

Recommendation XXX. MPD should modify its use of force policies to more clearly instruct officers on the duty to employ tactical alternatives to force, and to make clear the Department's expectation that officers follow tactical principles of officer safety. [OIR 89]

Discussion: The Committee approved this recommendation in full as proposed by OIR. In its response to the OIR Report, the MPD agreed that “[t]hese are laudable goals, consistent with MPD’s philosophy and core values.”

This recommendation relates to Action Items 3 and 5 from the President’s Work Group report. Action Item 3 ordered the Chief to explicitly incorporate the duty to intercede and de-escalate into MPD’s use-of-force and deadly-force SOPs, while Action Item 5 directed the Ad Hoc Committee to evaluate a set of precautionary principles (necessity, proportionality, reassessment, totality of officer conduct, and immediate threat) for incorporation into MPD policies, practices, and procedures.

In explicating this overall recommendation, the OIR Report made two specific recommendations on policy language:

1. OIR noted: “The current ‘Purpose’ statements at the beginning of both the deadly and non-deadly force policies states, ‘The Department is committed to resolving conflicts through the use of communication skills, crisis intervention and de-escalation tactics, when feasible.’ This provision could be strengthened and clarified, to further reinforce the idea that the Department’s interest is to reduce incidents of force to a minimum. For example, instead of qualifying the statement with ‘when feasible,’ the policy could be modified to include language such as:

The Department is committed to resolving conflicts through the use of communication skills, crisis intervention and de-escalation tactics. When time, circumstances, and safety permit, officers should consider these alternatives to using force.”

2. OIR also recommended that MPD specifically include the following language in its use-of-force policies:

Police officers shall ensure their actions do not precipitate the use of deadly force by placing themselves or others in jeopardy by taking unnecessary, overly aggressive, or improper actions. It is often a tactically superior police procedure to withdraw, take cover or reposition, rather than the immediate use of force.

This provision goes to the heart of OIR Recommendation 89. It is identical to the core language of the “totality of officer conduct” precautionary principle specified in President’s Work Group Action Item 5 and adopted by the Ad Hoc Committee in Recommendation xx. Specifically, the “totality of officer conduct” principle consists of this language, prefaced by the sentence, “The reasonableness of an officer’s use of force includes consideration of the officer’s tactical conduct and decisions leading up to the use of force.” In its supplementary report, OIR further

notes: “MPD responds that it already has adopted language that speaks to the ‘same concepts.’ We respectfully disagree.” MPD subsequently incorporated the following sentence, partially responsive to this recommendation, in its de-escalation SOP: “Officers should utilize appropriate tactical and officer safety principles to avoid placing themselves at risk unreasonably.” This is a beneficial addition, but less explicit than the language recommended by OIR and was not included in the use-of-force policy as OIR recommended (it was included instead only in the de-escalation SOP). Moreover, current MPD SOPs do not appear to explicitly mention the option of tactical withdrawal. MPD stated that officers would receive training on the updated SOP. It will remain important that the Independent Monitor proposed in Recommendation #1 of this Report review the adequacy of and compliance with this new SOP.

Recommendation XXX. MPD should amend its Electronic Control Device Use SOP to limit ECD use to circumstances involving violent or assaultive subjects, or to prevent subjects from harming themselves or others. [OIR 91]

Discussion: The Committee adopted this OIR recommendation as proposed, given that the recommendation states sound policy and that MPD is in agreement with that policy. MPD’s original SOP language allowed ECD use “[t]o overcome violent or assaultive behavior or its threat; if the officer reasonably believes that the subject poses an articulable threat of harm to an officer or to another person.” OIR’s concern was that the second clause could be interpreted as a sufficient condition for ECD use. MPD responded that the second clause was meant to be interpreted as delimiting the first, and that this requirement had long been addressed in MPD training. OIR replied that they were pleased to learn that the intent of the policy was to limit ECD use to those circumstances in which the subject is violent or assaultive, but recommended very slight tightening of the language to remove any ambiguity. MPD then fully addressed this recommendation by simply replacing “; if” with the word “when.”

Recommendation XXX. MPD should modify its ECD guidelines to prohibit ECD use, outside of exigent circumstances, on women obviously pregnant, elderly individuals, obvious juveniles, individuals on stairwells, rooftops, or other elevated positions, and bicyclists. [OIR 92]

Discussion: Because of the high risk that ECD use can cause catastrophic injuries or death when deployed in certain circumstances or against vulnerable individuals, it is important to limit ECD use to those circumstances where it is most useful and the benefits are not outweighed by the risks of unintended harms. MPD policy already recognizes this, given that the MPD SOP expressly prohibits ECD use (absent exigent circumstances) in a list of circumstances, including handcuffed subjects, fleeing subjects, and those operating a motor vehicle. OIR noted, however, that while this list is commendable, it has “a few notable omissions.” This recommendation adds to the SOP by filling those gaps.

The OIR recommendation also urged abandoning the exception to these prohibitions for “exigent circumstances,” noting that, for example, “[i]t is hard to imagine an ‘exigent circumstance’ that would make it reasonable to use a Taser on a handcuffed individual or one using a motor vehicle.” The MPD objected, however, arguing that “[a] complete prohibition on ECD use in these contexts is unwise, as the alternative force options or outcomes that result from not using an ECD could be far worse than the potentially increased risk from using an ECD.” OIR noted in reply, “If MPD believes that there is a need to have an ‘exigent circumstance’ exception to prohibited use (although it is hard to contemplate an exigent circumstance when ECD use would be appropriate in dealing with a person on a rooftop), it should define what circumstances would constitute an exigency.” To accommodate the MPD’s objection, the Committee amended the OIR recommendation to permit use of Tasers in these contexts if officers are truly presented with “exigent circumstances,” but with the understanding that those circumstances will arise exceedingly rarely. MPD subsequently amended its SOP to add prohibitions, unless exigent circumstances are present, for ECD use against “subjects in an elevated position where a fall is likely to result in significant injury,” “small children,” “a subject who is visibly pregnant or known to be pregnant,” and “elderly subjects.” The circumstances that would constitute an exigency appear to remain undefined.

Recommendation XXX. MPD should modify its ECD guidelines to require officers to re-assess the threat posed by an individual prior to any successive ECD application, as is the case for any repeated use of force. [OIR 93]

Discussion: Recent studies of Taser use—including a 2011 report by the National Institute of Justice¹—caution against prolonged or multiple uses of Tasers or simultaneous use of Tasers on a single subject because of the significantly increased health risks. This recommendation is designed to limit the repeat use of Taser applications to those circumstances where such repeated use is truly required and outweighs the health risks. MPD responded that requiring re-assessment before reapplying Taser shocks is a principle that “applies to any use-of-force tool or technique, and is a cornerstone of MPD’s use-of-force training.” In recognition of this, the Committee amended the OIR recommendation by adding the last clause, acknowledging, “as is the case for any repeated use of force.” The Committee agrees with OIR, however, that spelling this out more explicitly in the ECD SOP is advisable. As OIR notes: “We do not disagree that the principle is covered in training, but believe it is wise nonetheless to include it in a policy specific to ECD use because of the frequency with which we have seen officers from other agencies use the device multiple times, beyond its necessity or usefulness, and the significantly increased health risk for persons on whom the ECD is used.”

¹ National Institute of Justice, “Study of Deaths Following Electro Muscular Disruption” (May 2011).