



MUNICIPAL LIABILITY NEWSLETTER

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City of Cleveland Reaches Agreement on Use of Force

This newsletter focuses on a report and settlement agreement recently reached between the Department of Justice (“DOJ”) and City of Cleveland pertaining to use of force by the police department. The report and agreement provide guidance for insurance professionals and municipal personnel who deal with police claims.

I. Introduction and Background

On March 14, 2013, City of Cleveland Mayor Frank Jackson requested that the DOJ begin looking at its patterns and practices in response to several high profile incidents relating to use of force. After conducting an investigation the DOJ issued a report on the Cleveland Police Department (“CPD”) in December, 2014 finding that the department engaged in a pattern of “unreasonable and unnecessary use of force.”¹

The DOJ found that officers unnecessarily used deadly force; used excessive force against the mentally ill; inappropriately resorted to tasers, chemical sprays, and punches; and failed to recognize that pointing a gun at a suspect qualified as a “use of force.” The report provided specific examples of misconduct, finding particular fault with officers who used their guns to strike suspects or fired their weapons from or into moving cars. The DOJ also criticized a structurally flawed discipline policy, and the CPD’s failure to appropriately keep records of use of force, which made it difficult to know what officers were doing.

The DOJ has opened numerous investigations into police departments in the past. Federal investigators found patterns of unconstitutional policing in other cities including Seattle, Newark, Albuquerque, and Ferguson. The DOJ also recently announced an investigation of the Baltimore Police Department.²

II. The Settlement Agreement

On May 26, 2015, the DOJ filed a complaint against the City of Cleveland in the United States District Court for the Northern District of Ohio seeking declaratory and injunctive relief under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141. The complaint was filed “to remedy a pattern or practice of conduct by law enforcement officers of the [CPD] an agent of the City of Cleveland, that deprives persons of rights, privileges, and immunities secured and protected by the Constitution and laws of the United States.” The case was assigned to Judge Solomon Oliver, Chief Judge for the Northern District of Ohio.

¹The document can be found by searching for: [DOJ Investigation of Cleveland Police](#).

²A comprehensive list can be found at: <http://www.justice.gov/file/441491/download>

On the same day the DOJ and City of Cleveland filed a proposed settlement agreement, which was accepted by Judge Oliver on June 12, 2015.³ It calls for:

- Selecting an independent monitor to report whether the requirements of the agreement have been implemented for at least five years.
- Creating a community police commission, made up of ten representatives from across the community, and one representative each from the Cleveland Police Patrolmen's Association, the Fraternal Order of Police, and the Black Shield Police Association.
- Reforming the use of force policies, including requirements for the use of de-escalation techniques whenever possible, a prohibition on retaliatory force, mandatory reporting and investigation standards following use of force, and medical care for the subjects of force.
- Creating a mental health response advisory committee and providing all officers with training to identify and appropriately respond to situations involving individuals in crisis. The CPD must also develop a plan to ensure that specialized mental health officers are available to respond to calls related to those in mental health crisis.
- Updating officer training.
- Improving equipment and resources available to officers, including providing officers with functioning, up-to-date technology in their zone cars.
- Developing a recruiting policy and strategic recruitment plan that includes clear goals, objectives, and action steps for attracting qualified applicants from a broad cross-section of the community.



The settlement agreement does not mandate body cameras, an idea which has received a good deal of attention from news outlets. The 2014 DOJ report provides insight into why body cameras are not required – the DOJ found that CPD officers lacked many basic technologies such as computers, and that getting the CPD to a baseline technological level should take priority over costly body cameras.

III. Recent Developments

A. Body Cameras

Although not mandated, CPD officers in Cleveland's fourth district started wearing body cameras in early 2015. Currently officers in three of the five Cleveland police districts are fully equipped with the body cameras, and all districts will have the devices by the end of the year. Reportedly, Cleveland spent \$2.4 million to outfit officers with Taser's Axon Flex body-worn cameras. The City is in the process of finalizing policies on how the cameras are used, and recently posted an online survey seeking feedback from residents on the body camera program.

³The agreement can be found at: <http://www.justice.gov/file/441426/download>.

B. Objections to Settlement Agreement

There have been objections to portions of the agreement. On June 29, 2015, a group consisting of the NAACP and other community-based organizations filed a motion for leave *instanter* to submit an *amici curiae* brief expressing the following concerns:

- The settlement agreement creates a police inspector general to review police policies, analyze trends, and make recommendations. However, while the inspector general is appointed by the mayor, the position reports to the chief of police. The inspector general should not report to the chief.
- The police investigate the most serious tier of uses of force, but those occurrences should be investigated by an outside agency.
- The use of force reports utilized by officers should include demographic data.
- The agreement creates a monitor who is responsible for ensuring compliance with the settlement agreement, but improperly makes that monitor exempt from testifying about matters related to the settlement agreement or the City’s conduct.



This last objection is of particular concern to municipalities. The objectors argue that the monitor may be a vital witness in other proceedings, “such as cases under *Monell v New York Dep’t of Soc. Services* that explore whether the City is engaged in an unconstitutional custom, policy, or practice.” The ability to call the monitor as witness could be a powerful weapon for plaintiff’s attorneys alleging that the City had an unconstitutional practice or policy. The monitor could provide evidence to support those allegations.

The DOJ and City of Cleveland recently filed responses to the motion for leave to file *amici curiae* brief, and on July 16, 2015, a reply was filed. As of the date of this newsletter Judge Oliver has not issued a ruling.

C. Community Police Commission

Mayor Jackson also has announced panelists who will choose the members of the community police commission. The panelists must recommend the appointments to the commission to Mayor Jackson at an open forum in September.

IV. Analysis and Recommendations

The DOJ’s report and settlement agreement provide guidance for those in municipalities who work with police departments, including insurance professionals who handle claims against police departments.

The DOJ expects the police departments and municipalities to do the following:

- Define “force” liberally in its written policies, and spell out when it can be used
 - There should be written policies
 - Use of force should never be punitive

⁴The survey can be found at: <https://www.surveymonkey.com/r/?sm=rpOy0wY2BQm0BhALQ3VI5A%3d%3d>



- Encourage reporting of the use of force
- Document all instances of use of force
 - Every officer involved should file a report
 - The report should be specific and not use boilerplate language
- Provide officers with resources such as computers in squad cars with access to the police database
- Keep records of use of force
 - Track by officer for possible early intervention if there is a sudden uptick in incidents
 - Track department trends
 - Periodically review statistics
- Prohibit certain practices outright
 - Striking suspects with guns
 - Using Tasers on “drive-stun” mode
 - Using force against handcuffed or subdued suspects
 - Shooting at fleeing suspects in cars if not posing a risk to others
- Install adequate training programs
 - Re-train officers periodically
 - Briefing when new policy is adopted
 - Training for dealing with mentally ill suspects
 - Training for physically subduing suspects
 - Encourage certifications
- Conduct adequate internal investigations of the use of force
 - Have a procedure for reviewing an whether force was justified
 - Have specific timeliness benchmarks for the investigation
- Investigate all citizens complaints

Of course, every claim must be considered on its own merits. Even so, the foregoing DOJ expectations offer helpful guidance in assessing the strength or weakness of a particular claim.



**John Travis**

A former Cleveland Chief Assistant Law Director and Prosecutor, John Travis defends municipalities and law enforcement officials against claims alleging Sections 1983 and 1985 civil rights violations, violations of First and Fourth Amendment rights, false arrest, malicious prosecution, intentional infliction of emotional distress, racial discrimination, tortious interference with business and contractual relations, conspiracy, respondeat superior, personal injury, and in claims involving motor vehicle accidents, and workers' compensation issues. He has represented a wide variety of political subdivisions such as sewer districts, fire departments, ambulance services, boards of education, and city officials involved in engineering, inspection, zoning, and economic development.

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Steven Strang joined Gallagher Sharp in 2009. He focuses his practice on defending insureds in complex personal injury and property damage claims, lawyers against claims alleging legal malpractice, and municipal entities and law enforcement professionals in personal injury and section 1983 civil rights claims.

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Hannah Klang joined Gallagher Sharp in 2013. She represents businesses, insurance companies and individuals in civil claims and lawsuits involving property damage, personal injury, and wrongful death. She is a member of the firm's General Litigation and Professional Liability practice areas.

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