



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 8, 2013

Chief Noble Wray
Madison Police Department
211 South Carroll Street
Madison, Wisconsin 53703-3303

Dear Chief Wray,

As you know, Assistant Chief John Davenport requested a review of a shooting incident involving a Madison Police Officer on November 9, 2012 from the Wisconsin Department of Justice, Training and Standards Bureau. This review was conducted to determine whether the officer's actions were consistent with the training approved by the Law Enforcement Standards Board. This review is based on the internal investigation, interviews, and information supplied by the Madison Police Department. It is not the result of an independent investigation, and does not evaluate whether the officer's actions were consistent with the policies and procedures of the Madison Police Department.

Education Consultant Stephanie Pederson and Training Officer Glenn Rehberg were assigned to this project and met twice with Lt. Dan Olivas from your Professional Standards Section. Ms. Pederson is the Education Consultant in charge of the Tactical Skills portion of the Law Enforcement Standards Board (LESB) recruit training curriculum; Mr. Rehberg is a certified police officer and has been a certified firearms and defense/arrest tactics instructor for more than a decade. At these meetings, my staff reviewed the documents and pertinent information related specifically to Officer Stephen E. Heimsness' use of force on November 9.

Ms. Pederson and Mr. Rehberg found that force used by Officer Heimsness to stop the threat and control the subject falls within the training curriculum approved by the LESB. I have reviewed their "Administrative Review" and concur with their findings.

Their report is enclosed. If you have any questions regarding this document, please feel free to contact me (608/266-7052 or okeefebr@doj.state.wi.us).

Sincerely,

Brian O'Keefe
Administrator
Division of Law Enforcement Services

cc: Assistant Chief Davenport

Madison Police Department Shooting Administrative Review

Training and Standards Bureau, Wisconsin Department of Justice

January 8, 2013

At the request of the Madison Police Department, a Use of Force review team was assembled at the Training and Standards Bureau, Wisconsin Department of Justice to conduct an administrative review of the Madison Police Department's use of force at 513 S. Baldwin Street, Madison, Wisconsin on November 9, 2012.

The Use of Force Review Team:

- Stephanie Pederson, Education Consultant, Training and Standards Bureau
- Glenn Rehberg, Senior Training Officer, Training and Standards Bureau

Scope:

The scope of the review was restricted to whether the actions of Police Officer Steven Heimsness were consistent with LESB-approved curriculum.

Summary of Facts:

- PO Heimsness was on-duty, in uniform, and readily identifiable as a police officer at the time of the incident.
- PO Heimsness was acting within the scope of his employment as a police officer and was responding to the report of a burglary in progress.
- Upon arrival PO Heimsness reported he saw the suspect and homeowner (who he identified through a clothing description) “wrestling and pushing and shoving each other.”
- Prior to discharging his firearm, PO Heimsness gave several verbal commands for the suspect to get down on the ground, which the suspect disregarded. The suspect advanced on PO Heimsness, grabbed and held onto PO Heimsness’ left hand, and reached and attempted to grab for PO Heimsness’ handgun with his other hand.
- PO Heimsness intentionally fired three rounds from his duty weapon, striking the suspect and causing his death. Deadly force was selected from the Defensive and Arrest Tactics (DAAT) intervention options.
- PO Heimsness’ use of deadly force to control the suspect stopped the threat to himself.
- MPD officers provided medical first aid to the suspect.
- PO Heimsness reported his actions to dispatch as soon as practical.
- PO Heimsness was trained and qualified by the Madison Police Department in the use of his duty weapon at the time of the incident.

Additional Information:

- Prior to shooting, PO Heimsness was backing up on a sidewalk and knew he was going to encounter a curb or other obstacle that could cause him to trip and fall down. He believed if he fell down the suspect would get on top of him and have a greater advantage.
- PO Heimsness did not re-holster his weapon, because he said he was trying to maintain control of it while trying to “keep the suspect off” of him. He said he was afraid he may “miss his holster or drop” the weapon if he attempted to re-holster it.
- Prior to discharging his weapon, PO Heimsness gave repeated verbal commands to get down on the ground, which the suspect ignored.

- PO Heimsness acquired and identified the suspect, who he feared was trying to disarm him. PO Heimsness felt he isolated the target and said he knew he could shoot because he could not see the homeowner and could tell there was no one else around. PO Heimsness said, "I thought my background was clear, he's trying to get my gun. I think if he gets my gun, he's going to shoot me."

The Law Enforcement Standards Board *Defensive and Arrest Tactics Training Guide for Law Enforcement Officers* (August 2007)

The word imminent means “about to happen.” An imminent threat is an immediate threat. For a subject’s threat to be considered imminent, it must meet three criteria:¹

- a. Intent
- b. Weapon
- c. Delivery System

Intent. The subject must indicate his or her intent to cause great bodily harm or death to you or someone else, either through words or acts. The suspect’s behavior was first observed by the officer as the suspect struggled with the homeowner. When the officer intervened, the suspect disengaged from the homeowner and, ignoring the uniformed officer’s orders, aggressively advanced, grabbed the officer, and reached for the officer’s weapon. PO Heimsness said the suspect was “looking directly at his gun and the suspect’s eyes were locked on [his] gun.” LESB curriculum describes this behavior as a ‘target glance.’²

Weapon. The subject must have a conventional or unconventional weapon capable of inflicting great bodily harm or death. The suspect was restraining the officer’s left arm and reaching for a handgun.

Delivery System. The subject must have a means of using the weapon to inflict harm. If the suspect succeeded in disarming PO Heimsness, the suspect would be in a position to use the weapon against the officer and anyone else in the area.

Preclusion

“Within the DAAT system, you may use deadly force to respond to [a suspect’s] behavior, but only if no other reasonable option is available. In other words, deadly force is a last resort...This concept is called preclusion. Note that in many deadly-force situations, you will not have time or the ability to try other options – if a subject a few feet away from you suddenly pulls a gun and threatens to shoot you, generally the only reasonable response is to fire. There is simply not enough time to try alternatives.”³

Failure to immediately control the suspect could pose a significant threat of death or great bodily harm to PO Heimsness. “Many disarmings occur because officers are physically defeated in empty-hand confrontations and are no longer able to defend their weapons. The best defense is never to let that happen: choose an appropriate Intervention Option to control any situation quickly and effectively.”⁴ “If someone has taken your firearm, you are in immediate danger of

¹ *Defensive and Arrest Tactics Training Guide*, p. 69, reproduced in Appendix A.

² *Defensive and Arrest Tactics Training Guide*, p. 25, reproduced in Appendix B.

³ *Defensive and Arrest Tactics Training Guide*, p. 70, reproduced in Appendix A.

⁴ *Defensive and Arrest Tactics Training Guide*, p. 72, reproduced in Appendix C.

losing your life.”⁵ The suspect’s immediate actions during this incident could lead a reasonable officer to believe no other use of force option was reasonable. PO Heimsness met the element of preclusion.

Target Requirements

The Law Enforcement Standards Board text *Firearms Training Guide for Law Enforcement Officers* states that if you have determined that you face a threat that meets the requirements to permit deadly-force response, and you have decided to shoot, you must still fulfill three target requirements:⁶

1. Target acquisition
2. Target identification
3. Target isolation

Target acquisition and target identification. PO Heimsness acquired and identified the suspect (the suspect was in close proximity, grabbing at his gun and restraining Heimsness’ other hand). When PO Heimsness decided to shoot, the subject was actively resisting and ignoring his commands.

Target isolation. PO Heimsness felt he isolated the target and said he knew he could shoot because he could not see the home owner and could tell there was no one else around. PO Heimsness said “I thought my background was clear, he’s trying to get my gun. I think if he gets my gun, he’s going to shoot me.”

Use of Force Category

The *Defensive and Arrest Tactics Training Guide* states when an officer uses force as part of his or her law enforcement duties, the use of force must fit into one of these categories to be justifiable:⁷

1. A trained technique.
2. A dynamic application of a trained technique (i.e., not quite the classroom model, but as close to it as possible under the circumstances).
3. A technique not trained, but justifiable under the circumstances.

PO Heimsness’ use of his duty weapon was a “trained technique.”

⁵ *Defensive and Arrest Tactics Training Guide*, p. 72, reproduced in Appendix C.

⁶ *Firearms Training Guide for Law Enforcement Officers*, December 2010, pp. 8-9, reproduced in Appendix E.

⁷ *Defensive and Arrest Tactics Training Guide*, p. 3, reproduced in Appendix D.

Final Findings

PO Heimsness' use of deadly force on November 9, 2012, falls within the training approved by the Wisconsin Law Enforcement Standards Board.

or other instrument must be *likely to cause death*. A baton strike to the knee area is not likely to cause death, but it conceivably could do so in certain unlikely circumstances (e.g., the strike fractured the bone, and a sharp splinter of bone sliced an artery, causing the subject to bleed to death). Because a baton strike to the knee is not likely to cause death, it would not be considered deadly force even if the subject did, in fact, die.

The definition of subject behavior that justifies an officer's use of deadly force is any behavior:

which has caused or imminently threatens to cause death or great bodily harm to you or another person or persons.

Note that this definition is not quite the same as the definition of deadly force: it includes behavior likely to cause great bodily harm⁶ as well as death. As you have learned, an officer may respond to a given level of force with a higher one, in order to control the situation.

The word *imminent* means "about to happen." An imminent threat is an immediate threat. For a subject's threat to be considered *imminent*, it must meet three criteria:

- Intent
- Weapon
- Delivery System

Intent. The subject must indicate his or her intent to cause great bodily harm or death to you or someone else. Some of the ways that intent might be shown would include deliberately pointing a weapon at you, stating an intention to kill you, rushing at you with a knife, and so on.

Weapon. The subject must have a conventional or unconventional weapon capable of inflicting great bodily harm or death. Guns and knives are not the only weapons—many other common objects can be used as weapons. Beer bottles, baseball bats, pieces of broken glass, large rocks or bricks—all of these and others can be weapons. Some individuals are even able to inflict death or serious injury with their hands or feet alone, and some apparently innocuous items, such as a pen or pencil, can be used as a weapon.

Delivery System. The subject must have a means of using the weapon to inflict harm. A person armed with a baseball bat, having stated his or her intention to kill you, does not meet the criteria for imminent threat if he or she is standing 50

⁶Wisconsin law defines "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." (§939.22(14)Wis. Stats.)

yards away from you on the other side of a fence. There is no delivery system. The same person standing 10 feet away from you does meet the criteria.

Preclusion. Within the DAAT system, you may use deadly force to respond to behavior, but only if no other reasonable option is available. In other words, deadly force is a last resort. You must be able to articulate that, if possible, you attempted to escalate through other modes and tactics, and that all options except deadly force were closed. This concept is called *preclusion*. Note that in many deadly-force situations, you will not have time or the ability to try other options—if a subject a few feet away from you suddenly pulls a gun and threatens to shoot you, generally the only reasonable response is to fire. There is simply not enough time to try alternatives. If feasible, you should give a verbal warning before firing, but again, this is not always possible, and in some cases may not be desirable.

Target Requirements. If you have determined that you face a threat that meets the requirements to permit a deadly-force response, and you have decided to shoot, you must still fulfill three target requirements:

- Target acquisition
- Target identification
- Target isolation

Target acquisition. Target acquisition means simply that you have acquired an actual target to shoot at. You cannot fire blindly in the direction of a sound, for example, because you may endanger others. If someone has shot at you from an apartment building, you cannot return fire until you have a specific target to aim at.

Target identification. Target identification means that you have identified your target as the source of the imminent threat. To continue the previous example, just because you see someone at a window in that apartment building, you cannot shoot until you verify that the individual you see is the person who shot (or someone else who is about to shoot at you).

Target isolation. Target *isolation* means that you can shoot at your target without danger of harming innocent people. If the person who shot at you from the apartment building ran out of the building and into a crowd of people, you could not shoot at him or her without endangering others.

The one exception to the requirement for target isolation is called the **greater danger exception**. Essentially, this exception allows you to shoot without target isolation if the consequence of not stopping the threat would be worse than the possibility of hitting an innocent person. For example, if a deranged subject were randomly shooting people, you might be justified in firing without target isolation because if not stopped, the suspect could be expected to continue shooting. The

- **Pre-attack postures**-these are physical postures that may indicate the subject is about to attack you:
 1. Boxer stance
 2. Hand set/clenched fists
 3. Shoulder shift, or rolling the shoulders forward as if preparing to attack
 4. Target glance – looking at a potential target
 5. The "thousand-yard stare" – a direct, continuing, but unfocused stare

Indications of mental illness, emotional disturbance, or medically significant behavior—behaviors that indicate that the subject is mentally ill, in crisis, or under the influence of alcohol or drugs. You will often be called upon to deal with those who are mentally ill or emotionally disturbed. You will learn more about these conditions in *Crisis Management* and will learn techniques in *Professional Communication* to help you manage such subjects. While assessing a subject's mental state, you must also try to determine if that state is coupled with medically significant behavior. In some cases, mental illness, stimulant drug use, or underlying medical conditions can cause a chemical imbalance in the body that produces characteristic violent and delusional behavior. Some of the indicators that a subject may be in a state of medically significant behavior requiring medical assistance include these:

- Abrupt onset – bystanders say, "he suddenly just started acting strange"
- Agitation or excitement
- Confusion and impaired thinking and perception
- Bizarre, often violent behavior directed at objects, especially glass
- Superhuman strength and insensitivity to pain
- Profuse sweating and clothing removal caused by extremely high body temperature

One condition characterized by this behavior is called Excited Delirium. Many of the deaths that occur in police custody are thought to be a result of Excited Delirium. An early request for medical assistance when observing this type of behavior is very desirable.

Weapon-control factors-circumstances that indicate the subject may intend to use a weapon against you, including these:

- The subject's hands (especially the palms) are out of sight
- The subject is armed (you can see a weapon or have information to that effect)
- The subject is in a position to control one of your weapons

If you see any of these indicators, your assessment of the potential threat posed by the subject should increase.

Many disarmings occur because officers are physically defeated in empty-hand confrontations and are no longer able to defend their weapons. The best defense is never to let that happen: choose an appropriate Intervention Option to control any situation quickly and effectively.

If a subject attempts to disarm you, the basic technique is called the GUN technique, an acronym for Grab, Undo, and Neutralize. The GUN technique has two variations, depending on whether the disarming attempt takes place when your weapon (baton or firearm) is in the holder/holster or when the weapon is outside of the holder/holster.

GUN - Weapon in holder/holster. If the weapon is in the holder/holster, your goal will be to keep it there at least until you can create distance and consider your options. To apply the technique:

1. **Grab:** Secure the weapon in its holder or holster, using one or both hands, and lowering your center to increase your stability.
2. **Undo:** Undo the subject from your weapon, using an appropriate technique, such as one of these:
 - Striking the subject's hand or arm
 - Directing the subject to the ground
 - Striking the subject, using active countermeasures
 - Using deadly force, if it is justified
3. **Neutralize:** Neutralize the subject's ability to continue or re-initiate the disarming attempt. Possible actions include these:
 - Disengaging
 - Verbalizing
 - Using passive or active countermeasures
 - Using the baton
 - Using deadly force, if justified

GUN - Weapon outside holder/holster. If a subject has succeeded in taking your baton or firearm away from you, you are in an extremely dangerous situation, requiring prompt action.

If a subject has taken your baton, your best defense—if it is feasible—would be to draw your firearm, create distance, and attempt to defuse the situation with verbalization. In some situations, such as crowd control, drawing your firearm might not be feasible. If someone has taken your firearm, you are in immediate danger of losing your life.

3. When the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office; or
4. When the actor's conduct is a reasonable accomplishment of a lawful arrest.

The concept of *privilege* is very important. What it means is that as a law enforcement officer, if you are acting in good faith and seeking to achieve legitimate law enforcement objectives (including making arrests), you can legally use force *that could otherwise be considered a criminal act*. Naturally, if you use force for some unauthorized purpose—such as to retaliate against someone—your use of force is *not* privileged, and you may be subject to criminal charges.

Agency Policy

Your employing agency has a set of policies and procedures that describe how officers are expected to carry out their duties. Under § 66.312 of the Wisconsin Statutes, the agency must have a policy on use of force by law enforcement officers in the performance of their duties. This policy may be more restrictive than Wisconsin law. You need to know your agency's policies on use of force and act within them. If you are acting within the scope of your employment, you are *indemnified* against individual liability in the performance of your duties. This means that if someone brings a lawsuit against you for a use-of-force incident, the governmental unit that you work for (such as a county or municipality) will face the liability—your individual assets won't be at risk.

On the other hand, if you act outside the scope of your employment—which is, in part, defined by policy, you could face individual civil liability. If someone brings a lawsuit and you lose, you (or your insurance company) could have to pay the judgment.

Officer Training

In DAAT you will learn a number of effective physical techniques to gain compliance from a subject. You may have been trained in other methods (such as one of the martial arts) as well. When you use force as part of your law enforcement duties, your use of force must fit into one of these categories:

1. A trained technique
2. A dynamic application of a trained technique (*i.e.*, not quite the classroom model, but as close to it as possible under the circumstances)
3. A technique not trained, but justifiable under the circumstances

The same person standing 10 feet away from you does meet the criteria. As you learned in DAAT, the danger zones for weapons are

| | |
|-----------------------|---|
| Unarmed: | less than 10 feet |
| Club or edged weapon: | less than 21 feet |
| Gun: | in the line of sight unbroken by cover (i.e. something that would stop the bullet) |

Preclusion

Within the DAAT system, you may use deadly force to respond to behavior, but only if no other reasonable option is available. In other words, deadly force is a last resort. You must be able to articulate that, if possible, you attempted to escalate through other modes and tactics, and that all options except deadly force were closed. This concept is called **preclusion**. Note that in many deadly-force situations, you will not have time or the ability to try other options—if a subject a few feet away from you suddenly pulls a gun and threatens to shoot you, generally the only reasonable response is to fire. There is simply not enough time to try alternatives. If feasible, you should give a verbal warning before firing, but again, this is not always possible, and in some cases may not be desirable.

Target Requirements

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Target isolation. Target *isolation* means that you can shoot at your target without danger of harming innocent people. If the person who shot at you from

the apartment building ran out of the building and into a crowd of people, you could not shoot at him or her without endangering others.

The one exception to the requirement for target isolation is called the **greater danger exception**. Essentially, this exception allows you to shoot without target isolation if the consequence of not stopping the threat would be worse than the possibility of hitting an innocent person. For example, if a deranged subject were randomly shooting people, you might be justified in firing without target isolation because if not stopped, the suspect could be expected to continue shooting. The chance that your bullet might strike an innocent person is preferable to the likelihood of the suspect killing or injuring many others.

As discussed earlier, *Tennessee v. Garner* means that you cannot automatically use deadly force to stop a fleeing suspect, especially if the person appears to be non-dangerous. What about a dangerous suspect? Can an officer legitimately use deadly force to stop a fleeing suspect who has committed a serious, violent crime? The question rests on the two criteria of imminence and preclusion. If not apprehended, is there an imminent danger that the suspect will kill or severely injure someone? Are all other options for capturing the suspect unworkable or have they already failed? If the answer to both questions is *yes*, deadly force is an option. The justification for deadly force is based not on the nature or seriousness of the crime, but on the imminent danger to others.

Your judgment in a deadly-force situation is based on the totality of circumstances known to you at the time. For example, if a suspect points a pistol at you with the clear intent to shoot, you are justified in using deadly force. If it turns out later that the suspect's gun was unloaded, that does not make your decision unjustified. Your perception of the threat was reasonable, under the circumstances.

The purpose for using deadly force, as presented in the Intervention Options, is to *stop a threat*. Accordingly, **when the threat stops, you must stop shooting**. Again, your judgment as to whether the threat has stopped is based on your reasonable perception of the totality of the circumstances at the time.

BALLISTICS

The term *ballistics* refers to the processes involved in firing a weapon and the behavior of the projectile that is fired. With respect to police firearms, we are chiefly concerned with three types of ballistics:

- Internal ballistics (what happens inside the firearm)
- External ballistics (what happens during the projectile's flight)
- Terminal ballistics (what happens when the projectile strikes an object)