

February 3, 2021

To: Mayor and Members of City Council **202001354**
From: Paula Boggs Muething, City Manager
Subject: Report on Use of Non-Lethal Force in Riot Control

REFERENCE DOCUMENT #202000831

On June 24, 2020, the following item was referred for a report:

MOTION, submitted by Councilmembers Seelbach, Sittenfeld, Young, Landsman and Kearney, WE MOVE that the Administration implement a complete review of CPD non-lethal and less than lethal use of force techniques with the stated goal of learning about the use of OC gas or CS smoke in various forms including in the use of pepperballs as a means of crowd or riot control. WE FURTHER MOVE that the report be returned to Council in by the August meeting for referral to a committee.

Response

The responsibility of the Cincinnati Police Department (CPD) during demonstrations is to ensure the safety of the public and to enable persons to exercise their First Amendment rights of free expression and assembly. Ensuring the safety of the public includes the safety of persons engaging in demonstrations. However, when demonstrations become riots and pose an immediate threat to persons as well as property, CPD strives to abate the public safety threat utilizing tools that pose the least harm while enabling officers to control the individuals involved in disorder, violence, or property destruction.

The use of non-lethal tools, such as OC spray, CS gas, or Pepperball, are essential in a riot. Non-lethal tools allow officers to control violence and property destruction by a crowd. For individuals in unlawful crowds who are subjected to these uses of force, permanent or long-lasting health consequences are rare in healthy persons.

Moreover, the alternatives to non-lethal force would result in a greater number of injuries, as well as more serious injuries, both to officers and members of the public. Assuming officers are not directed to acquiesce to violence and property destruction from crowds, some action must be taken to restore order. Eliminating non-lethal tools commits CPD to a path of increasing injuries to the public, instead of decreasing injuries.

CPD has specific policies and procedures to address both lawful demonstrations and illegal gatherings that present a risk of injury to persons and/or property. At times, the safety of the public becomes jeopardized due to the unlawful actions of the individuals assembled and CPD must react to restore the peace. CPD performs strictly guided actions to restore order.

A. Use of Force in Riot Control

A rioting crowd poses a significant and immediate threat to public safety. Engaging in a riot or a disorderly crowd is an offense that is defined by the Ohio Revised Code. Attached as an appendix are the relevant statutes but in short, a riot is four or more individuals engaged in disorderly conduct with the purpose of facilitating a misdemeanor or intimidating a public official. R.C. 2917.03. Similarly, police may order individuals to disperse when five or more persons engaged in a course of disorderly conduct in the vicinity of other persons' creates a likelihood of harm to person or property. R.C. 2917.04.

The risk that is associated with these offenses can be great – to the public, to the rioters, and to police officers – because of the numbers of individuals involved. As the 2020 summer unrest demonstrated, disorderly crowds can quickly escalate into a riot and cause hundreds of thousands of dollars in damage in a few hours as well as threaten the lives of officers. As was widely reported, an officer was shot in the head during the riots of May 2020 and only escaped death or serious injury because of the ballistic helmet he was wearing.

Moreover, the individuals engaging in rioting or disorderly crowds are often actively resisting officers' efforts to disperse the crowd or apprehend offenders. During riot conditions, the number of rioters gives confidence and a sense of anonymity to offenders, who rarely submit to arrest without some other kind of active resistance, from verbal aggression to assaulting the officer.

Under these conditions, the use of non-lethal force is necessary to apprehend offenders or to defend members of the public or police officers from death or physical injury. CPD acknowledges that non-lethal use of force in riot scenarios are not insignificant intrusions. However, for that very reason, the appropriateness of the use of force is highly dependent on the circumstances and is reserved for when there is active resistance to officers. As detailed below, significant training and supervision is employed by CPD to ensure that any significant use of force is reserved for offenders who are aggressive or otherwise constituting a threat to the public or officers. These tools are necessary given the reality that confronts police officers in riot control situations.

B. Non-Lethal Uses of Force for Riot Control

CPD could utilize the following during a riot or crowd control situation: OC Spray (also known as pepper spray), CS gas (also known as tear gas), or Pepperball.

1. OC Spray

OC is the abbreviation of Oleoresin Capsicum, which contains the active ingredient capsaicin that is derived from peppers. OC is available in either a spray or powder form and is intended to be deployed to the face and upper chest. It is an inflammatory agent which affects the mucus membranes, including eyes and skin. The duration of its effects is directly related to the amount of exposure but can range from less than five minutes to more than thirty minutes.

Treatment includes blinking excessively and the use of water to flush eyes and other soft tissue. The Journal of Investigative Ophthalmology and Visual Science published a study in July of 2000 which found that OC led to intense but relatively short-lasting pain and any structural or functional effects are mild and temporary.

OC can be deployed from the small canister carried as a force option on an officer's belt, via a large hand-held spray system, or from a hand-throwable ball which delivers three stimuli for psychological and physiological effects: light, sound, and OC.

2. CS Gas

Chlorobenzylidene Malononitrile, commonly known as CS, causes tearing and closing of the eyes, as well as burning irritation of the nose, mouth, and throat. The effects of CS are more intense than OC. CPD escalates to the use of CS when the original application/deployment of OC is found to be ineffective or insufficient. For crowd and riot control, CS is primarily deployed from a throwable ball configuration or the Pepperball delivery system.

3. Pepperball

Pepperball launchers are a non-lethal device which dispense projectiles via compressed air. The actual Pepperball is a .68 caliber projectile consisting of a plastic outer shell and a payload of either OC or CS agent. Pepperballs are designed for both direct impact deployments as well as area saturation. When utilized for direct impact deployments, the platform utilizes both the impact and the dispersal of the agent to gain compliance. For area saturation, the projectiles are directed at hard surfaces, causing the payload to disperse and saturate the target area.

C. Alternatives to Non-Lethal Uses of Force

In addition to non-lethal uses of force, officers have other options to gain control of a disorderly crowd. Those options range from physically subduing individuals, use of a baton, beanbag shotgun or 40mm foam rounds. But unlike non-lethal uses of force previously described, the following options have limitations for use in a crowd control situation. Manual compliance, for example, would likely be impossible under most riot control scenarios. The most significant difference between non-lethal and less-lethal is that the following less-lethal options could produce death in certain situations. Officers are prohibited from using the following tools in a manner that would intentionally produce the death of a person unless use of deadly force would otherwise be authorized; however, in a rapidly developing and chaotic situation, inadvertent injuries are possible. For that reason, non-lethal uses of force are necessary options where there is active resistance from a disorderly crowd.

1. Manual Compliance (Hardhands or Balance Displacement)

Hardhands is the term to describe an officer utilizing physical pressure to force a person against an object or the ground, use of physical strength or skill that causes pain or leaves a mark, leverage or balance displacement, joint manipulation, pain compliance, and pressure point control tactics. It requires an officer to grapple with the subject the officer intends to detain. More often than not, multiple officers are required to safely gain compliance over a single subject. For that reason, officers cannot physically subdue large numbers involved in a disorderly crowd. The crowd usually outnumbers the number of officers, making these options impossible. Moreover, entering a rioting crowd exposes the officers and crowd to injury, making manual compliance also impractical in crowd control situations.

2. Baton (PR-24/Auto-Lock Baton)

CPD has two kinds of metal batons in its inventory. The Auto-Lock baton is a 16 inch metal telescoping tube that locks into place. The PR-24 is a 24 inch aluminum baton with a handle at a 90 degree angle. The PR-24 use is limited exclusively to crowd control (officers do not carry it on a day to day basis). Both batons can be worn on officer's duty belts.

Either baton has limited usefulness in crowd control. They are relatively short, which requires officers to be within arm's reach of the disorderly crowd. Having distance between officers and

offenders is useful to allow for de-escalation and reduce injuries to officers by reducing the kind of weapons that can threaten their safety as well as provide officers time to react to the danger. As a result, officers could easily be injured by relying solely upon batons. In addition, even the inadvertent strike to the head of a person could cause death or serious injury. As a result, the baton has limited utility in crowd control.

3. Beanbag & 40mm Foam Rounds

The beanbag shotgun is an impact projectile device which offers a less-lethal method for subduing or incapacitating a subject and preventing physical harm to officers and bystanders. The beanbag shotgun deploys a drag stabilized, beanbag round which contains small lead pellets housed within a cloth sock or bag. The bag is designed with a tail portion to prevent it from flattening out during flight to reduce the chances of the round causing penetrating injuries.

The 40mm launcher is a dedicated platform which propels a projectile consisting of a plastic body and a crushable foam nose. The foam round can be either inert or contain a payload of marking, OC, or CS powder. The 40mm is a “point-of-aim, point-of-impact” direct fire round commonly used in situations where greater accuracy and energy is desired for the incapacitation of aggressive, non-compliant, subjects at longer distances. The 40mm has been extensively tested by the manufacturer to ensure the round is less-lethal when fired within the optimal energy range and at the large muscle groups of the buttocks, thigh, and knees. These areas provide sufficient pain stimulus, while greatly reducing serious or life-threatening injuries.

While both beanbag and 40mm foam rounds are available for crowd control, their utility is limited to circumstances where there is an imminent risk of injury or death to a member of the public or an officer.

D. CPD Use of Non-Lethal Force in Crowd Control

CPD’s current response protocol and procedures meet or exceed current best practices across the country. CPD constrains the use of non-lethal and less than lethal force in riot and crowd control scenarios through policy as well as extensive training of select officers.

CPD Procedure 12.545, Use of Force, governs the force response during crowd control and riot situations. There are a number of restrictions placed upon the use of force in crowd control that are designed to ensure that force is being used against persons who are actively resisting being dispersed or detained. In particular, the following procedural prohibitions are applicable to use of force in crowd control situations:

- Officers are prohibited from utilizing ANY force on a crowd except in three situations:
 - (i) to protect a member of the public or the offender from death or harm;
 - (ii) to apprehend a fleeing offender who has committed a crime; or
 - (iii) when necessary for self-defense.
- Absent exigent circumstances, a command officer (captain or above) must be present and authorize the use of tools such as the beanbag shotgun, 40mm foam round, OC spray, CS gas, or Pepperball rounds.
- Officers are prohibited from targeting a person with a beanbag shotgun, 40mm foam round, or Pepperball rounds unless attempting to apprehend that individual or the individual poses an immediate risk of injury.
- Before any chemical irritant (OC spray or CS gas) is used against a disorderly crowd, a verbal warning must be issued unless the warning would endanger members of the public or officers.

In addition to these specific rules, officers are trained to de-escalate tensions within the crowd. The first “force” that is utilized against a disorderly crowd or rioters are the officer’s presence and verbal commands to leave the area. But if verbal commands are not successful in dispersing a rioting crowd, the use of **non-lethal** force is the preferred response. **Non-lethal** force includes OC spray, CS gas, and Pepperballs. Such devices encourage a disorderly crowd to disperse through minimum physical contact with officers, thus reducing the likelihood of injury to either officers or citizens. Use of these responses typically have short term effects requiring minimal medical care, if any, and are incapable of causing death according to the manufacturers.

Less than lethal force (less-lethal) includes the use of the beanbag shotgun, 40mm foam round, and the baton. These are considered impact weapons and have the propensity to cause injury, but are less likely to cause death. However, death can still be caused through the use of less-lethal force and for that reason, non-lethal force is the preferred response to a rioting crowd.

In 2015, the CPD established the Civil Disturbance Response Team (CDRT) as the Department’s primary response to crowd control. This specialized unit consists of selected officers who have shown the required traits and skills necessary in facilitating protests and demonstrations. These officers are frequently trained in the latest crowd control best practices and are proficient in the techniques of de-escalation, as well as non-lethal and less-lethal responses when required.

Until the most recent unrest, CDRT was able to manage all previous events without the need to resort to either non-lethal or less-lethal responses. No serious injuries have been reported in connection with any crowd control situations. CDRT has been deployed dozens of times since its inception, including during past demonstrations associated with the two trials of former University of Cincinnati Police Officer Ray Tensing.

E. Consequences of Eliminating the Use of Non-Lethal Force in Riot Control

Non-lethal tools are preferable options to uses of force that might cause the death of a person in a rioting crowd. There are a variety of reasons why non-lethal uses of force are necessary. The life and safety of the members of the public participating in or near riots is first, as is officer safety. It is indisputable that other forms of force would result in greater numbers of and more significant injuries to both citizens and officers. Moreover, an unintended serious injury to a member of the public might produce a reaction that would further exacerbate the underlying public safety situation. Finally, with more numerous and more serious injuries, the City could expect an increase in civil claims.

Increased Injuries to Officers and the Public

In the years between 2001 and 2020, the City did not experience any serious injuries among officers or members of the public in crowd control. During the recent civil unrest, CDRT and other CPD units utilized the above non-lethal responses. Members of the public did not report any serious injuries to CPD. The use of non-lethal force reduced the potential for injury to rioters. Without the availability of non-lethal force options, there would certainly be an increase in the utilization of less-lethal responses, as well as associated injuries.

Another consideration is the public safety consequences of a serious injury to a member of the public during crowd control. If officers are involved in a use of force that causes serious injury to an individual, that event could dramatically escalate tensions, particularly in the context of widespread unrest. Non-lethal use of force reduces the possibility of serious injury and the chances such an event might occur.

1. Increased Legal Liability

The likelihood of increased serious injuries will result in more civil claims being filed against the City as well as police officers. In addition, the more serious the injuries, the more the City may have to pay in damages if found liable. In addition to potential damages for injuries, the City may also have to pay attorney fees and costs for the person who files a claim.

CONCLUSION

The availability of non-lethal tools, such as OC spray, CS gas, and Pepperball, enable CPD to manage large, violent, unlawful crowds in the safest manner possible while using the least amount of force. Alternatives to non-lethal tools would increase the likelihood of injury to both the public and officers. In a situation where some amount of force must be used to subdue a disorderly crowd, eliminating less intrusive options would only increase the risk to all.

cc: Colonel Eliot K. Isaac, Police Chief

APPENDIX

Chapter 2917 of the Ohio Revised Code (ORC) *Offenses Against the Public Peace* codifies several laws in determining if an individual or group's conduct is unlawful, to include:

Aggravated Riot, 2917.02, ORC:

A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code:

- (1) With purpose to commit or facilitate the commission of a felony.
- (2) With purpose to commit or facilitate the commission of any offense of violence.
- (3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(B) (1) No person, being an inmate in a detention facility, shall violate division (A)(1) or (3) of this section.

(2) No person, being an inmate in a detention facility, shall violate division (A)(2) of this section or section 2917.03 of the Revised Code.

(C) Whoever violates this section is guilty of aggravated riot. A violation of division (A)(1) or (3) of this section is a felony of the fifth degree. A violation of division (A)(2) or (B)(1) of this section is a felony of the fourth degree. A violation of division (B)(2) of this section is a felony of the third degree.

Riot, 2917.03, Ohio Revised Code:

(A) No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code:

- (1) With purpose to commit or facilitate the commission of a misdemeanor, other than disorderly conduct.
- (2) With purpose to intimidate a public official or employee into taking or refraining from official action, or with purpose to hinder, impede, or obstruct a function of government.
- (3) With purpose to hinder, impede, or obstruct the orderly process of administration or instruction at an educational institution, or to interfere with or disrupt lawful activities carried on at such institution.

(B) No person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such act might otherwise be lawful.

(C) Whoever violates this section is guilty of riot, a misdemeanor of the first degree.

Failure to Disperse, 2917.04, Ohio Revised Code:

- (A) Where five or more persons are participating in a course of disorderly conduct in violation of section 2917.11 of the Revised Code, and there are other persons in the vicinity whose presence creates the likelihood of physical harm to persons or property or of serious public inconvenience, annoyance, or alarm, a law enforcement officer or other public official may order the participants and such other persons to disperse. No person shall knowingly fail to obey such order.

- (B) Nothing in this section requires persons to disperse who are peaceably assembled for a lawful purpose.

- (C) (1) Whoever violates this section is guilty of failure to disperse.

- (2) Except as otherwise provided in division (C)(3) of this section, failure to disperse is a minor misdemeanor.

- (3) Failure to disperse is a misdemeanor of the fourth degree if the failure to obey the order described in division (A) of this section creates the likelihood of physical harm to persons or is committed at the scene of a fire, accident, disaster, riot, or emergency of any kind.