


ADMINISTRATION
GENERAL ORDER A-42

Subject: **Use of Force**

Effective Date: **June 11, 2021**

Pages: **Twelve (12)**

Authorization:



Timothy B. Howard, Sheriff of Erie County



PURPOSE:

Erie County Sheriff's Office deputies are authorized to use reasonable and legitimate force in specific circumstances. Federal constitutional and State statutory standards dictate when and how much force can be used. This policy is founded in these standards but is not intended to be an exhaustive recitation of state and/or federal legal framework governing use of force. These policies are designed to provide guidance to individual agencies as they develop their own use of force policies in accordance with Executive Law §840(4)(d)(3). This policy is not intended to endorse or prohibit any particular tactic, technique, or method of employing force.

POLICY:

The federal and state standards by which use of force is measured are both founded in the basic premise of objective reasonableness. **(1)** The amount of force that is used by the officers shall be the amount of force that is objectively reasonable under the circumstances for the officer involved to effect an arrest, prevent an escape, or in defense of themselves or others. The standard of objective reasonableness, established by the United States Supreme Court in *Graham v. Connor*, is used in this policy and is intended to provide officers with guidelines for the use of force, including deadly physical force.

As the Supreme Court has recognized, this reasonableness inquiry embodies "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." **(2)**

This policy is written in recognition of the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires a careful balancing of all interests

It is the policy of the Erie County Sheriff's Office that deputies shall use physical force in the performance of their duties **ONLY WITHIN** the limits established by Article 35 of the New York State Penal Law.

Any deputy who uses physical force shall report or cause to be reported, all of the facts and circumstances surrounding such use of force. For this purpose, the appropriate form (Erie County Sheriff's Office Use of Firearms/Force Report) shall be completed and submitted with all other required paperwork.

DEFINITIONS:

Objectively Reasonable – An objective standard used to judge an officer's actions. Under this standard, a particular application of force must be judged through the perspective of a reasonable officer facing the same set of circumstances, without the benefit of 20/20 hindsight, and be based on the totality of the facts that are known to that officer at the time that the force was used. **(3)**

Deadly Physical Force - Physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury. **(4)**

Physical Injury – Impairment of physical condition or substantial pain. **(5)**

Serious Physical Injury – Physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ. **(6)**

Additional definition of terms in this order is consistent with all definitions as set forth in Article 10, Article 35 and elsewhere, as applicable, in the New York State Penal Law.

USE OF FORCE:

In general terms, force is authorized to be used when reasonably believed to be necessary to effect a lawful arrest or detention, prevent the escape of a person from custody, or in defense of one's self or another. **(7)**

Under the 4th Amendment, a police officer may use only such force as is "objectively reasonable" under the circumstances. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. **(8)**

DETERMINING THE OBJECTIVE REASONABLENESS OF FORCE:

When used, force should be only that which is objectively reasonable given the circumstances perceived by the officer at the time of the event.

Factors that may be used in determining the reasonableness of force include, but are not limited to:

1. The severity of the crime or circumstance; **(9)**
2. The level and immediacy of threat or resistance posed by the suspect; **(10)**
3. The potential for injury to citizens, officers, and suspects; **(11)**
4. The risk or attempt of the suspect to escape; **(12)**
5. The knowledge, training, and experience of the officer; **(13)**
6. Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion, and the number of officers or subjects; **(14)**
7. Other environmental conditions or exigent circumstances. **(15)**

DUTY TO INTERVENE:

Any officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.

An officer who observes another officer use force that exceeds the degree of force as described in subdivision A of this section should promptly report these observations to a supervisor.

USE OF DEADLY PHYSICAL FORCE:

- A. Deadly physical force may be used by an officer to protect themselves or another person from what the officer reasonably believes is an imminent threat of serious physical injury or death. **(16)**

- B. Deadly physical force may be used to stop a fleeing suspect where:
 - 1. The officer has probable cause to believe the suspect has committed a felony involving the infliction or threat of serious physical injury or death; and,
 - 2. The officer reasonably believes that the suspect poses an imminent threat of serious physical injury to the officer or to others.
 - 3. Where feasible, some warning should be given prior to the use of deadly physical force. **(17)**

- C. Chokeholds and Obstruction of Breathing or Blood Circulation
 - 1. Any application of pressure to the throat, windpipe, neck, or blocking the mouth or nose of a person in a manner that may hinder breathing, reduce intake of air or obstruct blood circulation, is prohibited unless deadly physical force is authorized. **(18)**

PROHIBITED USES OF FORCE:

- A. Force shall not be used by an officer for the following reasons:
 - 1. To extract an item from the anus or vagina of a subject without a warrant, except where exigent circumstances are present;
 - 2. To coerce a confession from a subject in custody;
 - 3. To obtain blood, saliva, urine, or other bodily fluid or cells, from an individual for the purposes of scientific testing in lieu of a court order where required;
 - 4. Against persons who are handcuffed or restrained unless it is used to prevent injury, escape, or otherwise overcome active or passive resistance posed by the subject.

REPORTING AND REVIEWING THE USE OF FORCE:

- A. Any deputy who has custody of a person must provide attention to the medical and mental health needs of a person in their custody and obtain assistance and treatment of such needs, which are reasonable and provided in good faith. **(19)**
1. This includes appropriate and timely medical attention being provided to a party injured as a result of a use of force incident.
 2. The immediate mental health needs of a person shall be based upon the reasonable cause to believe that a person, who appears to be mentally ill, is conducting themselves in a manner which is likely to result in a serious harm to themselves or others. **(20)**
- B. Members involved in use of force incidents as described below shall notify their supervisor as soon as practicable and shall complete a departmental Use of Force report.
- Use of force that results in a physical injury.
 - Use of force incidents that a reasonable person would believe is likely to cause an injury.
 - Incidents that result in a complaint of pain from the suspect, except complaints of minor discomfort from compliant handcuffing.
 - Incidents where a conducted energy device (Taser) was intentionally discharged or accidentally discharged after being displayed.
 - Incidents where a firearm was discharged at a subject. **(21)**
- C. A standardized use of force form should be used to document any reportable use of force incident. **(22)**
- D. Officers should document any requests for necessary medical or mental health treatment, as well as efforts of police to arrange for such treatment

PROCEDURES FOR INVESTIGATING USE OF FORCE INCIDENTS:

- A. Where practicable, a supervisor should respond to the scene to begin the preliminary force investigation.
- B. A supervisor that is made aware of a force incident shall ensure the completion of a use of force report by all officers engaging in reportable use of force and, to the extent practical, make a record of all officer's present.
- C. Photographs should be taken which sufficiently document any injuries or lack thereof to officers or suspects.
- D. The applicable person, unit, or bureau will receive the supervisor's report and conduct an investigation.
- E. Consistent with agency disciplinary protocols and any applicable collective bargaining agreements, agency policy should establish standards for addressing the failure to adhere to use of force guidelines. **(23)**

TRAINING:

All officers should receive training and demonstrate their understanding on the proper application of force.

Training topics will include use of force, conflict prevention, conflict resolution and negotiation, and de-escalation techniques and strategies, including, but not limited to, interacting with persons presenting in an agitated condition as well as duty to intervene and prohibited conduct. **(24)**

This policy is not intended to be a substitute for proper training in the use of force. Comprehensive training is the key to the real-world application of the concepts discussed within this policy.

ADDITIONAL PROCEDURES:

Responsibilities of Deputies Using Physical Force:

- A. Use of physical force shall be consistent with the training and policies of the Erie County Sheriff's Office. Only issued or approved equipment, per the Authorized Equipment List issued by the Sheriff, will be carried on duty, including when applying physical force, except in emergency situations when personnel must use any resources at his disposal.
- B. After physical force is used, the deputy shall immediately evaluate the need for medical attention or treatment for that person upon whom the physical force was used and arrange for such treatment if that person is injured or complains of an injury or discomfort.

NOTE: Any refusal of medical assistance must be properly documented by the EMS Agency or at a medical facility.

- C. Personnel involved shall immediately notify their supervisor of the incident.
- D. Personnel involved shall prepare and submit the Erie County Sheriff's Office Use of Firearms/Force Report and other required reports detailing the facts and circumstances surrounding the use of force.

USE OF FORCE-FIREARMS:

Sworn personnel are not authorized under authority of their position to purchase a firearm. Sworn personnel are not authorized under authority of their position to carry on their person any firearm, either on duty or off duty, unless they have met all of the following criteria:

- A. They have been certified to do so by the authorized Range Officer of the Erie County Sheriff's Office (this certification involves the successful completion of course work in marksmanship and instruction in the proper care and safe handling of firearms).
- B. The Range Officer certifies that they have passed the most previous annual qualification.
- C. Qualified Departmental Firearms Instructor certifies that they have successfully participated in a course of instruction regarding "Justification - Use of Force" (Article 35, New York State Penal Law).

- D. The carrying of such firearms is necessitated by the nature of the duties performed by the officer. Such assignments are:
1. Sworn personnel of the Sheriff's Police Division or Special Operations Division.
 2. Sworn personnel of the Civil Enforcement Division.
 3. Designated sworn personnel of the Jail Management Division.
 4. Designated sworn personnel of Administrative Services Division.
- E. The ECSO requires that deputies are not authorized or permitted to carry or use any firearm in connection with the performance of their duties, with the exception of authorized departmental firearms training, unless such deputies have satisfactorily completed that portion of an approved Municipal Police Training Council Program or a program that meets or exceeds those requirements that constitute the basic course of instruction in the use of deadly physical force and in the use of firearms.
- F. All personnel of the Erie County Sheriff's Office not expressly authorized to carry a firearm in the performance of their duties are **FORBIDDEN** to purchase or carry a firearm under authority of their position. Newly hired members of the Sheriff's Office who will be required to carry a firearm as part of their duties shall comply with all policies established by the Office regarding the purchase and handling of the firearm until the completion of mandatory training. They may not carry the firearm off-duty until all requirements are met.
- G. Whenever a member discharges a firearm they will immediately submit an Erie County Sheriff's Office Use of Firearm/Force Report, through the proper channels, to their division head, except for the dispatch of injured animals, target or competitive shooting or annual qualification.
- H. The Professional Standards Division will be responsible for the investigation of all incidents involving the discharge of firearms, except for the dispatch of injured animals, target or competitive shooting or annual qualification, by members of this office and will submit its findings to the Sheriff for his review and determination. This includes accidental discharges. Professional Standards Division will review all incidents in relation to ECSO policy A-42 and NYS Article 35. This report will then be sent to the Undersheriff for approval.
- I. No member of this Office will fire warning shots.

- J. No member of this Office will fire at or from a moving vehicle, except when they are justified under Article 35 of the New York State Penal Law. Even when justified by law, all officers should use extreme caution when firing at or from a moving vehicle.
- K. Dry firing shall only be conducted while following the fundamentals of firearms safety, pursuant to approved firearms training.
- L. Members of the Sheriff's Office shall draw their firearms while on duty in a manner consistent with their training, experience and the Policies and Procedures of this Office. It is not possible to itemize each circumstance under which a firearm might be drawn, but all members of the Sheriff's Office must be fully cognizant that any resultant use must be fully justified under Article 35. Unwarranted or unnecessary display of the firearm is expressly forbidden. In addition, members of the Sheriff's Office may draw their firearm for official inspections, cleaning, and training functions.
- M. While on duty, members of the Sheriff's Office will carry and use only those weapons from a manufacturer that has been authorized by the Sheriff.
- N. Members of the Erie County Sheriff's Office, duly certified and qualified to carry firearms, shall be issued a duty weapon.

NOTE: Plain clothes personnel may carry other weapons from a manufacturer authorized by the Sheriff or his designee. They must demonstrate proficiency and qualify annually with weapon(s) at the Erie County Sheriff's Office range.

- O. Uniformed members, whose duties require the carrying of a firearm while on duty, shall carry their firearm fully loaded on their strong-arm side. They shall carry a minimum of two fully loaded magazines. Secondary firearms will be from an authorized manufacturer, and carried in a secure manner.
- P. Off duty members of the Sheriff's Office, who are authorized and qualified to do so, may carry a weapon from an authorized manufacturer (Glock) concealed upon their person. It is never necessary for any deputy to carry a weapon while off duty.
- Q. Members shall be responsible for the security of their firearms at all times.
- R. Members shall immediately report to their immediate supervisor the loss, theft, sale or disposal of firearms whether it is their own firearm or departmentally owned firearm.

- S. When a firearm is purchased, sold, or disposed of under authority of an authorized member's credentials, he/she shall register said weapons on the NYS Police Form C. Failure to comply with this provision is a violation of the Penal Law, Article 400.00 (12-c [a]) and the Policies and Procedures of the Erie County Sheriff's Office. Whenever a new weapon is purchased or a current one is disposed of, it is the responsibility of the member to complete the appropriate form and forward it through the chain of command to the respective division head. This provision does not apply to weapons purchased, sold, or disposed of under a valid New York State Pistol Permit. The completed NYS Police Form C will be filed by the Professional Standards Division.
- T. Unless authorized by the Superintendent, or designee, no Jail Management Division personnel shall bring a firearm into the Erie County Holding Center, Erie County Correctional Facility or the ECMC Lock-up.
- U. Members may discharge their firearms (in a safe direction) in an emergency situation as a distress signal when in need of assistance.
- V. Only authorized weapons and ammunition shall be carried while on duty. While off duty, all departmental authorized (Glock) semi-automatic pistols and ammunition may be carried. Additionally, every personnel issued a departmental weapon will also be issued fifty (50) rounds of ammunition.

SUMMARY:

All members of this Office will be held accountable in the performance of their duties which necessitates the use of firearms. Each incident will be thoroughly investigated, and the circumstances in which the use was made necessary will be examined on an individual basis.

Members should bear in mind that the indiscriminate use of a firearm could lead to criminal charges against such employee. Therefore, it is essential that all sworn employees make themselves thoroughly acquainted with these guidelines and Article 35 of the New York State Penal Law.

FOOTNOTES:

1. Force which is objectively reasonable is insulated from criminal liability through Article 35 of the NYS Penal Law and civil liability by the 4th Amendment standard of objective reasonableness.
2. *Graham v. Connor*, 490 U.S. 386 at 396 (1989).
3. *Graham*, 490 U.S. 396 (1989)
4. NY Penal Law § 10 (11) (McKinney 2013)
5. NY Penal Law § 10 (9) (McKinney 2013)
6. NY Penal Law § 10 (10) (McKinney 2013)
7. NY Penal Law and § 35.30(1) (McKinney 2013)
8. *Graham*, 490 U.S. at 396 (1989)
9. *Ibid.*
10. *Ibid.*
11. *Scott v. Harris*, 550 U.S. 372 (2007)
12. *Graham*, 490 U.S. at 396 (1989)
13. Analysis of cases under the 4th Amendment require the focus to be on the perspective of a reasonable officer on the scene which includes the training and experience of the officer. *Graham v. Connor*, 490 U.S. 386 (1989), *Terry v. Ohio*, 392 U.S. 1 (1968)
14. *Sharrar v. Felsing*, 128 F. 3d 810 (3rd Cir. 1997) (numbers of officers or subjects)
15. Courts have repeatedly declined to provide an exhaustive listing of factors. *Chew v. Gates*, 27 F. 3d 1432, 1475 n.5 9th Cir. (1994)
16. NY Penal Law and § 35.30(1)(c)(McKinney 2013)
17. NY Penal Law and § 35.30(1), as restricted by *Tennessee v. Garner*, 471 U.S. 1 (1985) (restricting the use of deadly physical force as it relates to fleeing felons) In *Garner*, the Supreme Court uses "significant threat of serious physical harm, either to the officer or others" in describing the limited circumstances under which deadly force can be used to prevent the escape of a felon.
18. NY Penal Law § 121.13-a establishes the crime of Aggravated Strangulation.
19. NY Civil Rights Law § 28
20. NY Mental Hygiene Law § 9.41

21. NY EXC § 837-v requires that any discharge of a weapon, while either on duty or off duty, in the direction of a person be verbally reported to the involved officer's supervisor within six hours and a written report prepared within forty-eight hours of occurrence.
22. Chiefs of police departments, County Sheriffs, and the Superintendent of State Police should consider utilizing these forms to ensure compliance with the administrative reporting requirement of EXC §837-t.
23. NY EXC § 840(4)(d)(2)(vi)
24. EXC § 840(4)(d)(2)(vii)