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MEMORANDUM

DATE: February 29, 2016

TO: Marty Halloran, President-Executive Board
Michael Nevin, Secretary-Executive Board

FROM: Blake P. Loebs

RE: ***Review of proposed SFPD General Orders related to use of force and use of lethal force.***

1. Introduction

I have been asked by the San Francisco Police Officers Association ("SFPOA") to provide an analysis, both from a legal and practical prospective, of the proposed revisions to San Francisco Police Department's ("SFPD") department general orders ("DGOs") 5.01, 5.01.1 and 5.02 (the "Proposed Orders"). Below are my initial impressions, understanding that many of these issues are complex and would benefit from further analysis and empirical evaluation.

2. My Background

I am partner at Meyers Nave and the head of the Police Defense practice group. Before joining Meyers Nave, I served for 22 years as a Deputy City Attorney for the City and County of San Francisco. For nine of those years, I was the Chief of Civil Rights Litigation, focusing primarily on supervising a 22-member trial team on civil rights litigation matters, and personally defending officers and the SFPD against claims of excessive force stemming from officer-involved-shootings. While at the City Attorney's Office, I also provided instruction at the SFPD police academy regarding officer involved shootings.

As a Deputy City Attorney, I served as first chair in over 25 civil jury trials. I have briefed and argued numerous appeals before the Ninth Circuit and the California Court of

Appeal.[1] I have also assisted the SFPD, shaping policy on matters including use of force, officer-involved shootings, and vehicle pursuits.

3. Hastily Enacted, Substantial Modifications To Any DGOs Could Have Disastrous And Unintended Consequences.

The Proposed Orders reflect sweeping and novel changes to the guidelines concerning appropriate use of force. Changes of this magnitude need careful consideration of the legal and practical impact such changes may have. Ideally, a committee would be formed consisting of individuals with a variety of viewpoints to help advise on each policy change, just like the California Commission on Police Officer Standards and Training ("P.O.S.T.") does before changing its learning domains. The existing general orders in place regarding use of force have largely been in effect since 1995. There is no doubt that some of the language should be changed and updated. But, the scope of the changes contained in the Proposed Order is so broad that more deliberation and deeper evaluation is necessary to avoid creating unclear, inappropriate policy and unintended consequences.

Below, I have attempted, with the limited time afforded to me, to outline the primary areas of concern I have with the Proposed Orders that I hope will be given greater consideration and analysis before the Proposed Orders are enacted by the SFPD.

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[1] The following is a select list of the cases that I worked on for the SFPD: *Espinosa v. City and County of San Francisco* (allegation that officers shot and killed an unarmed man in his home without provocation; defense verdict after a one-month jury trial); *Boyd v. City and County of San Francisco* (allegations that an officer executed an unarmed disabled man; defense verdict after a six-week jury trial; affirmed on appeal; $120,000 in costs awarded to defendants); *Dunklin v. City and County of San Francisco* (allegations that officers shot an unarmed man in a wheelchair; summary judgment for defense; affirmed by the Ninth Circuit); *Moll v. City and County of San Francisco* (allegations that officers shot and killed an unarmed 19-year old; plaintiff dismissed for a waiver of costs one month before trial); *Sheehan v. City and County of San Francisco* (allegations that officers unnecessarily shot an emotionally disturbed woman; defendants won on summary judgment; matter recently decided by the United States Supreme Court; *Wu v. City and County of San Francisco* (allegations that an officer unnecessarily shot an emotionally disturbed man armed holding a pair of scissors; plaintiff dismissed for a waiver of costs one month before trial); *Tapueluelu v. City and County of San Francisco* (allegations of excessive force causing death; defendants won on summary judgment; affirmed on appeal).

4. Specific Aspects Of The Proposed DGOs, Which Left Uncorrected, Could Have Disastrous And Unintended Consequences.

a. Requiring Force To Be "Proportional To The Severity Of The Offense Committed," Without Further Clarification Is Problematic.

The concept of "proportional force" is not entirely new. A few federal cases discuss "proportional force," and officers in Seattle are required to use "proportional" force. In each case that I have reviewed that discusses "proportional force," and with Seattle Police Department's General Orders, the requirement to use proportional force does not stand on its own. And, the concept is tied not just to the "severity of the offense," but also to the threat to the officer or the public. Furthermore, in every other instance in which I have seen that term used (with one exception), it is directly tied to the *Graham v. Connor*, 490 U.S. 386 (1989) framework for evaluating use of force.[2]

For example, Seattle defines "proportional" as follows: "The level of force applied must reflect the totality of circumstances surrounding the situation, including the presence of imminent danger to 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." (Seattle PD General Orders 8.200.1.) Seattle's use of the term proportionality is consistent with the Supreme Court's seminal holding *Graham v. Connor*, 490 U.S. 386 (U.S. 1989) (Officers may use force that is objectively reasonable based on the totality of circumstances known to the officer at time, without the benefit of 20/20 hindsight).

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[2] The Police Executive Research Forum ("PERF") also proposed that officers should be required to use "proportional" force and defined proportional as "how the general public might view the action." This suggestion has come under almost universal criticism, for essentially requiring that officers defer to future Youtube commentary for determining whether the use of force is appropriate at the time, instead of what is objectively reasonable, from a police officer's prospective, based on the totality of circumstances that were known at the time – which has been the law for thirty years. In the event San Francisco is intending to adopt PERF's requirement, it would be wise to give such a radical change extremely careful consideration before doing so.

The primary concern that I have with San Francisco's proposed use of the phrase "proportional force," it that it is unclear whether San Francisco intends that phrase to be consistent with *Graham* or a departure from that legal standard. Unfortunately, San Francisco's proposal *does not* define what is meant by "proportional force," which is deeply concerning. In fact, San Francisco's proposal could suggest that "proportional" means that the officers are required to match the degree of force being used by the suspect. In other words, if an officer is being threatened by a knife, the maximum force the officer can use in response is a knife – even though officers are not equipped with knives and are not trained on how to use them. Section III.A.1, seems to support this implication. Section III.A.1 states that Officers must consider the "relative size and physical capabilities of the subject compared to that of the officer." This could suggest that a big officer cannot engage a small suspect, and that two officers cannot engage one suspect. If that is what is intended by this language, all SFPD officers will need to be retrained, and SFPD could lose its P.O.S.T accreditation. (*See* the analysis of Don Cameron, renowned police procedures expert who literally helped write the book on use of force – the P.O.S.T. force Learning Domains.)

b. The Use Of Reasonable Force Section (II.B.), Which Purports To State The Law Under The Fourth Amendment And Penal Code Section 835(a), Misstates The Law.

Although Section II.B. purports to describe use of force law under the Fourth Amendment and Penal Code Section 835(a), it does so inaccurately. First, although it mentions that force must be objectively reasonable under the totality of circumstances,[3] it neglects to say that the use of force should not be judged based on 20/20 hindsight. This is an extremely important aspect of the *Graham* analysis, was part of the previous general orders, but is inexplicably absent from this Proposed Order. This aspect of *Graham* is part of P.O.S.T training and included in the Ninth Circuit Model Jury Instructions, which apply to all federal claims of excessive force in California.

The removal of the 20/20 hindsight qualifier suggests that it was *intentionally* omitted with the objective of making San Francisco the only city in the country where an officer's

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[3] I mention that this section only "appears" to state that these tests apply. Oddly, this portion of the proposed general order does not use the words "shall," or "may" or "must." This portion merely states that it is describing the law under the Fourth Amendment and Penal Code Section 835(a). It does not state that this is required of San Francisco police officers, although that may be implied.

use of force can now be analyzed based on 20/20 hindsight. If the omission was unintentional, it should, obviously, be corrected. Removal of the 20/20 hindsight qualifier would effect a radical change to the established perspective for analyzing officer involved uses of force. This inconsistency could have undesirable implications for officer training and accreditation under P.O.S.T.

This portion of the Proposed Orders also misstates the factors under *Graham* and its progeny that make up the "totality of circumstances" that an officer may properly consider when making the decision to use force. Buried between these well-established factors is proposed "factor" No. 5, which provides that: "[a]ny force should be proportional to the severity of the offense committed for which the officer is taking action." There are three things wrong with listing this as a *Graham* factor. First, it is not a "factor" at all. Rather, it represents a standard that force should be proportional. Factors, on the other hand, are circumstances that the officer should consider, such as "the severity of the crime," or "whether the subject poses an immediate threat." If San Francisco intends to require "proportionality," whatever that ultimately is intended to mean, it is inappropriate to place it among the *Graham* factors as if it were a "factor" itself. Second, not only is this not a *Graham* factor or a factor under Penal Code Section 835(a), I have been unable to find it listed as a factor in any other reported decision. Third, as discussed above, "proportional," as used in this context, is impermissibly vague – "proportional" is not defined, and could be interpreted in a variety of ways, many of which would lead to absurd outcomes, such requiring an officer to defend himself with a broken bottle when he is attacked with a broken bottle.[4]

Furthermore, although Section II.B purports to state the law under Penal Code Section 835(a), it does not. In particular, Penal Code Section 835(a) states "[a] peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." Inexplicably, although purporting to describe the legal requirements of Penal Code Section 835(a), a very short statute, this language is omitted.

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[4] From my research, this phrase "proportional to the severity of the offense committed," seems to be used almost exclusively in the criminal sentencing context, where it is appropriate for the sentence to be "proportional" to the crime.

Finally, if San Francisco implements entirely new force guidelines not found in P.O.S.T., or any reported decision, it will be very difficult for officers to know what conduct is allowed, and what conduct is prohibited. Their force training as cadets, field training, experience as officers, and their P.O.S.T. training will be inapplicable. And, neither they, nor the Academy instructors will have anywhere other than the Proposed Order to look to see what is prohibited and what is allowed because these guidelines are unprecedented. The obvious problem with relying on mere general orders to usher in an entirely novel approach to using force is that guidance in the general orders will be inconsistent with the classroom and real world training officers receive. (*See* Don Cameron's report.)

c. The Definition of "Thoughtful Communication" Is Unclear.

The phrase "thoughtful communication" is used throughout the proposed revisions. Section I.B, which appears to be a definition of "thoughtful communications," states that "communication with non-compliant subjects is most effective when officers establish a rapport, use proper voice intonation, ask questions and provide advice to diffuse conflict and achieve voluntary compliance before resorting to force options." This policy will be confusing to officers, is problematic from a legal perspective and is contradicted by other portions of the Proposed Order. For example, if an officer sees an individual with a gun about to shoot a child, does this portion of the Proposed Order require the officer to "use proper voice intonation," and "ask questions and provide advice," or, can the officer aim his gun at the suspect as he or she yells "drop the gun!" At a minimum, this section of the Proposed Order should distinguish the circumstances when "thoughtful communication," as defined in the Proposed Order, is appropriate from those where more direct and commanding communication should be used.

d. The Proposed Use Of Force Guidelines For When A Person Is A Danger To Himself Or Others Make No Sense. (II.A.5)

Under section II.A.5, Officers are advised that they can use force to prevent a person from injuring themselves or others "unless the person also poses an imminent danger of death or serious bodily injury to another life or officer." Read literally, this order would prevent officers from using any force to stop someone who is not only trying to injure themselves, but others. This not only conflicts with common sense, but with revised DGO 5.02, which allows officers to use lethal force to stop someone from injuring themselves if they are also presenting an imminent threat of death or serious injury to others. This is probably just an oversight, but if left uncorrected it will create confusing and contradictory instructions.

e. The Proposed Supervisors' Responsibilities For When An Officer Responds To A Weapons Call Are Potentially Dangerous To Everyone While Both Unnecessary, And Accomplishing Little or Nothing.

Proposed Section II. F. 2, requires that when an officer is dispatched to confront or on-views a subject with a weapon, "a supervisor shall immediately remind responding officers, while en route, to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources." In other words, if an officer says over the radio that he sees someone with a shotgun, running out of a bank with a bag of money and jumping into a car and correctly calls Code 33 – the supervisor is then required to go on the air (which blocks all other transmissions) and remind the officer "to protect life, isolate and contain the subject, maintain distance, find cover, engage in thoughtful communication without time constraint, and call for appropriate resources."

This is potentially dangerous to civilians and officers because in the 10-15 seconds in which the supervisor would clog the air waves with this generic announcement, the officer on the scene would have been prevented from conveying critical information such as "shots fired," or "officer down" or calling out the direction the suspect has fled. This requirement may be unnecessary because it entails merely repeating general orders that the officer should already have in mind (assuming that this language is added elsewhere to the general orders). Although SFPD should conduct appropriate empirical analysis of the expected benefits of such a policy, it would seem that *requiring* a supervisor to reiterate general policies, it in the heat of action, accomplishes little or nothing. As a generic announcement heard dozens of times each day, officers in the field will likely begin to tune it out. Moreover, such an announcement runs contrary to the very purpose of Code 33 – which is to clear the air of all unnecessary chatter so that the lead officer can send critical information regarding the emergency. It is notable that no other law enforcement department in the country, of which I am aware, has such a requirement.

In sum, without a very clear and compelling empirical basis for such a requirement, its speculative benefits would appear to be greatly outweighed by the potential for endangering the public and officers.

f. Two Aspects Of The Proposals Prohibiting The Use of Impact Weapons Are Problematic.

i. The Prohibition On Striking A Handcuffed Prisoner With An Impact Weapon Does Not Make Sense.

It is well documented that someone in handcuffs can still be dangerous – even lethal. To prevent officers from using an impact weapon against a dangerous individual, whether handcuffed or otherwise, only increases the risk of injury to the officer and the individual. Impact weapons are a non-lethal alternative use of force. The more non-lethal options that are removed from an officer's arsenal, the more likely the incident will escalate to the point where the officer's only option is lethal force. Proper use of force guidelines and corresponding disciplinary consequences are the appropriate means of addressing the risk that an officer will use an impact weapon on an individual who is not posing a threat. Therefore, there is no value in having a blanket prohibition against use of impact weapons on individuals who are handcuffed.

ii. The Prohibition On Raising An Impact Weapon Above The Head To Strike Would Accomplish Nothing Except Increase Liability And Set Officers Up For Unfair Discipline.

Policies that reduce inappropriate baton strikes are commendable, but a ban on over-head strikes does nothing to accomplish that goal. San Francisco policies, academy and P.O.S.T. training already focus on the appropriate areas of the body to strike an individual with impact weapons, not whether the blow is delivered with a forehand swing, a backhand or an overhand strike. Because it is the part of the individual being struck that matters (head versus thigh), a categorical restriction on how the strike is delivered is nonsensical. Specifically, an over-hand strike may not be any more likely to result in an inappropriate strike than a side-arm strike. Nor is an over-head strike likely to deliver more force than a side-arm strike. (*See* analysis of Don Cameron, who has trained over 45,000 police officers on the use of force.) In addition, what is or is not an over-head strike is not always clear. If the officer is bent over, is a strike over the officer's head an overhead strike? If the officer is on the ground, would any strike be prohibited as "over-head"? If the suspect is above the officer, is an officer prohibited from reaching up to strike the individual on the thigh? The likely unintended consequence of this categorical ban on overhead-strikes is that officers will be less likely to use this non-lethal option, even when appropriate. Such an outcome will not increase safety.

g. The Prohibition On The Carotid Restraint Does Not Seem Warranted and Should Not Be Absolute.

Section III.A.3. provides that officers are prohibited from using the carotid restraint. Based on my 22 years at the City Attorney's Office, I cannot recall a single case in which an individual claimed injury from the carotid restraint. And, I am informed by the SFPOA, that they have searched their files and cannot find one either. I am also informed by Don Cameron that the carotid restraint can be a very effective means to gain control over a suspect without causing injury. I have also been informed that when the CHP attempted to eliminate the carotid restraint, it risked losing P.O.S.T. accreditation. As with other non-lethal force options, the more options at an officer's disposal, the greater the chance the officer will not have to resort to lethal force. If it has not already been done, I would recommend that the SFPD conduct a study of the use of the carotid restraint to determine if its use has been problematic before banning the technique. Regardless, if the SFPD wants to ban this otherwise approved technique, it should not do so categorically. The SFPD should, at minimum, be allow to use this technique in the same situations where using lethal force is justified. I cannot see any reason for why an officer could be in a situation in which he or she was justified in using lethal force, but should be prohibited from using this non-lethal technique.

h. The Ban On Officers Shooting At The Operator Of A Vehicle Who Is Only Using The Vehicle As A Weapon Will Endanger The Public And Officers Or Require Officers To Choose Between Saving A Life Or Their Job.

It is beyond dispute that individuals can and do use their vehicle as a lethal weapons. It is also beyond dispute that officers can and have successfully saved lives by shooting at the operator of the vehicle to prevent them from killing officers or others.

In the past, one of the concerns was that officers were unnecessarily shooting at drivers when the officer could have instead gotten out of the way. The previous general order, which was revised in 2011, directly addressed that concern, providing that officers could only shoot at the driver if there was an imminent threat of serious bodily injury or death *and* the officer had no reasonable or apparent means of retreat. The Proposed Order eliminates that language, and thus prevents an officer from shooting at the driver of a vehicle, even if there is no means of retreat, and where the officer or a bystander will likely be killed if the officer cannot shoot. In addition, this categorical ban prevents an officer from shooting at a driver of a vehicle to prevent their escape, even where there is a

substantial risk that the driver will cause death or serious injury to others if allowed to escape.

Two examples illustrate these dangers: First, if an individual were driving around San Francisco in an SUV, and running over pedestrians for fun, the Proposed Order would prevent an officer from shooting the driver to prevent that driver from killing a family of four in a cross-walk, even if the officer had a clear shot and there was little risk of injury to anyone else. Under the proposed policy, the officer would be required to hold his or her fire and watch the driver run over the family. This is not an abstract hypothetical. (On August 30, 2006, Omeed Aziz Popal, struck 18 pedestrians, killing one in San Francisco with his Honda Pilot SUV).

Second, after a high-speed chase through San Francisco, an individual who had been firing at police during the chase comes to a stop. Just as he is pulling away at under 5 m.p.h., an officer has an opportunity to shoot the driver. Under the proposed policy, the officer would be prohibited from taking the shot. Instead, a high-speed chase would likely ensue, endangering far more civilians. The is not an abstract hypothetical either. (On May 5, 2004, an officer appropriately shot at Cameron Boyd to keep him from killing or injuring others.)

i. The "Exceptional Circumstances, Not Contemplated By This Order," Language Of The Proposed General Order Is Too Vague To Be Any Guide To Officers.

The last two sentences of the Proposed Order state that: "If exceptional circumstances occur, not contemplated by this order, an officer's use of force shall be reasonably necessary to protect others or himself or herself. The officer shall articulate the reasons for employing such use of force." The Proposed Order, however, does not provide any description of what constitutes "exceptional circumstances," or provide any examples, nor does it state what was or was not "contemplated by the order." Because this provision is vague, officers and civilians will be left to guess whether conduct is or is not permitted, which is contrary to the purpose of a general order. I recommend that the Proposed Order either define what is meant by "exceptional circumstances, not contemplated by this order," provide some examples, or consider dropping this language entirely.

5. Conclusion

This represents only a fraction of some of the issues that I believe will be created if these Proposed Orders go into effect as they are. One overall concern I have is that different terms are used interchangeably, and the standard for use of force is mentioned

repeatedly, but using different language throughout the Proposed Orders. When it comes to general orders and litigation, words matter. Even one word used incorrectly, or unintentionally, can have disastrous results. I would hope that the SFPD can take the necessary time to consider the possible ramifications of these Proposed Orders, for the good of the community and the fine men and women who make up the SFPD.

Thank you for requesting my advice on these important issue. Please let me know if I can be of any further assistance. If there is an opportunity to work directly with the SFPD on revising the Proposed Orders, I would be honored to assist.

Blake Loebs

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