206. LIABILITIES ASSOCIATED WITH USE OF FORCE

RICHFIELD POLICE DEPARTMENT POLICY

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NOTE: This policy is for internal use only and does not enlarge an employee's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third party claims. Violations of this policy, if proven, can only form the basis of a complaint by this Department, and then only in a non-judicial administrative setting.

I. PURPOSE

The purpose of this Policy is to familiarize officers in the Richfield Police Department with the potential liabilities associated with the use of force.

II. POLICY

It is the policy of this Department that all officers understand the potential liabilities associated with the use of force. Peace Officers Standards and Training (POST) Use of Force Learning Objective A8 requires that officers be able to explain the civil, criminal, licensing, and employment consequences of unlawful or unreasonable use of force.

III. PROCEDURE

Minnesota law gives peace officers the power to use force, and sometimes deadly force, in the course of their official duties. The law also places responsibility on peace officers to conform their use of force or deadly force to the requirements of Minnesota statutes, case law, state and federal constitutions, and licensing requirements. A peace officer who violates any of these laws in the use of force can be held both civilly and criminally liable for his or her actions.

Obviously, a peace officer, like any other citizen, is subject to state and federal criminal laws; that is if the officer should assault or kill a citizen unlawfully, that officer could be prosecuted for those offenses and punished like any other citizen. In cases of non-criminal excessive or unreasonable use of force, the injured citizen may have grounds to sue the police officer and municipality for civil damages due to assault, false arrest, wrongful death, and/or deprivation of civil rights, to cite only a few examples of typical civil causes of action. Additionally, the municipality employing the police officer can be sued and may be held civilly liable to the victim for the use of excessive force by a peace officer.

To properly understand potential criminal and civil exposure for excessive use of force or deadly force, officers must have a solid working knowledge of the Minnesota and federal statutory privileges and limitations on the use of force while in the scope of duty. Minnesota has general statutes authorizing the use of force and deadly force; specific statutes governing peace officers' use of deadly force; and arrest statutes authorizing the use of force and, in some limited circumstances, deadly force in effecting an arrest. Cases applying and interpreting these statutes provide additional information about the limitations on the use of force by peace officers. Federal statutes and federal court decisions also define what constitutes reasonable use of force and the liabilities officers and governments face when force is unreasonable.

STATUTORY GUIDELINES

MINNESOTA

a) Minnesota Statutes section 609.06:
- A public officer, or a person acting under the public officer's direction, may use "reasonable force" in executing any duties imposed on the officer by law, including making a lawful arrest, executing legal process, or enforcing a court order.
- Any person can use "reasonable force" to prevent the escape, or to retake following the escape, of a person lawfully held on a charge or conviction of a crime.

b) Minnesota Statutes section 609.065:
"Justifiable taking of life": Intentional taking of life is not authorized by section 609.06 "except when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death." (The statutes also defines as "justifiable taking of life" by any person "preventing the commission of a felony in the actor's place of abode.")

c) Minnesota Statutes section 609.066:
- Notwithstanding sections 609.06 and 609.065, a peace officer is justified in using deadly force in the line of duty only when necessary to:
  (1) "protect the peace officer or another from apparent death or great bodily harm";
  (2) "effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force";
  (3) "effect the arrest or capture, or prevent the escape, of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed".

d) Minnesota Statutes section 629.32: "A peace officer making an arrest may not subject the person arrested to any more restraint than is necessary for the arrest and detention."

e) Minnesota Statutes section 629.33 describes the amount of force a peace officer may use to effect an arrest: "If a peace officer has informed a defendant that the officer intends to arrest the defendant, and if the defendant then flees or forcibly resists arrest, the officer may use all necessary and lawful means to make the arrest but may not use deadly force unless authorized to do so under section 609.066." This statute also defines reasonable use of force to enter a home: "After giving notice of the authority and purpose of entry, a peace officer may break open an inner or outer door or window of a dwelling house to execute a warrant if: (1) the officer is refused admittance; (2) entry is necessary for the officer's own liberation; or (3) entry is necessary for liberating another person who is being detained in the dwelling house after entering to make an arrest.

f) Minnesota Statutes section 609.066 also states that that "section and sections 609.06, 609.065 and 629.33 may not be used as a defense in a civil action brought by an innocent third party."

Summary: If the officer informs the person of the intent to arrest and the individual flees or forcibly resists, the officer may use all necessary and lawful means to make an arrest but may not use deadly force unless consistent with Minnesota Statutes section 609.066, that is, to protect against or prevent death or great bodily harm.

FEDERAL STATUTES

a) Statute: 42 U.S.C. § 1983 is a federal statute under which a citizen may obtain money damages for a violation of his or her civil rights by the government. The United States Congress has provided for civil liability when a peace officer acting under color of law uses excessive force or deadly force. Title (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not create any substantive rights, but it provides remedies for deprivation of rights established elsewhere. City of Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985). A constitutional or statutory violation can be the basis for a section 1983 claim. Main v. Thiboutot, 488 U.S. 1, 4 (1980). Parties injured by constitutional abuses are entitled to recovery of monetary damages. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

b) Stating a Claim under Section 1983:
Only two allegations are necessary to state a cause of action under section 1983: (1) that a person has deprived the claimant of a federal right, and (2) that the person so depriving acted under color of state law. L.K. v. Gregg, 425 N.W.2d 813, 818 (Minn. 1988) (citing Gomez v. Toledo, 446 U.S. 635, 640 (1980).

c) Custom, Practice, or Policy:
A municipality may, in certain circumstances, be held liable under section 1983 for its failure to train its employees. City of Canton v. Harris, 489 U.S. 378, 380 (1989). The U.S. Supreme Court in the Harris case stated: "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact."

Only when the municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of his inhabitants can such a shortcoming be characterized as a city "policy or custom" actionable under section 1983. Id. at 389. The failure to train must be a "policy," as the Supreme Court has defined that term, and reflect a "deliberate" or "conscious" choice in order for a municipality to be liable. The Court gave an example:

[C]ity policy makers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious" that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.
Id. at 390 n.10

CASE LAW

In addition to the statutory privileges, requirements, and restrictions on the use of force and deadly force, judicial law, also known as "case law," has interpreted the constitutions and statutes to place limitations on the use of force, particularly deadly force. The courts have construed the use of excessive force to implicate citizens' constitutional rights to be free from unreasonable seizures and to enjoy equal protection of the laws and due process of law.

a) General rule: an officer will be found liable in a civil lawsuit or guilty of a crime if the force used was excessive. A party can recover only for injuries resulting from the excessive use of force, not for all injuries incurred during the arrest, and an officer will not be found guilty of a criminal offense if the force used was reasonable.
b) What is "excessive" depends on the particular circumstances encountered. There is no absolute and inflexible rule defining what constitutes excessive force.
c) Key question is whether force used was appropriate in light of the situation at the time.

FEDERAL CASE LAW

Decisions by the U.S. Supreme Court are the law of the land. A decision by the U.S. Court of Appeals for the Eighth Circuit (which includes Minnesota as well as Arkansas, Iowa, Missouri,

Nebraska, North Dakota, and South Dakota) or the U.S. District Court for the District of Minnesota governs actions in Minnesota.

Leading U.S. Supreme Court cases on use of force is Graham v. Conner, 109 S.Ct. 1865 (1989).

- Facts: A person with diabetes had friend drive to store to get orange juice. Line was too long, so he rushed back out and told friend to drive to another friend's house. Police saw, followed and stopped. Would not listen to claims regarding medical needs. Graham was thrown on sidewalk; handcuffed; thrown on hood. Friend was not allowed to give him OJ. Police determined nothing happened at store and released him. Injuries: Broken foot, injured wrist, bruised forehead, injured shoulder, ringing in ear.

- Claim: Civil rights action, claiming excessive force in course of investigatory stop.

- Holding: The use of excessive force by a police officer might furnish the basis for a claim under section 1983. All excessive force claims under section 1983 are not adjudged the same. Court must first identify the constitutional right allegedly infringed by the challenged application of force, then judge the claim by the specific constitutional standard that governs the right. Most cases claim a Fourth Amendment unreasonable seizure or Eighth Amendment cruel and unusual punishment. In evaluating the reasonableness of a seizure, courts are to consider: "[T]he facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham v. Conner, 490 U.S. 386, 396 (1989).

- Standard against which use of force during an arrest, investigatory stop or other seizure of a free citizen (non-prisoner) is most properly characterized as involving the protections of the Fourth Amendment, which guarantees citizens the right to be secure in their persons against unreasonable seizures. Therefore, use the Fourth Amendment's *objective reasonableness* standard.

- Factors to be considered:
  (1) Severity of crime;
  (2) Whether the suspect poses an immediate threat to the safety of the officers or others;
  (3) Whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

- Objective reasonableness is judged from the perspective of a reasonable officer on the scene, and in light of the facts and circumstances confronting the officer, but without regard to the officer's underlying intent or motivation. This determination must allow for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.

d) Leading U.S. Supreme Court case on use of deadly force is Tennessee v. Garner, (1985).

- Facts: Officer saw Garner, and, noticed from his hands that he was young and unarmed. The officer yelled a warning which went unheeded. The officer shot and killed Garner.

- Rule: If a suspect threatens an officer with a weapon or there is probable cause to believe he or she has committed a crime involving the infliction or threatened infliction of serious physical harm or death, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given. Current standard is still one of "objective reasonableness."

- Holding: Fatal shooting of a fleeing suspect constituted an unconstitutional seizure. The use of deadly force to apprehend a suspect who is unarmed and who poses no threat to an officer or others will result in liability of the officer. In such a case, the

harm resulting from the failure to apprehend does not justify the use of deadly force to do so.

e) Other deadly force cases:

- Brower v. Inyo County (1989): There is only a Fourth Amendment seizure when there is governmental termination of freedom of movement through means intentionally applied. Use of an 18-wheel truck as a roadblock, placed in such a manner as to be likely to kill decedent, constituted unreasonable seizure by excessive force. If police sideswiped, would be seizure. If chase and he unexpectedly loses control and crashes, not seizure. Once determine seizure, determine if unreasonable.

Summary: The general principle is that there is less privilege to use force if the suspect is not armed, not dangerous, and not resisting arrest or fleeing. Some factors that have been used to determine if force was excessive:

- Known character of arrestee;
- Risks and dangers faced by the officer;
- Nature of the offense involved;
- Chance of the arrestee's escape if the particular means are not employed;
- The existence of alternative methods of arrest;
- The physical size, strength and weaponry of the officer as compared to the arrestee;
- "Exigencies of the moment."

Some practical considerations: The nature of case and status of offender do not directly influence the degree of force that is appropriate, but these factors affect the risks the officer can anticipate facing. Questions to consider:

Is there potential of death or great physical harm if the suspect is not apprehended immediately?

- What other means are available?
- Where are you in relation to the suspect and in terms of your safety?
- Are there other people present who might be harmed?
- How big is the suspect in relation to you?

Damages in cases in which the officer is found to have used unreasonable deadly force can be significant.

STATE CASE LAW

Minnesota Supreme Court decisions constitute the rule of law in Minnesota. Some Minnesota Court of Appeals decisions also have the force of law over persons and actions in Minnesota.

Qualified Immunity

Even if the plaintiff's claims are actionable under section 1983, the police are sometimes entitled to "qualified immunity" against those claims. Qualified immunity (also called "good-faith" immunity) is an affirmative defense available to public officials sued for damages under section 1983. Elwood, 423 N.W.2d at 674 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)). The standard for qualified immunity was set forth by the U.S. Supreme Court in Harlow v. Fitzgerald:
"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. The two-part question is (1) whether the officer violated a particularized law at the time of conduct, and (2) whether no reasonable officer would have acted similarly. Qualified immunity should be recognized if officers of reasonable competence could disagree on the issue.

Official Immunity Doctrine

The doctrine of "official immunity" protects from personal liability a public official charged by law with duties that call for the exercise of judgment. Rico v. State, 472 N.W.2d 100, 106-07 (Minn. 1991). To have official immunity: (1) the challenged acts must have occurred in the exercise of the officer's discretion, and (2) the officer must not have committed a willful or malicious wrong.

In defining the scope of official immunity, the Minnesota Supreme Court distinguishes between "discretionary" duties, which are immunized, and "ministerial" duties, for which the officer remains liable. The court has described an official's duty as ministerial "when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." Cook v. Trovatten, 200 Minn. 221, 224, 274 N.W. 165, 167 (137).

Police officers are generally classified as discretionary officers who are typically entitled to official immunity for actions within the line of duty. In making the decision to use deadly force, it is necessary for a police officer to determine whether a felony is in progress and whether the officer or another person is in imminent danger. Such a decision necessarily involves the exercise of judgment or discretion. Thus, the decision whether to use deadly force is properly characterized as discretionary. Consequently, police are entitled to official immunity if they did not commit a willful or "malicious wrong." "Malice" is defined as a term that "means nothing more than the intentional doing of a wrongful act without legal justification or excuses, or, otherwise stated, the willful violation of a known right." Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 462, 205 N.W. 630, 631 (1925). Thus, in the official immunity context, "willful" and "malicious" are synonymous. Liability will attach when a police officer intentionally omits an act that the officer, at the time of the act, has reason to believe is wrong. Whether or not an officer acted willfully or maliciously is usually a question of fact to be resolved by the jury.

Discretionary Immunity

Minnesota Statutes section 466.03, subdivision 6, establishes that a municipality is immune from any tort liability for: "[A]ny claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." In analyzing the discretionary function exception, the Minnesota Supreme Court has distinguished between "planning" decisions (which are discretionary and protected) and "operational" decisions (which are not discretionary and are not protected). Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the political, economic and social effects of a given plan or policy. Holmquist v. State (Minn. 1988). Operational decisions are those relating to ordinary day-to-day operations of the government. The critical inquiry is whether the challenged governmental conduct involved a balancing of police objectives. Nusbaum v. County of Blue Earth (Minn. 1988). Not all acts involving the exercise of judgment by government agents are protected as discretionary functions. The protection afforded by discretionary function exception does not extend to professional or scientific judgment where such judgment does not involve a balancing of policy objectives. Instead, "government conduct is protected only where the state produces evidence that the conduct was of a policy-making nature involving social, political, or economic considerations."

The training a city provides to its police officers is a policy decision. The city must decide what kinds of training the officers need and must take into account the resources the city has to pay for such training. Thus, the city is protected by discretionary immunity.

Licensing Consequences

In addition to the criminal and civil liabilities for use of excessive force or deadly force, peace officers can face licensing consequences from the Minnesota POST's Board. The 1992 Minnesota Legislature requires that all peace officers be trained annually in the use of force and deadly force. The officers must conform their conduct to the requirements of Minnesota and federal law. The use of excessive force, particularly deadly force, can be considered police misconduct, which could subject the officer to sanctions including the loss of license.

By Order Of:

Chief of Police