



103-01 USE OF DEADLY PHYSICAL FORCE

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REFERENCES: <u>NEW YORK STATE ACCREDITATION STANDARDS</u> 20.1 (Use of Force: General) 21.1 (Review of Firearms Use)			
SPECIAL INSTRUCTIONS: This policy supersedes all previous policies and procedures			
DISTRIBUTION: ALL MEMBERS OF THE DEPARTMENT			PAGE: - 138 -
ISSUING AUTHORITY: GREGORY J. AUSTIN, CHIEF OF POLICE			

PURPOSE:

The purpose of this order is to establish clear guidelines for officers regarding the use of "deadly physical force".

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.¹²

DEADLY PHYSICAL FORCE: "Deadly Physical Force" as used in this policy is defined as that force which is intended to cause death or serious physical injury or which creates some specified degree of risk that a reasonable and prudent person would consider likely to cause death or serious physical injury.

SERIOUS PHYSICAL INJURY: Is defined as 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.

REASONABLE CAUSE TO BELIEVE: Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable, discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it. Except as otherwise provided in Chapter 70 of the Criminal Procedure Law, such apparently reliable evidence may include or consist of hearsay.

PHYSICAL INJURY – Impairment of physical condition or substantial pain.¹³

¹² Graham, 490 U.S. 396 (1989)

¹³ NY Penal Law § 10 (9) (McKinney 2013)

BACKGROUND:

The value of human life is immeasurable in our society. Police officers have been delegated the awesome responsibility to protect life and property and apprehend criminal offenders. The apprehension of criminal offenders and protection must at all times be subservient to the protection of life. The officer's responsibility for protecting life must include his/her own. Members of the Rye Brook Police Department shall use only the force necessary to effect lawful objectives consistent with Article 35 of the NYS Penal Law. Members of the Rye Brook Police Department may use deadly physical force only when the officer reasonably believes that the action is in defense of human life including the officer's own life or in defense of any person in immediate danger of serious physical injury. The fact that a police officer is justified in using deadly physical force DOES NOT allow reckless conduct by the police officer if the use of deadly physical force may injure innocent persons whom he is not seeking to arrest or retain in custody.

The federal and state standards by which use of force is measured are both founded in the basic premise of objective reasonableness.¹⁴ 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."¹⁵

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.

NOTE: Effective June 12, 2020 New York State Penal Law section 121.13 A was signed into law by Governor Cuomo. This law makes it unlawful for a police officer to use a choke hold to restrain a subject.

Section 121.13-A Aggravated strangulation - New York State Penal Law

A person is guilty of aggravated strangulation when, being a police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law or a peace officer as defined in section 2.10 of the criminal procedure law, he or she commits the crime of criminal obstruction of breathing or blood circulation, as defined in section 121.11 of this article, or uses a chokehold or similar restraint, as described in paragraph b of subdivision one of section eight hundred thirty-seven-t of the executive law, and thereby causes serious physical injury or death to another person.

¹⁴ 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.

¹⁵ *Graham v. Connor*, 490 U.S. 386 at 396 (1989).

Aggravated strangulation is a class C felony.

POLICY:

1. Choke holds are not an authorized method of restraint by members of this Department.
2. An officer may use deadly physical force only under the following situations, and in no event fire warning shots:
 - a. Confrontation Situations
 - b. To defend the officer or another from what the officer reasonably perceives as an immediate threat of death or serious physical injury.

Apprehension and Pursuit Situations

3. When an officer acting on personally known information has reasonable cause to believe that an armed or dangerous subject has committed a felony which involved the use or attempted use, or threatened immediate use of deadly physical force against a person; and
4. There is substantial risk that the fleeing subject will cause death or serious physical injury to the officer or to others, if not immediately apprehended; and
5. There is no other reasonable means to effect the arrest; and
6. The discharge does not appear likely to injure innocent bystanders
7. Where Feasible, some warning should be given prior to the use of deadly physical force¹⁶
8. The foundation of this policy is found in Section 35.30 of the penal law as modified by the holding of the United States Supreme Court in *Tennessee v Garner*. That court held that the firing at a fleeing felon is unconstitutional unless the discharging officer has probable cause to believe that the suspected person poses a significant threat of death or serious physical injury to the officer or others. Officers should be thoroughly familiar with the above section and the holding in *Tennessee v Garner*.

Determining the objective reasonableness of force

9. When used, force should be only that which is objectively reasonable given the circumstances perceived by the officer at the time of the event.
10. Factors that may be used in determining the reasonableness of force include, but are not limited to:
 - a. The severity of the crime or circumstance;¹⁷
 - b. The level and immediacy of threat or resistance posed by the suspect;¹⁸

¹⁶ 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.

¹⁷ Ibid.

- c. The potential for injury to citizens, officers, and suspects;¹⁹
- d. The risk or attempt of the suspect to escape;²⁰
- e. The knowledge, training, and experience of the officer;²¹
- f. Officer/subject considerations such as age, size, relative strength, skill level, injury or exhaustion, and the number of officers or subjects;²²
- g. Other environmental conditions or exigent circumstances.²³

Duty to Intervene

- 11. 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.
- 12. 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

Injured Animal

- 13. Officers are authorized to kill a dangerous animal or an animal so badly injured that it should be destroyed to prevent further suffering. However, all other options shall be exhausted before shooting the animal. All other departmental procedures governing same must be adhered to. Headquarters shall be notified whenever possible before the discharge of a weapon. Headquarters shall notify the supervisor on duty of the situation.

Firearms Practice and Testing

- 14. For target practice, other legitimate competition or purpose, or ballistic testing at approved sites.

Procedures and Prohibitions

Juveniles

- 15. No distinction shall be made relative to the age of the intended target of deadly physical force. Self-defense and imminent threat shall be the only procedural guidelines for employing deadly physical force.

Moving Vehicles

¹⁸ Ibid.

¹⁹ Scott v. Harris, 550 U.S. 372 (2007)

²⁰ Graham, 490 U.S. at 396 (1989)

²¹ 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)

²² Sharrar v. Felsing, 128 F. 3d 810 (3rd Cir. 1997) (numbers of officers or subjects)

²³ 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. Discharging a firearm at or from a moving vehicle is prohibited unless the occupants of same are using deadly physical force against the officer, or another and the officer reasonably believes that he will not endanger innocent persons.

Warning Shots

17. A police officer is not justified in using his firearm to fire a warning shot.

Firing Shots for Alarm

18. Firearms shall not be discharged to summon assistance except where the officer's safety or that of another is seriously endangered and he believes there is no reasonable alternative. Extreme care must be exercised in such situations to prevent injury to the officer or other persons.

Drawing or Displaying

19. An officer shall draw or display a firearm only if there is reason to fear for the personal safety of the officer or others.
20. After any use of Deadly Force an officer shall immediately evaluate the need for medical attention or treatment for that person upon whom the force was used and arrange for such treatment when:
 21. That person has a visible injury, complains of injury, discomfort, or requests medical attention.
 22. Sworn members shall report or cause to be reported all facts relative to the incident on a Use of Force Report Form and any required case and supplemental reports whenever an action is taken that results in, or is alleged to result in injury or death of another person
 23. Persons having visible injuries, complaining of injury or discomfort and refuses medical treatment must be evaluated by EMS where the refusal will be witnessed by EMS and noted on the Rye Brook Police Department Use of Force Report.
 24. The officer shall prepare and submit the reports required by current directives. If more than one officer is involved, each officer who uses force shall complete a Rye Brook Police Department Use of Force Report outlining their actions and observations in the incident. All copies of the report(s) will then be forwarded together, along with other applicable reports to the Patrol Supervisor for approval.
 25. The Supervisor shall respond to the scene of the incident as soon as possible.
 26. The Supervisor shall insure that officers receive any necessary assistance, including medical treatment. The Supervisor shall also ensure that any injuries to officers are properly documented.
 27. A detective should respond to the scene to assist with the investigation.

PROCEDURES FOR INVESTIGATING USE OF FORCE INCIDENTS

28. 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 officers present

29. Photographs should be taken which sufficiently document any injuries or lack thereof to officers or suspects.
30. The Lieutenant will receive the supervisor's report and conduct the investigation.
31. 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 guidelines²⁴
32. Upon notification of the use of Deadly Physical Force by subordinate personnel, the supervisor shall initiate an investigation into the incident and prepare a supervisory memo to be distributed through the chain of command.
33. The supervisor shall review the report(s) describing the use of force, and all other relative reports.
34. In the absence of discrepancies or additional facts, the supervisor's memo shall briefly advise that a supervisory investigation has been conducted and that facts are as reported in the official incident report and Use of Force Report.
35. When the supervisory memo and pertinent reports cannot be routed through the Chain of Command immediately, the supervisory memo and pertinent reports will be routed directly to the Chief of Police and the incident shall be verbally reported through the Chain of Command at first opportunity.
36. The supervisory memo shall be captioned with Deadly Physical Force followed by the incident number.
37. The Lieutenant shall be responsible for the following:
 - a. Insure that a thorough investigation was conducted and that all reports were prepared and submitted.
 - b. Prepare his own report, including any comments he may have regarding the incident, and how it was handled.
 - c. The Lieutenant's report, the supervisory memo, the Use of Force Report, and a copy of the incident report shall be forwarded to the Chief of Police through the Chain of Command without delay.

Steps To Take With Involved Officers

38. In every instance in which an officer uses deadly physical force and where such use of force results in death or bodily injury to another person, or where an officer is involved in an auto accident which results in the death or serious physical injury to another person, the following steps shall be taken:
39. If the incident involves an officer's weapon, it will be replaced with another weapon and all weapons carried by the officer at the time of the incident will be safeguarded and turned over to the investigating officer.

²⁴ EXC §840(4)(d)(2)(vi)

40. The involved officer will be given the opportunity to call his family as soon as possible to avoid the possibility of their learning about the incident through other than official sources, e.g. press, radio, TV, etc.
41. The officer shall not be allowed to talk to the press. All information regarding the incident will be given out through the office of the Chief of Police.
42. Prior to the officer making a written statement, he shall be provided the opportunity to consult with an attorney and/or a member of the Rye Brook Police Benevolent Association.
43. Supervisors and other department personnel must insure that the officer is treated in a dignified manner. He should be accompanied by a fellow officer during the initial phases of the inquiry. All personnel should be sensitive to the psychological trauma that is associated with these types of incidents. Behavior, such as blaming, ridiculing, teasing, and isolating the involved officer, will only increase the potential trauma and therefore shall not be tolerated.
44. Assignment to a relieved of regular duty status shall be non-disciplinary with no loss of pay or benefits.
45. Relief from regular duty with full pay and benefits is intended to serve two purposes.
 - a. To address the personal and emotional needs of an officer involved in the use of deadly physical force which results in injury or death; and
 - b. To assure the community that verification of all the facts surrounding such incidents are fully and professionally explored.
46. Officers so relieved from regular duty status shall remain on a "limited duty" status and shall assure their availability to the police department, county, state and federal authorities to assist, when necessary, in the investigation of the incident until it is concluded.

Reporting Use of Force Incidents to DCJS

47. The categories of reportable Use of Force incidents include:
 - a. **Display a chemical agent** – To point a chemical agent at a subject.
 - b. **Use/Deploy a chemical agent** – The operation of a chemical agent against a person in a manner capable of causing physical injury.
 - c. **Brandishes/Uses/Discharges a firearm** – The operation of a firearm against a person in a manner capable of causing physical injury.
 - d. **Brandishes/Uses/Deploys an impact weapon or electronic control weapon** – The operation of an impact weapon or electronic control weapon against a person in a manner capable of causing physical injury.

- e. **Uses a chokehold or other similar restraint** – Any application of sustained pressure to the throat or windpipe of a person in a manner that may hinder breathing or reduce the intake of air.
- f. **Conduct that Resulted in Death**
- Serious bodily injury** – Bodily injury that creates or causes:
- A substantial risk of death; or
 - Unconsciousness; or
 - Serious and protracted disfigurement; or
 - Protracted loss or impairment of the function of any bodily member, organ or mental faculty.
48. Use of Force incidents that fall into the above categories will be reported to DCJS by the Chief or Lieutenant in accordance with DCJS guidelines.

