Police use of force is in response to behaviors and the underlying cause of those behaviors may not always be apparent during a police-citizen encounter. There is not a separate legal standard for use of force involving persons experiencing mental impairment. Rather, providing officers with policy guidance and training is intended to reduce the likelihood that a police-citizen encounter will lead to use of force.

There are other special populations that require additional consideration such as the elderly, juveniles, and pregnant women. [This needs more consideration. Possibly add to Appendix D referenced above.]

SECTION 3: LESS LETHAL FORCE

The dynamics of all encounters are unique, and it is impossible to attempt to categorize and define the levels of force appropriate in any given situation or set of variables. It is, however, reasonable to categorize the levels of force that may be used, to various degrees, in any situation. When an officer determines that use of force is necessary and appropriate, the officer shall utilize objectively reasonable force. Officers should modulate their use of force as resistance changes.

In determining whether a particular use of force is objectively reasonable, the officer must consider:

- A. The seriousness of the offense the officer believes the subject is involved in;
- B. Whether or not the subject poses an immediate physical threat to the officer or others;
- C. The degree of the threat posed by the subject;
- D. Whether the subject is actively resisting or attempting to evade arrest/detention by flight;
- E. Whether the totality of the circumstances justifies the officer's response.

Agencies shall provide officers with a range of force options and appropriate training or certification on these tools. Not all agencies will have the same force options. Officers may only carry tools/weapons that are issued by the agency and for which they have been trained. Officers must comply with all training requirements of the Vermont Criminal Justice Council. Agencies must provide policy guidance on the use of agency-issued tools or weapons.

Officers are responsible for visually inspecting their issued equipment prior to each shift and testing any equipment consistent with training and manufacturer's recommendations. Any equipment not functioning properly shall not be used.

When an officer meets resistance in the performance of lawful duties, reasonable attempts to inform the subject of the reason they are being detained/arrested should be made and to the extent feasible, persuasion and de-escalation should be used. When a subject is not compliant, response to resistance can be addressed by "empty-hand" techniques or in some circumstances, using tools designed to bring a situation under control. Examples of empty-hand techniques include:

- A. **Officer Presence/Verbal Commands/Persuasion:** While not a use of force, officer presence and communication can be an effective way to control a situation. Officers should use effective communication skills when practical. Persuasion may occur by a show of authority either by a uniform presence or obvious identification as a police officer. Verbal and non-verbal commands should be given to direct and let the subject know what is expected of them. Officers should document their verbal orders regarding arrest, investigative detention, or protective custody, verbal warnings regarding non-compliance and the results. The subject should be informed as to the reason for detention as soon as practical.
The option of officer presence and verbal commands should not be construed to suggest that an officer risk losing control of a situation and potentially endangering the safety of themselves or others in situations where the use of escalated force is the proper choice.
- B. **Control/Restraint (including soft empty-handed control techniques):** Officers may use a variety of techniques in accordance with their training to gain compliance of passively

or actively resistant subjects including but not limited to techniques using their hands, elbows, arms, legs and bodies.

Common tools used in police use of force include:

- A. **Aerosol Agents:** Aerosol Agents are designed to respond to various threat levels and may be utilized to address subjects who are actively resisting. When an aerosol agent has been used an officer shall, as soon as practical, provide the subject with the Administrative Warning form (See Appendix B) in preparation for providing care for the individual contaminated by the product. Decontamination should occur as soon as practical following the application of an aerosolized agent.

Oleoresin Capsicum (OC) 10% solution is an example of an aerosol agent used by some departments. It may be issued in one of several delivery systems including individual “fog” spray, individual “stream” spray, and a crowd control “fog” system (used in special circumstances only as authorized by the Officer in Charge).

- B. **Conducted Energy Weapon (CEW):** See statewide policy on CEW use.
- C. **Police Batons:** A fixed or expandable impact and control weapon. The baton is designed to respond to various threat levels. Since the levels of force used in response to threats differ, the officer must evaluate the level of the threat to determine the appropriate techniques to be employed. Batons can be used in accordance with approved techniques and target areas as a tool for control and restraint techniques, impact techniques and as an instrument to assist in the movement of individuals or groups of individuals. There may be exigent circumstances that prevent the use of a baton but require the use of an impact device due to the level and immediacy of a threat. In such circumstances, an officer may utilize alternate techniques or devices, as good judgment would deem appropriate, such as the use of arms and legs, flashlight, clipboard or other such method.

Additionally, under circumstances that present an *imminent risk of serious bodily injury or death*, improvised weapons such as pens, knives carried by officers to cut ligatures and seat belts and other such tools or instruments could be used.

- D. **Use of police canines (K-9):** Canines can be used in numerous ways that are not considered a use of force such as search and rescue or evidence searches. When used as a force option to protect the handler and/or others or to apprehend a person, canines are generally considered to be commensurate to an impact tool. An example of using canines at a lower level of force is a sit watch to monitor subjects who have been detained. See agency policy on use of police canines for more information.

- E. **Less Lethal Impact Munitions (LLIMs) or impact projectiles:** LLIMs are designed to function as extended range impact weapons and their use is justified whenever use of an impact technique is appropriate. The intended role of less lethal munitions is to immobilize resistant persons at safe distances to prevent injury to officers or the public. LLIMs are discharged only by specially trained officers called “Grenadiers.”
- i. LLIMs may be used to prevent the escape of suspects under appropriate circumstances. In these cases, the severity of the threat posed by the continued freedom of the suspect must be carefully weighed.
 - ii. LLIMs are also effective in crowd control and riot situations. When their use is anticipated in this capacity, the Grenadier will obtain clearance from the Officer in Charge prior to deploying one or more LLIMs. (NOTE: Crowd control policy further informs this area of operations. It should be noted for readers that no action, including LLIMs, are used during peaceful protest and demonstrations.)
 - iii. The decision to use LLIMs should never be done at the risk of officers’ safety or that of the public. Officers should not assume unreasonable risks in deploying LLIMs against a suspect threatening to use deadly force.
 - iv. If a suspect is threatening to use deadly force and LLIMs offer an opportunity to resolve the incident without use of deadly force, LLIMs may be deployed if:
 - a. The scene is contained and there are not active attempts of serious bodily injury; and
 - b. There is adequate staff on scene to supplement the use of LLIMs with deadly force options should LLIMs fail to control the suspect and result in further deterioration of the incident.
 - v. LLIMs may be used against wild and domestic animals to drive them away or to deter an attack. Where an animal poses a threat of bodily injury or must be euthanized, conventional firearms should be used.
- F. **Firearms (Lethal Force):** see section 4 below.
- G. **Factors in Choosing the Level of Force Deployed:** Circumstances that may be considered in the officer’s assessment of physical threat and the appropriate use of force include, but are not limited to, the following:
- i. Severity of the offense or significance of the need to apprehend the subject;
 - ii. Age;

- iii. Size;
- iv. Skill level (whether they possess knowledge of martial arts, advanced fighting techniques, etc.);
- v. Number of suspects;
- vi. Whether the suspect is armed or reported to be armed;
- vii. Actual proximity to weapons;
- viii. Prior experience with the suspect(s);
- ix. Location of the encounter;
- x. Background or peripheral hazards;
- xi. The subject's response to commands/instructions;
- xii. Availability of cover for the officer(s);
- xiii. Time considerations – when possible officers should seek to use additional time to their advantage to reduce the likelihood of having to use lethal force. Other time considerations include the action/reaction lag time, as well as the uncertainty of any response or instrument instantly stopping a threat.

Officers are not required to use or consider alternatives that increase danger to themselves or to others. Nothing in this policy requires officers to assume unreasonable risks. In assessing the appropriate use of force, the safety of the public and the officer(s) is paramount.

All tools/devices intended for police use of force should be securely carried in their approved holders when performing uniform patrol functions. Tools should only be removed from their holders when their use is anticipated.

SECTION 4: LETHAL FORCE

General: Lethal force is used to stop an action that could reasonably result in death or serious bodily injury to a person.

Agencies must specify what types of firearms, ammunition or other lethal force tools are authorized for use by officers.

Agencies shall also provide guidance on care, safe handling, storage and inspections of all lethal force tools.

Use of Force Authorization: An officer is justified in using lethal force upon another person only when, based on the totality of the circumstances, such force is objectively reasonable and necessary to:

1. Defend against an imminent threat of death or serious bodily injury to the officer or to another person; or
2. 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.¹⁰

The use of deadly force is necessary when given the totality of the circumstances, an objectively reasonable law enforcement officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the officer or to another person.¹¹

When the decision is made to use lethal force, officers may continue its application until the subject is under the officer's control or no longer poses an imminent threat of death or serious bodily injury to the officer or another person.¹²

Even when lethal force is permissible, officers should assess whether its use creates a danger to third parties that outweighs the likely benefits of its use. For example, background or peripheral environments should be considered.

In the event an officer uses force that results in the death or serious bodily injury of a person, the procedure found in Appendix A "*Lethal force post-incident procedures and statewide policy on review of BWC recordings following lethal force incidents*" shall apply.

Verbal warning: When feasible, an officer shall, prior to the use of force, make reasonable efforts to identify him/herself as a law enforcement officer and to warn that deadly force may be used.¹³

Lethal force restrictions:

- A. 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 another person.¹⁴ Put more simply, officers shall refrain from using deadly force against a person who is only posing a threat to their own life and no other.
- B. Warning shots: Are strictly prohibited.
- C. Discharging a Firearm and Moving Vehicles: An officer will not discharge a firearm at or from a moving vehicle unless: a person in the vehicle is threatening the officer or another person with lethal force other than the vehicle; or, the vehicle is operated to deliberately strike a person(s) and all other means of defense (including moving out of the path of the vehicle) have been exhausted or are not practical.

¹⁰ ACT 165 language (c)(1 A & 1 B)

¹¹ ACT 165 language (c)(2)

¹² ACT 165 language (c)(3)

¹³ ACT 165 language (c)(5)

¹⁴ ACT 165 language (c)(4)

- D. Unholstering Firearms: Firearms should only be drawn when an officer has reason to fear for their safety or the safety of others, and at no other time in any public place, except for humane destruction of an animal described below.
- E. Dangerous/Injured Animals: Firearms may be utilized to euthanize a dangerous animal or one so badly injured that humanity requires its removal from further suffering when no other disposition is reasonably practical.
- F. Alcohol or Drugs: Officers will not use any Department issued or approved firearm while under the influence of alcohol or regulated drugs not otherwise prescribed by a medical professional.

SECTION 5: DUTY TO INTERVENE

All officers have an affirmative duty to intervene whenever they witness another officer using a prohibited restraint or using excessive force.¹⁵ In addition, officers shall report any instance of excessive force or use of a prohibited restraint to a supervisor prior to the end of the shift during which it occurred.

SECTION 6: DUTY OF CARE

Whenever a person in an officer's care or custody sustains an injury, becomes unconscious, displays a further altered mental status, or states that s/he is injured, the officer must provide or obtain appropriate medical attention. This applies whether the officer used force or not, and whether the person's condition preceded custody. Officers will provide care commensurate with their training and experience and officers will quickly summon emergency medical assistance when needed.

Additionally, any time a person has been sprayed with an aerosolized agent that causes irritation, s/he will be decontaminated as soon as practical. Officers will read the OC administrative warning form to the person being decontaminated. (See Appendix B)

SECTION 7: REPORTING & SUPERVISORY REVIEW

- A. Reporting – Whenever an officer uses force beyond compliant handcuffing, s/he will complete a Use of Force Report (See Appendix C) and identify all relevant supporting

¹⁵ ACT 165 (c)(6)

documentation such as recordings, witness statements, etc. within 72 hours, except in the following circumstances:

- i. The officer is injured or otherwise unable to complete the report, in which case the officer shall provide the necessary information verbally to a supervisor as soon as practical.
- ii. When lethal force is used, or whenever the actions of an officer result in death or serious bodily injury to a person, the officer will not complete a Use of Force Report. Instead, an administrative investigation will be completed. The administrative investigation team will complete the data required in the Use of Force Report.
- iii. In cases where multiple officers use force in excess of compliant handcuffing during an incident, only one officer will author a Use of Force Report which clearly names all officers who used force. Each officer who used force will complete a supplemental report and all reports will be included as supporting documentation when the Use of Force Report is submitted.

Pointing the muzzle of a firearm at or in the direction of a person is considered a use of force. Officers shall not point the muzzle of a firearm at or in the direction of a person absent articulable facts that the situation may escalate to the point where use of lethal force would be authorized. Drawing or maintaining a firearm at a ready position shall not be considered pointing a firearm.

Use of Force Reports shall contain details of the citizen's actions and the officer's responses. Officers should take reasonable steps to gather and preserve any electronic or physical evidence, including witness statements, regarding use of force incidents.

- B. Supervisory review procedure – A supervisor will review the Use of Force Report and all supporting documentation. At a minimum, supervisory review includes:
 - i. Ensuring that the information submitted is complete and all required data is present.
 - ii. Determining if the use of force was objectively reasonable and consistent with this policy. The supervisor shall make a notation indicating his/her approval or disapproval of the use of force being reasonable.
 - iii. Identifying any need for training, performance counseling or other administrative action.
 - iv. If necessary, consulting with the officer or returning the report for more information.
 - v. Supervisory review of whether the decision by an officer to use force was objectively reasonable shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances. A law enforcement officer's failure to use feasible and

reasonable alternatives to force shall be a consideration for whether its use was objectively reasonable.¹⁶

- vi. The home agency CEO shall make a referral to the Vermont Criminal Justice Council if the use of force was not reasonable and resulted in injury to a citizen.

SECTION 8: ADMINISTRATIVE INVESTIGATION

The Vermont law enforcement community recognizes the enormous responsibility that comes with the authority to use force. As guardians of our communities, the police must ensure that all uses of force, but especially those resulting in death or serious bodily injury, are thoroughly reviewed.

Anytime an officer employs lethal force or takes action that results in death or serious bodily injury to a person, the agency shall conduct an administrative investigation. This investigation is separate from any criminal investigation that may occur. The agency may employ outside assistance to conduct the administrative review. The purpose of the review is to document the incident, complete required Use of Force report(s), determine if the incident is within policy, identify areas for improvement and to determine if there are any training or policy implications.

This investigation may result in remedial training, recommendations for discipline or commendation, or recommendations for policy revision. [See Appendix A for more information]

SECTION 9: TRAINING

At a minimum, officers must comply with all certification and in-service training standards of the Vermont Criminal Justice Council. Training relative to use of force and tactics will only be conducted by instructors certified by the Vermont Criminal Justice Council. All officers will receive a copy of and training on use of force policies at least annually and all training will be documented.

In addition, all officers shall be trained on ways to avoid confrontations, de-escalate conflict and recognize during a physical confrontation when de-escalation must occur.

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¹⁶ ACT 165 language (b)(4)

References:

“8 Can’t Wait” from Campaign Zero

An Introduction to Vermont Criminal Law, Edition XIV revised 2018

Burlington, VT Department Directive 05 “Use of Force” revised June 17, 2020

Camden County, NJ Police Department policy “Use of Force” revised 08/21/2019

Federal Executive Order #13929 issued June 16, 2020

National Consensus Policy on Use of Force 2020

Police Executive Research Forum’s Guiding Principles on Use of Force

Seattle, WA Police Department Manual, Title 8 “Use of Force”

South Burlington Police Department PR-302 “Use of Force”

United Nations Code of Conduct on Use of Force

Use of Force Policies: Dispelling the Myths by Lexipol

VT Act 165

VT League of Cities & Towns policy “Response to Resistance” revised 2020

VT State Police DIR-701, 702, 703 Use of Force, Reporting & Training

Appendix A - DRAFT Statewide Use of Force Policy on lethal force post-incident procedures and statewide policy on review of BWC recordings following lethal force incidents

INTRODUCTION:

Impartial and thorough investigation of officer involved shootings and other serious use of force incidents is essential to ensure police accountability, transparency and to maintain public trust. The following procedure is to be followed whenever an officer is involved in a lethal force incident (see definition below).

Among other things, this document describes the transition from an officer(s) being the investigator to that officer(s) becoming the subject of parallel investigations (administrative and potential criminal) in the wake of a lethal force incident. It also provides clear direction on the use of BWC recordings in the wake of a lethal force incident.

DEFINITIONS:

Chief Executive Officer (CEO): Means the person in control of a police agency, normally the Chief, Colonel or Sheriff.

Lethal force incident: Whenever an officer uses lethal force (whether the subject is injured or not); and, any incident where an officer takes any action that results in death or serious bodily injury to a person. Hereinafter referred to as "incident".

Public Safety Statement: A statement given at the scene of a lethal force incident, or as soon as practical, that allows the on-scene investigation to continue once the involved officer(s) leaves the area. It is a brief statement provided to the on-scene supervisor. The statement should include initial information such as type of force used; location of injured or dead person(s); description of any outstanding subject(s) including direction and mode of travel, known weapons, clothing description, etc.; description and location of any known victims, witnesses or evidence; and, any other information necessary to ensure officer and public safety and assist in the apprehension of outstanding suspects.

PROCEDURE:

When an incident covered by this policy occurs:

- A. Officers should take actions necessary to render the scene safe.
- B. When necessary, officers shall immediately summon emergency medical services and immediately provide appropriate medical attention.

C. The ranking officer on scene shall assume incident command, and immediately request the response of a supervisor. Upon arrival, the supervisor shall take control of the incident scene.

D. The incident location should be secured for purposes of investigation and evidence preservation.

E. The involved officer(s) will provide a Public Safety Statement prior to leaving the scene when practical. The Public Safety Statement should be made as contemporaneously to the event as possible.

F. The involved officer(s) should be removed from the scene to a secure location or a medical treatment facility if necessary. An officer should be assigned to stay with the involved officer(s). If available, a Peer Officer Support Team (POST) member or similar crisis response staff should be assigned this task.

G. To maintain the integrity of the investigation those involved should not discuss the incident amongst themselves. This excludes communication with family, legal counsel, mental health personnel, medical personnel or union representation. Employees should be encouraged to refrain from watching or listening to the news, social media or podcasts regarding the incident in which they were involved.

H. Appropriate personnel should be contacted, including but not limited to the CEO, the VT State Police Major Crime Unit, the State's Attorney's Office and POST members or counselors as necessary.

I. At the direction of the Major Crime Unit, the involved officer(s) shall be photographed, and any injuries documented prior to the end of the shift. All BWC or other recordings of the incident shall be preserved as evidence by the home agency. The home agency will be asked to provide all video, audio, phone and radio transmission recordings of the entire incident to the Major Crimes Unit. Additionally, the officer(s)' firearm or other tools used in the incident will be collected and preserved as evidence. The CEO will determine if and when a replacement firearm will be issued to the involved officer(s).

J. When practical, the involved officer should walk through the scene to assist Major Crimes Unit with his/her location at the time lethal force was used and/or leading up to lethal force.

K. Involved officers shall **not** be allowed to view their body-worn camera footage prior to being interviewed by the Major Crime Unit, nor will they be permitted to review any other recordings of the incident or have them described by others. (See below for additional detail)

VT STATE POLICE INVESTIGATION:

When a Vermont law enforcement agency is involved in a lethal force incident, there are multiple priorities that must be considered. First and foremost, the agency must ensure public

safety by cooperating with any investigation that seeks to identify person(s) who violate State or Federal law. Further, the agency has an obligation to its community to be as transparent and accountable as possible. Agencies also have an obligation to their employees who have the right to be treated fairly and in accordance with applicable collective bargaining agreements. There are times in the wake of a lethal force incident, when the officer(s) becomes the focus of a criminal investigation to assess compliance with the law.

Officers involved in lethal force incidents are afforded the same constitutional rights as any person under criminal investigation. It is preferable for transparency that officers participate in the Major Crime Unit's investigative process.

The following procedure is the statewide practice for Major Crime Unit review of lethal force incidents:

1. Officer(s) provides a public safety statement at the scene.
2. Officer(s) do not review BWC or other recordings of the incident, nor are they given an account of any recordings by anyone.
3. Officer and his/her attorney meet with investigators to provide an initial statement unaided by recordings or other information surrounding the incident.
4. Following this statement, the officer and his/her attorney may review the officer's BWC or cruiser camera footage and or other video that would show the officer's perspective at the time force was used.
5. The officer and his/her attorney may then provide investigators with additional information.

Discrepancies between an officer's unaided and aided statements following an incident are expected. The science of memory in the wake of a stressful or traumatic event is extensive and points to numerous physiological phenomena during acutely stressful situations (I.e. auditory exclusion and tunnel vision) being common causes of discrepancies.

ADMINISTRATIVE INVESTIGATION:

Whenever an officer uses lethal force, the home agency will initiate a parallel administrative investigation. The CEO of the home agency may request an independent review or investigation by an outside entity. Even if an outside entity is used, the administrative investigation is different from a potential criminal investigation in that the involved officer(s) is/are compelled to participate in the administrative investigation process as a condition of employment. The administrative investigation will be conducted in compliance with 20 V.S.A. Sections 2401(4) and 2402 and any other applicable law or regulation of the Vermont Criminal Justice Council.

In the event that an outside law-enforcement agency with jurisdiction (normally the VSP Major Crime Unit) initiates an investigation into the incident for the purpose of determining if there is

criminal liability, the administrative investigation should occur after the criminal investigation and decisions by the Attorney General's Office and the State's Attorney's Office are complete.

The administrative investigator will interview the involved officer(s) and witnesses, and review all available evidence, information and statements. The administrative investigator may use information obtained as part of the criminal investigation but may **not** provide any information from the administrative investigation to criminal investigators or prosecutors. All applicable collective bargaining agreements will be followed during an administrative investigation.

The officer shall be kept informed of the progress of the administrative investigation and upon completion, notified in writing of the outcome.

The CEO or his/her designee shall notify the State's Attorney, relevant municipal/state legal counsel, and any duly appointed police oversight body (in executive session) of the administrative investigation's outcome. If the investigation concludes a necessity to report to the VCJC, it shall be done without delay.

RECOMMENDATIONS PRIOR TO RETURN TO DUTY:

The officer(s) should be placed on administrative leave or assigned to administrative duties with no enforcement responsibilities pending completion of the criminal investigation and decision about prosecution by both the Attorney General's Office and the State's Attorney's Office.

It is strongly recommended that the CEO direct the officer to obtain psychological follow-up for post-incident trauma and that the agency pays for such services. With prior approval from the CEO, an officer may seek psychological follow-up from a licensed professional of his/her choice. At least an initial psychological follow-up should be completed before the officer is reassigned to duty.

RELEASE OF BWC OR OTHER RECORDINGS IN THE WAKE OF A LETHAL FORCE INCIDENT:

Recordings, or portions thereof, taken during the course of these significant incidents do become public pursuant to public records law. In the wake of an incident, ensuring due process for every person involved is essential. The question of releasing recording is not *if*, but *when*.

Following lethal force incidents, it is not uncommon for multiple agencies to possess copies of BWC or other recordings. For instance, the home agency, the Vermont State Police and the State's Attorney's Office or Attorney General's Office may all have copies of the relevant recordings. This can create confusion, duplication of effort and expense as well as inconsistency when presented with public information requests for release of the footage. Because multiple copies of digital recordings will exist, the following guidance is intended to identify the agency with the superordinate interest at certain stages post-incident.

When an outside agency (usually VSP) conducts a criminal investigation, the investigating agency will provide the home agency with a letter requesting preservation of all evidentiary items and describing the investigative process. Recordings are considered evidence in a criminal investigation. While the criminal investigation is ongoing, VSP (or other outside agency) is in control of the record¹⁷ and, in consultation with prosecutors, will control release of recordings until the investigation is complete and the case has been reviewed by both the Attorney General's Office and the State's Attorney's Office.

- a. If the VSP investigation results in criminal charges, the prosecuting agency shall be in control of the record and control release until such charges are resolved.
- b. If the VSP investigation does not result in criminal charges, the home agency resumes its controlling role as the keeper of the record.

This procedure is intended to provide clarity to involved agencies, members of the public and media and to avoid confusion and unnecessary duplication of effort to process requests for recordings. Nothing in this guidance is intended to shield recordings from public examination. There are numerous factors that impact the release of body-worn camera or other recordings of a serious incident. It is not possible to create a definitive timeline for the release of recordings given the number of legal, investigative, operational, and external factors that bear on events on a case by case basis. Footage should be released as soon as practical in consultation with investigators, prosecutors, and organizational leaders. Whenever possible, release will occur within 30 days of the incident.

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¹⁷ 1 V.S.A. 317(c)(5)

Appendix B – Administrative Warning for Use of Aerosol Agents

When an aerosol agent has been used an officer shall, as soon as practical, provide the subject with the Administrative Warning below in preparation for providing care for the individual contaminated by the product. Decontamination should occur as soon as practical following the application of an aerosolized agent.

Name: _____ Date: _____ Incident #: _____

You have been contaminated with an aerosol agent (insert the name of the product), a natural product derived from cayenne peppers. This aerosol agent is non-toxic and the effects will wear off in a short time.

The effects of being exposed may complicate other medical conditions, including, but not limited to:

1. Overdoses;
2. High levels of drugs like cocaine, amphetamines, barbiturates, PCP, opiates, heroin, prescription drugs or alcohol;
3. Medical conditions relating to heart problems;
4. Pregnancy.

I am going to ask you five questions for your own safety. Not answering my questions, withholding information or giving false or misleading answers could delay medical treatment and may seriously jeopardize your health and safety.

Do you understand everything I have told you? YES NO Refused to answer

1. Are you currently under the influence of cocaine, amphetamines, barbiturates, PCP, opiates, heroin, prescription drugs or alcohol?

YES NO Refused to answer

2. Are you, or could you be pregnant? YES NO Refused to answer

3. Do you have heart problems, lung problems, diabetes, high blood pressure, allergies or any other serious medical condition? YES NO Refused to answer

4. Do you have a pacemaker? YES NO Refused to answer

5. Do you wish to be medically evaluated? YES NO Refused to answer

Appendix C UOF Policy – Use of Force Reporting minimum requirements

Whenever an officer uses force beyond compliant handcuffing, s/he will complete a Use of Force Report and identify all relevant supporting documentation such as recordings, witness statements, etc. **At a minimum**, agencies will collect data on the following fields:

1. Name, DOB, address and contact info of the person or persons force was used on.
2. Name/rank/radio or badge number of the officer(s) involved.
3. Date/time/location of the use of force.
4. Incident number and call type
5. Description of the incident location to include whether it was indoors/outdoors, lighting conditions, and weather conditions.
6. Reason for the use of force such as: to effect an arrest, to defend self, to defend another, to effect an investigative detention, etc.
7. Description of the subject's behavior that necessitated the use of force.
8. Description of the level of resistance offered by the subject such as: passive resistance, active resistance, or assaultive.
9. Description of the force used by the officer(s) such as: empty hand controls or strikes, aerosol agent, baton (strikes or control/restraint techniques), display or use of CEW*, firearm, etc. This description should include all officer actions taken beyond compliant handcuffing, the intended target area, the area affected and a description of whether each action was effective to gain compliance.
10. Description of any injuries to the subject or officer, including where and by whom medical evaluation (if any) was provided, transport method to treatment, and photographs of injuries. A description and photos of any injuries should be obtained when feasible, even if the subject refuses medical attention.
11. Identification of other officers or agencies present when force was used.
12. Identification of any witnesses.
13. A narrative of the incident including identification of any supplemental information such as medical records, recordings, etc.
14. Name of the supervisor(s) who reviewed the use of force report and an indication of whether the use of force was within or outside of policy.

*If a CEW is used, the following information should be documented:

- a. Type of use (deployed from distance or drive stun) and number of cartridges and/or cycles applied;
- b. Clothing of the subject and whether contact probes penetrated the subject's skin;
- c. Whether CEW use was effective;
- d. Taser and cartridge(s) serial numbers.

APPENDIX D to Statewide Use of Force Policy

Guidelines for Interacting with Persons Experiencing Mental Impairment –

UNDER CONSTRUCTION

DRAFT