

TECHNICAL ASSISTANCE REPORT

Investigation of the Lorain Police Department
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Civil Rights Division
Special Litigation Section

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Introduction

This Technical Assistance Report sets forth recommended remedial measures and technical assistance in the following areas: (1) use of force; (2) complaints of officer misconduct; (3) supervisory oversight; (4) early intervention system; (5) unlawful searches, seizures, and arrests; (6) body-cavity searches and strip searches; and (7) officer training. The information contained in this Technical Assistance Report is designed to assist LPD in meeting best policing practices. Implementation of these remedial measures and technical assistance would further LPD's management of its uses of force. The technical assistance provided, however, does not serve to replace the fundamental requirement that force use meet the Fourth Amendment's objective reasonableness standard. *See Graham v. Connor*, 490 U.S. 386, 388 (1989); *Lanman v. Hinson*, 529 F.3d 673, 680 (6th Cir. 2008) (citing *Graham*, 490 U.S. at 395).

I. USE OF FORCE

1. LPD's Use-of-Force Policy

We found deficiencies in LPD's policies regarding force that make LPD's uses of excessive force likely to reoccur. We base our review on LPD's newly revised "Use of Force" policy, Section 4 of LPD's updated Standard Operating Policies and Procedures ("SOP").¹ Where applicable, we also point out deficiencies in LPD's prior use-of-force policy, Number 1.3, which had been in effect for a significant portion of our investigation.

Policies should be written in simple, clear language, allowing any officer to quickly consult them and understand what they say. Alternatively, they should paraphrase or quote legal precedent. We recommend that LPD update and replace its use-of-force policies into a single coherent policy consistent with this technical assistance.

A. Preamble

In general, a use-of-force policy should begin with a preamble setting forth the police department's basic doctrine on use of force. Specifically, this preamble should include a statement that LPD values the protection and sanctity of human life. Moreover, the preamble should set forth the general expectations that LPD holds for its officers' use of force -- i.e., that officers are prohibited from using force unreasonably or as a means of punishment or interrogation, and that policy only permits the use of force at a level that is appropriate in a given

¹ Throughout this Technical Assistance Report, we relied upon the most recent policies and procedures LPD provided to us. Most of these listed a revision or initial publication date of February 10, 2009. We recommend that LPD designate legal counsel to review all new or revised proposed policies to ensure that they are consistent with relevant legal standards.

situation for a lawful purpose. The preamble also should stress the importance of officers being familiar with, and understanding, the use-of-force policy.

LPD's new SOP 04.01.01 includes a preamble, like LPD's prior Policy 1.3, but the preamble is used to set forth expectations of what the policy is not: not a higher standard of care with respect to third party claims. This disclaimer should be framed in the larger context of LPD's values and expectation of officers' duties. In practice, LPD should ensure that its officers not use a disclaimer to justify uses of force inconsistent with its values or law.

B. Definitions

To ensure consistency in the application of the use of force, a successful use-of-force policy should define key terms where lack of clarity could lead to confusion. LPD has improved its prior policies to include more definitions. Even under the new policy, however, LPD does not define all terms necessary to understand and consistently apply its use-of-force policy. Most importantly, LPD's revised definition of "objectively reasonable" continues to lack clarity. SOP 04.01.01, "DEFINITIONS," states that reasonableness is the standard used to judge an officer's actions, but does not tell the officers what the standard is. The SOP Includes lengthy caveats about what objective reasonableness is not, e.g., not "hindsight," but it does not set forth what objective reasonableness is. *Id.* LPD must clearly define "objectively reasonable" with respect to force as: the minimal force which an objective person in the same position as the officer reasonably would believe necessary to overcome resistance offered in a lawful police action. LPD should also ensure that other necessary terms for all of its use-of-force policies have consistent definitions. For example, SOP 04.08, concerns "Specialized Less-Lethal Weapons," but the term "less-lethal" is not defined. We recommend that LPD define less-lethal force as any force other than lethal force.

Throughout LPD's revised policy is LPD's use of the term "aggression response" rather than "force." We suggest that LPD substitute the term "use of force" for the term "aggression response." "Aggression Response" suggests that all uses of force by LPD are responses to aggressive acts, but that may not always be the case.

C. Permitted Uses of Force

While LPD's policy includes a great deal of language that arguably justifies or shields an officer's decision(s) on reasonableness, the policy's general rule omits any mention of *necessity* for the use of force. SOP 04.01.01, "POLICY." LPD should revise its general statement on the use of force to permit force only when the force used is objectively reasonable because it is *necessary* to overcome resistance offered in a lawful police action to compel an unwilling subject's compliance with an officer's lawful exercise of police authority. This rule should specifically cite the Supreme Court's holding in *Graham*, 490 U.S. at 395-96, for the reasonableness requirement. Further, "necessary" should be qualified as the *least* amount of force necessary to overcome resistance offered.

At a minimum, the policy should require that officers use the lowest level of force objectively necessary from the officer's position to safely resolve a situation, including verbal commands and other alternative negotiation or de-escalation techniques. LPD's revised 04.01.01, "PROCEDURES," properly includes disengagement and awaiting backup when practicable, but does not make mention of de-escalation. We recommend that the use-of-force policy include alternatives to more significant uses of force, such as emphasizing announcement of officers' presence, the use of "soft hand" techniques (i.e., using hands to escort rather than control subjects), and other de-escalation techniques. The policy also should emphasize the use of de-escalation as a tactic, and should state that officers should allow subjects the opportunity to submit to arrest before they employ force. It is only when de-escalation is unsuccessful or cannot be used due to a present danger to officers or others that force should be employed, but the policy does not make this clear.

LPD's use-of-force policy should also incorporate the de-escalation techniques appropriate to interactions with individuals who are under the influence of drugs or alcohol or who have mental illness, including providing specialized training, e.g., crisis intervention training, or guidance to officers regarding the signs or symptoms for identifying such individuals (as well as how to properly interact with such individuals). Pursuant to 04.01.01, "PROCEDURES", officers are instructed to give a "loud" verbal command when using force. It is appropriate to give an oral warning prior to an officer's use of force, when feasible and when doing so would not endanger the officer or others. However, a "loud" command, as compared to a calm direction, can be inappropriate at times, as in the case of an officer trying to control an individual with mental illness. Therefore, such a general requirement should be accompanied by the caveat that, in certain situations, a loud command would not be appropriate. Even though it would not always be appropriate to address a subject with a loud command, the policy should be specific that in all situations the officer should make his command clearly to the subject.

D. Prohibited Uses of Force

SOP 04.07 addresses prohibited weapons and techniques. We are pleased to see such a section, but suggest that, along with the prohibitions listed, it also prohibit using force on a subject in a manner that is likely to cause positional asphyxia² and discuss the methods and procedures to avoid it. We also recommend that all policies involving weapons be grouped together in one section (presumably SOP 17, "Firearms and Weapons"). This will allow for ease of use, as officers should not be forced to look in several different parts of the policy manual to find all the policies involving weapons. Finally, if the weapons-related prohibitions are moved to Section 17, we suggest that SOP 4.07(C) and (D), which concern choking techniques and

² Positional Asphyxia is a fatal condition arising because of the adoption of particular body positions (often resulting from placement on the stomach), which cause interference with breathing.

choke holds, rather than weapons, remain within the use-of-force section, while SOP 04.07(A) and (B), which actually deal with weapons, be moved to SOP 17.

E. Use-of-Force Continuum

It is our understanding that LPD is considering, at the urging of its private police practice consultant, dropping LPD's use of a use-of-force continuum.³ We strongly urge LPD to retain the use-of-force continuum, which provides officers with uniform guidelines about the appropriate use of force. Regardless of the nomenclature of the guidance that LPD adopts, LPD should not require that an officer utilize a lower level of force before moving up to a higher level of force that is reasonably necessary in the situation. As now revised, 04.01.01, "PROCEDURES" affords only three levels of threat and corollary force: (1) imminently life threatening, (2) direct physical attack or threat of causing serious bodily injury, and (3) refusal to cooperate, passive resistance. In the last category, LPD's policy states that chemical sprays and Electronic Control Weapons ("ECWs") are approved tactics for passive-resistance situations. LPD's policy oversimplifies situations in which LPD permits officers to use these less lethal weapons. The many examples of officers using ECWs against passive but uncooperative subjects that we reviewed indicates to us that this policy and attitude among LPD members has led to poor outcomes, namely, the abundant use of ECWs to apprehend subjects for minor offenses when officers' use of force reports present no articulated threat to officers or others.

F. Lethal Force

LPD's revised use-of-force policy, like its prior policy, is incomplete with respect to uses of lethal force. SOP 04.01.01; Policy 1.3.2(G). The prior policy appropriately included the requirement that a threat be imminent and addressed the fleeing felon rule.⁴ The revised policy

³ A use-of-force continuum is a guide which attempts to rank uses of force, ranging from de-escalation techniques to deadly force, which an officer may employ to gain control and compliance of a suspect in an appropriate and justified manner. A use-of-force continuum is a flexible tool that allows an officer to escalate or deescalate his or her use of force in response to a subject's actions.

⁴ The fleeing felon rule permits the use of lethal force in the apprehension of a subject only: (1) to defend the officer or a third person from what the officer objectively reasonably believes is an imminent threat of lethal force or force from the subject likely to cause serious bodily injury; or (2) to prevent the escape of a suspect in cases where there is probable cause to believe the suspect either poses an imminent threat of serious harm to the officer or another, or has committed a crime involving the infliction or threatened infliction of serious physical harm, and other means of apprehension are inadequate or unavailable, and if, where feasible, warning has been given. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). LPD policy is slightly narrower. It does not specifically permit the use of lethal force against a fleeing felon who has committed a crime involving the infliction or threatened infliction of serious physical harm,

provided to us does not include this rule. The revised SOP lacks specificity or direction on potentially lethal uses of force. Accordingly, we recommend that LPD's policy specify that "lethal force" includes force methods that employ potentially lethal weapons (e.g., firearms, cars, etc.). Additionally, due to the possibility of death or serious bodily injury from the delivery of blows to the head with impact weapons, we recommend that LPD policy only permit strikes to the head with impact weapons as tactics of last resort, when the use of lethal force would otherwise be authorized.

G. Firearms

LPD provided us with a revised policy concerning firearms, SOP 17. SOP 17 contains many useful and appropriate provisions. However, changes to individual policies, as specified below, would improve this section.

Significantly, LPD's policy does not, but should, contain a general statement that officers are completely accountable for the safety and control of their authorized firearms. In furtherance of this responsibility, LPD should consider providing its officers trigger locks for department-issued firearms, as some other police departments in the United States have done.

SOP 17.01(F), provides that "loading, unloading or handling of any departmental firearm or approved personal firearms, shall be done . . . in accordance with training." By referring to training without further elaboration, this policy, like many other LPD policies, leaves it unclear exactly what it requires. The reader may be unsure what the training procedures are or if the training differs between officers. To be of more use to the officer reading the policy, it should simply describe what the policy is, so that an officer is not required to consult a training manual in order to follow the policy.

SOP 17.12(E), reads, in part, "Failure of proficiency will result in loss of Department authorization to carry or use firearms." Beyond that, the policy provides no direction for an officer who has failed the firearms proficiency test. The policy should discuss, in detail, the next steps an officer who fails the test must take, including: any remedial training that will be required of, or available to, the officer; how much time, and how many attempts, the officer will have to re-qualify; and the consequences for failing to re-qualify within that time period. If an officer fails to qualify with his or her required firearm, he or she should be immediately relieved of his or her firearm and all duties that require the carrying of a firearm. LPD should not reinstate such officers to duty until the officers have qualified to carry the required firearm. The policy should also contain a provision for the removal of authorization to carry firearms when an officer is disciplined (depending upon the nature of the infraction resulting in discipline), and the consequent relief from duties requiring the carrying of a firearm.

where other means of apprehension are inadequate or unavailable. Use-of-Force Policy 1.3.2(g). LPD policy properly may be narrower than the furthest constitutional limits on the uses of force.

SOP 17.02, notes that LPD members are not permitted to carry or use a firearm, “with a blood alcohol level higher than the state’s prescribed level for intoxication while operating a motor vehicle.” We recommend that the policy specifically reference that level, which in Ohio is .08%. Again, we reiterate that an officer should be able to ascertain all the information needed to comply with the policy by looking at the policy itself, rather than having to consult an outside source. Moreover, because policing standards would not permit the use of a firearm while impaired, even if not legally intoxicated, we also recommend that LPD policy prohibit the carrying of a firearm within six hours of having consumed alcohol.

SOP 17.05, requires that officers carry only ammunition approved by LPD, and SOP 17.04, advises how many loaded magazines officer “may” carry. LPD’s policy does not clearly limit the amount of ammunition officers are to carry on their person. It is imperative that supervisors be aware of the amount of ammunition that officers are carrying in order to facilitate accountability for expended rounds when investigating firearm use. We, therefore, recommend that LPD specify the number of rounds that all those who carry firearms are authorized to carry while on duty.

SOP 17.08, “Firearms-Inspection of Firearms,” makes it the responsibility of the Firearms Instructor to “conduct random inspections of all firearms approved for use.” We suggest that the instructor at the range conduct such inspections, with the chain of command then conducting periodic random inspections, of no fewer than one inspection per quarter for each officer. Specifically, inspections should address the condition of the firearm and the type and amount of ammunition carried. Furthermore, all such inspections should be documented in writing.

SOP 17.13 concerns “Firearms-Reporting Accidental Discharges.” The policy specifies different procedures following an “accidental” discharge, versus an “intentional” discharge. Identifying a discharge as accidental, before such discharge is investigated, presumes an accidental cause, whether supported by the evidence or not. We recommend that the policy describe a single procedure for all “critical firearms discharges,” which should be defined to encompass all discharges other than: training, target competition, hunting, ballistic tests, and destruction of an injured animal with prior notification to supervisors. *Compare* SOP 17.15. The critical-discharge procedure should involve a thorough investigation any time there is a critical firearms discharge. We also recommend that any time an officer’s weapon is critically discharged, whether or not that weapon is an authorized firearm, a report should be completed and filed with LPD.

H. Less Lethal Weapons

LPD’s policies should provide comprehensive and specific guidance and restrictions on all intermediate force weapons used, including batons, chemical weapons, ECWs, and impact munitions. Even intermediate force weapons have the potential of lethality. Accordingly, LPD

should consistently acknowledge in policy and treatment that these weapons are “less lethal” not “less than lethal.” As a general matter, LPD’s revised policies correctly delineate separate policies for each of these less lethal tools. The use-of-force policy should include, among other things: where these and other intermediate force weapons fall within the use-of-force continuum; the circumstances under which the intermediate weapons should be used and instructions on their proper use; prohibitions on the use of the weapons; whether all officers are required to carry them; reporting procedures; and (if applicable) appropriate decontamination and/or medical treatment procedures. LPD’s revised use-of-force policy, Section 4, does this to some extent, but we suggest that the policies and procedures be strengthened and made more detailed, as noted herein. Appropriate training and certification on the use and deployment of all intermediate weapons should be developed and implemented.

I. Conductive Energy Weapons

LPD’s ECW policy, SOP 04.14, should be strengthened as outlined below, in order to be more clear and effective. As a general matter, we note that ECW use among LPD officers appears to be high and that some officers use ECWs as a means of apprehension, rather than to overcome active resistance. We strongly recommend that the policy governing ECWs should specify that the ECW may not be used unless the suspect is actively resisting or unless the use is for the purpose of preventing harm to the officer or others. The policy should specify that the ECW cannot be used on a passive subject.

LPD should revise its policy to direct that LPD members complete a use-of-force report any time a ECW is used, whether the officer believes an individual is actually hit or not. We note that in some use-of-force reports LPD provided to us, officers stated their belief that ECW probes did not hit the subject, though the subject reacted after ECW deployment. The reactions recorded in the reports indicate that officers may incorrectly perceive whether a ECW prong has made contact with a subject. Because current policy is not explicit that perceived misses are also uses of force, officers would not necessarily be required to complete use of force reports in these instances. We recommend that LPD make its policy explicit that officers must report all ECW deployments in use-of-force reports regardless of perceived effect.

We recommend that the policy specify that officers should only actively target their ECWs, i.e., display the red targeting light on a subject, when the officers actually intend to use their ECWs and the use would be objectively reasonable. Such active targeting of subjects with ECWs, as we discuss later, should be reported as a use of force, as well.

If feasible (i.e., safe), officers should be required to announce that the ECW is being deployed beforehand, giving clear commands prior to deployment, such as “lay flat” or “stop or I will Taser you.” The policy should state that, whenever possible, the ECW should be deployed only when a backup officer is available. And the policy should make clear that no more than one officer should activate a ECW against a subject at any one time.

The prohibitions on ECW use in certain situations and against certain populations contained in SOP 04.14, “PROHIBITED USES,” are appropriate, but are not as comprehensive as they should be. Specifically, we recommend that the following prohibitions be added: ECWs should not be used on persons with known neuromuscular disorders (epilepsy or muscular dystrophy, for example), or on subjects with known heart problems or equipped with a pacemaker. Only conditions reasonably apparent to the officer(s) at the time of possible use of the ECW should trigger the prohibitions on ECW use. Also, ECWs should not be used as a prod or escort device; to experiment on a person; if requested by a civilian; or on restrained subjects, unless the subject engages in active resistance.

The policy should also state that any restraint following deployment of a ECW must not impair the subject’s breathing. To prevent accidental firearm discharge, the policy should direct officers to wear their ECW holster on the opposite side of their bodies from their firearms. Furthermore, the policy should state that, if a ECW is deployed three (or fewer if circumstances indicate it is appropriate) times on an individual, that individual should automatically be taken to a medical facility.

We also suggest that supervisors check the ECWs of their officers on a regular basis (at least monthly) in order to monitor their use, and that officers be required to inspect their own ECWs at the beginning of each shift. Furthermore, the policy should prohibit the use of a ECW on a restrained person, unless exigency requires such use and, even then, such use should be subject to a higher level of supervisory review.

J. Chemical Weapons

We recommend that LPD strengthen its policy on Oleoresin Capsicum (“OC”) spray, SOP 04.15. In particular, there are some issues that should be addressed by the policy but are not. The policy should clarify that OC can be used only when verbal commands are not effective and force is deemed necessary to protect the officer or others from physical harm, to effect the arrest of a subject who is actively resisting, or to prevent escape. The policy should also prohibit the use of OC in passive civil demonstrations and in crowded areas. Further, the policy should require officers to give a verbal warning before employing OC, unless doing so would present a clear danger to the officer or others.

We recommend that LPD make clear in its policy limitations on the use of OC spray. OC spray should only be used for a specific threat, for an appropriate target, for a limited duration, at a limited distance to the subject, at appropriate targets on the subject’s body (e.g., not up the nose or down the throat), and compliant with current training techniques and manufacturers’ guidelines.

Officers should be instructed not to place or permit sprayed subjects to remain in a face-down position (because it presents a risk of positional asphyxia). Further, officers should be instructed to obtain medical attention for the subject if the subject complains of the continued

effect of the OC after decontamination, or if the officer learns that the subject suffers from asthma, bronchitis, or any other such condition that affects the subject's breathing ability, or if the subject requests medical attention.

Finally, after deployment, incidents of OC use should be reviewed by a supervisor to ensure that the reasons for the use of OC are documented, and all uses should be reported in a detailed manner on a use-of-force report.⁵ Uses of OC that result in injury should be reviewed by an uninvolved supervisor, whose review should address whether the use was objectively reasonable, whether proper care was timely administered, whether the officer properly reported the use of force, and whether the chain-of-command supervisor properly reviewed the incident.

Lastly, LPD does not, but should, weigh OC spray canisters. Spray should be tracked and accounted for, to facilitate accountability and, when necessary, investigations into use of OC spray.

K. Search and Seizure as Related to Force

LPD policies on search and seizure are contained within the use-of-force sections of LPD's policy manual. SOP 04.05.01, "SEARCH AND SEIZURE. CONSTITUTIONAL REQUIREMENTS,"; SOP 04.05.02, "SEARCH AND SEIZURE. TYPES OF SEARCHES,". LPD should separate the sections on search and seizure from the use-of-force chapter (Chapter 4), as these are two distinct areas.

2. Reporting Uses of Force

We recommend changes to LPD's policies regarding use-of-force reporting. LPD's revised use-of-force reporting policy, SOP 04.11, sets forth the items that an officer should list in his or her report, but fails to clearly state when LPD requires that officers complete use-of-force reports. LPD should revise its policy to make clear the basic requirement that all involved officers or witness officers complete individual use-of-force reports for all uses of physical or instrumental force beyond un-resisted handcuffing. This should specifically include any instance in which an officer draws and aims a firearm, i.e., active targeting (including a ECW), even if that firearm is not discharged.

Unlike LPD's prior Policy 1.3.7(A), which listed certain situations in which LPD required that officers notify a supervisor, LPD's new reporting policy is silent on this point. We

⁵ Currently, policy refers to reporting OC use through an "Action-Response Report." SOP 04.15, "DOCUMENTATION." This is an apparent oversight. The preamble to the policy states that uses of OC must comply with LPD's "Aggression Response" policy, which requires use-of-force reporting. In any event, OC use, like any use of force, should be subject to use-of-force reporting.

suggest that the policy expressly require that an officer notify a supervisor any time an officer uses force. We also recommend that LPD require that supervisors report to the scene of all reportable uses of force beyond minor uses of force, e.g., soft hand control. Supervisors will, therefore, be aware of when a use of force occurs and when to expect report forms, and from whom. Also, supervisors should be required to respond to the scene on a priority basis if a serious injury has resulted from the use of force, or if a firearm has been discharged. LPD also should specify that a supervisor's chain-of-command superior is to report to the scene of a supervisor's use of force.

3. Supervisory Review of Uses of Force

Supervisory review of officers' uses of force is critical to a department's ability to ensure officers are using force in a manner consistent with constitutional standards and the department's policies. Use-of-force reviews may identify officer training needs, inappropriate use of tactics, including verbal tactics, and patterns of unauthorized or excessive uses of force. The information regarding each use of force also should be tracked in an early intervention system ("EIS"), as discussed in this letter.

LPD revised policy concerning reviews of uses of force, SOP 04.12, needs to be strengthened to include more levels of review, and more thorough reviews. Supervisors should not only review use-of-force report forms, but should be required to respond to the scene of a use of force and conduct their own investigation by interviewing officers and witnesses. Certain uses of force, i.e., where there are very serious injuries, should be investigated by an independent unit, not the supervisor.

The supervisor who reviews and signs off on the use-of-force report form should be one who was uninvolved in the use-of-force event. The review should determine not only if the use of force conformed with policy, but also whether the use of force was tactically sound. LPD should require that the supervisor provide the review in writing, and must include a finding regarding whether the use of force was consistent with policy and procedure and whether tactics, including verbal tactics, were appropriately employed. Supervisors who review use-of-force reports should reconcile multiple use-of-force reports from multiple officers concerning the same event. The supervisors should also check involved officers' training records to determine whether or not those officers are properly certified for the force method used. If questions or errors require supplemental report(s), after these qualitative assessments by front-line supervisors, the review should proceed up the chain of command.

Supervisors' reviews should consider the officer's "decision-point analysis," which is a review of the reasonableness of each decision prior to and throughout the officer's use of force – i.e., from the officer's initial point of contact with the subject to the officer's control of a situation, including any intermediate escalation or de-escalation – and a determination of whether or not a different decision would have affected the ultimate use of force. Decision-point analysis should also look at officers' reactions to subjects' verbal comments that lead to uses of

force, and at officers' decisions not to wait for backup, resulting in the need for force. Decision-point analysis looks at each aspect of the officers' and the subjects' actions to determine the reasonableness of officers' use of force.

The Operations Captain should not only review the use of force to determine whether it conformed with policy, but should also review the supervisor's review, to ensure that such review was proper, thorough, and complete.

SOP 04.12 refers to the Use of Force Review Board those use-of-force reports that are "not endorsed" by patrol supervisors or the Operations Captain. We suggest that LPD change this language to require Use of Force Review Board review of any use of force in which the subject alleges s/he was injured or the subject sustains an injury requiring medical attention, to determine whether such use of force was reasonable and consistent with policy, and whether or not it was endorsed by any supervisors. This review should encompass the tactics employed, including verbal tactics, and any training issues that may be indicated.

SOP 04.12 also refers to the Use of Force Review Board those use-of-force incidents that result in "serious physical injury." Because that phrase is open to interpretation, it should be specifically defined, and we recommend that it be defined to include any case requiring medical attention -- whether or not the subject was admitted to the hospital -- or in which the subject requested medical attention.

4. Identifying Use-of-Force Trends

We recommend certain changes and clarifications to enhance the Use of Force Review Board policy. We recommend that in order to place appropriate importance on the review board process and give the board authority, a Captain-level command staff member chair the board. The policy should require the board to consider the officer's "decision-point analysis," as discussed above, as well as consideration of the officer's current training, tactics employed, and prior disciplinary and use-of-force history. We recommend that LPD revise its policy to make clear the requirement to track all uses of force and the need to record all uses of force in an early intervention system.

5. Competency-Based Evaluation

While LPD requires officers to sign that they have received and reviewed use-of-force policies, systematic checks should be implemented to ensure that officers have actually understood the material they have read. This could be effectuated through the use of occasional competency-based quizzes, and informal quizzes during daily roll calls, or via officers' mobile data terminals.

II. COMPLAINTS OF OFFICER MISCONDUCT

LPD should implement a formal, structured, and consistent system for receiving and handling complaints of officer misconduct.

1. Complaint Procedure

An open, fair, and impartial process of receiving and investigating citizen complaints serves several important purposes. It ensures officer accountability and supervision, deters misconduct, and helps maintain good community relations by increasing public confidence and respect. Improving the current procedure for handling citizen complaints at LPD would maximize these goals.

A. Complaint Process Information

An effective complaint process should allow unfettered access for citizens (or others) to make complaints, and should reinforce the public trust in the integrity of the process. We recommend that LPD better disseminate information to the public about its complaint process. LPD already has made its complaint forms and an instruction sheet available on-line, in English and Spanish, as our expert consultants recommended during our exit conference with LPD. We recommend that city offices and LPD headquarters also have information about the complaint process prominently posted in visible places in public reception areas. Additionally, LPD should make complaint forms and secure drop boxes available at the city hall,⁶ other public venues (e.g., the public library) the housing authority office, and through non-government community organizations. Complaint process information and forms should be posted in multiple languages. Finally, we recommend that LPD institute periodic customer satisfaction surveys, and include feedback questions regarding the public's perception of the complaint process, so that LPD knows about any actual or presumed deficiencies.

B. Complaint Intake

An open complaint process contemplates that complaints will not be discouraged. LPD should change aspects of its citizen complaint process that have the potential to discourage the filing of complaints and to impair effective complaint tracking. LPD has an obligation to investigate all complaints whether or not the complaints are submitted on LPD complaint forms, signed, or submitted anonymously. LPD may consider the anonymity of a complainant in weighing the evidence that can be gathered in the determination of the outcome of a complaint. LPD must not, however, disregard notice of alleged wrongdoing or even criminal behavior by its

⁶ Complaint packages are to be available in the Safety Service Director's Office under the current policy. SOP 3.12., "PROCEDURES."

officers merely because a complainant has chosen not to attribute his or her complaint or fears retaliation by doing so.

All complaints of officer misconduct should be documented regardless of their origin or formality.⁷ We recommend that LPD formally document, investigate, respond to, and track all allegations of misconduct that, if true, would constitute a violation of LPD policy, LPD standards of conduct, or criminal law, regardless of how such allegations are received.

In its revised policies, LPD has separated what LPD refers to as “citizen inquiries” from “allegations of employee misconduct.” Compare SOP 03.11, and SOP 03.12. Categorization of citizen complaints as only “inquiries,” separate and apart from the formalized complaint process, may allow legitimate complaints to go unaddressed. Indeed, LPD’s “citizen inquiries” policy tacitly acknowledges this likelihood in that the policy refers to “types of complaints.” SOP 03.11. LPD’s separation of “inquiries” from “complaints” is likely to result in LPD’s failure to address legitimate citizen complaints adequately. Additionally, the absence of guidance on classification of complaints allows “inquiries” to be used to minimize, rather than investigate and track, citizen complaints. LPD’s complaint form provides areas for check marks for either “Allegation of Misconduct,” or “Inquiry,” in an area marked for “Department Use Only.” Neither the policy, the complaint instruction form, nor the complaint form give guidance on who categorizes the complaint as an inquiry or a misconduct allegation.

LPD should investigate and track all complaints, even if minor in nature. Use-of-force complaints, in particular, should never be classified as “inquiries.” LPD should apply a single policy to the collection of citizen complaints, although there may be differing means of classifying and handling those complaints once received and recorded, as discussed below.

Pursuant to the revised LPD policy on receiving complaints, all employees are responsible for assisting a person who desires to lodge a complaint. SOP 03.12. The policy goes on to state, however, that a supervisor will be summoned to the scene, and only when a supervisor is unavailable does the policy specify that the complainant will be given a complaint package. *Id.* Paradoxically, this creates a situation in which all employees are responsible for accepting complaints, but a complainant may only receive a complaint package from a supervisor.⁸

⁷ We received numerous credible allegations from citizens who claimed to have contacted senior LPD officials informally to complain about officer misconduct, including conduct that, if proven as alleged, would constitute criminal conduct. Some of these citizens also alleged that LPD failed to respond to such allegations. Some allegations have been made that after LPD failed to address prior allegations of misconduct, the same officers repeated similar misconduct.

⁸ During an on-site visit to LPD headquarters, both our interviews with LPD staff about the complaint process and our attempts to secure a complaint form revealed that LPD’s practice has been to require a supervisor to be summoned in order to file a complaint. Similarly, LPD’s on-

Requiring a supervisor to be summoned to the scene of a complaint, if feasible, is consistent with current policing practices. Only permitting a complainant to receive a complaint package from a supervisor, however, is not. Accordingly, LPD's practice may lead to a stifling effect on submission of legitimate complaints. We recommend that LPD make available complaint packages through all its employees, immediately upon a complainant's request. LPD should continue to have a supervisor respond to the scene of all complaints, whenever feasible. If a supervisor is unavailable, the policy should then direct personnel to attempt to document the complaint, if the complainant will provide the information, which should include: the complainant's name, nature of complaint, date of complaint, name of the officer involved in the incident, and collecting transient evidence. Currently, the policy specifically prohibits a non-supervisory LPD officer from asking any questions or speaking to a complainant at any time. SOP 03.12, "PROCEDURES," B.7. This prohibition is contrary to accepted policing practices and may lead to the loss of perishable evidence, failure to identify witnesses to the alleged incident, and a stifling of the effectiveness of the complaint process. If the complainant will not provide such information, LPD should nonetheless provide the complainant a complaint form, without demanding that the complainant only receive such a form from a supervisor.⁹

Moreover, we recommend that LPD policy specifically memorialize situations in which LPD would self-initiate a complaint and investigation. For example, whenever a law suit is filed against an LPD officer, LPD's Office of Professional Standards should initiate an administrative review and ultimately, if justified, an investigation. This should occur even if the law suit does not identify an officer by name, i.e., Officer John Doe, and should lead the Office of Professional Standards ("OPS") to attempt to identify such officer through the course of an OPS investigation. Similarly, LPD should self initiate a complaint whenever misconduct becomes know to LPD, regardless of whether a citizen has filed a complaint.

LPD policy currently requires that all complaints be forwarded to LPD's OPS. SOP 03.12, "PROCEDURES". OPS is to assign the complaint a number and record the complaint in a database. These are fitting steps. However, we recommend that LPD add to its policy a

line complaint instruction sheet provides instructions on mailing in letters of commendations, but omits instructions for sending in complaint forms. Instead, the instruction sheet "encourage[s]" complainants to submit their complaints in person at LPD's headquarters.

⁹ We also learned that civilian communications personnel, i.e., "telecommunicators," on many occasions may have discouraged complainants from filing complaints, failed to contact supervisors regarding complaints, and failed to document the calls and the complaints. Such responses to complainants who call 911 may deter would-be complainants who are unable to, or otherwise unwilling to, go to a police station to file a complaint. LPD should train all its personnel, particularly communications staff members, on their responsibility to accept complaints -- verbal, written, telephonic, TDD, email, etc. -- and to report pertinent complaint information to supervisors.

requirement that OPS also record the receipt of complaints to an EIS. Additionally, in order to allow supervisors to identify trends, we recommend that LPD specify in its policy that even complaints for which complainants refuse to submit written forms or which are submitted anonymously be listed in the database and added to the EIS.

C. Complaint Classification

LPD classifies complaints of officer misconduct as either major or minor. SOP 03.12, “CLASSIFICATION OF COMPLAINT”. Major complaints are subject to a full OPS investigation. *Id.* Minor complaints are only subject to chain-of-command review, though the description of this process is absent from the policy. *Id.* We found the division of complaints of officer misconduct into only two categories to be useful and consistent with our recommendations to other departments. The process and criteria for classification of complaints, and who performs that classification, however, need clarification.

LPD’s policy on classification does not specify who conducts the classification of complaints as major or minor. In the later processing-of-complaints section of the policy, however, the policy requires that all complaints, once received, must go to the Chief, and, “[i]f an investigation is deemed necessary, [t]he Chief of Police will make all determinations relative to assignment.” SOP 03.12, “PROCEDURES,” C.3. That policy section is silent on what factors are used to determine when an investigation should be “deemed necessary,” what criteria the Chief should apply, or if that policy is intended to apply to classification of complaints at all. The policy section goes on to speak to the assignment of complaints to supervisors, but not the classification of complaints.

We recommend that LPD revise its policy to require that LPD utilize a trained OPS investigator for the classification of complaints as either major or minor. We also recommend that if a supervisory officer in OPS’ chain of command reduces the initial classification of a complaint from major to minor, the policy then require that the supervisor provide a written justification to attach to the investigatory file.

In addition to defining who may classify a complaint, we recommend that LPD revise its policy to attempt to further define what type of complaints fit within the “minor” and “major” categories. Currently, LPD’s policy specifies that major complaints are those “which if proven would result in monetary loss.” SOP 03.12. The ultimate discipline that may be imposed if an allegation is proven, however, may be a function of an officer’s complaint history and participation in the investigation. Accordingly, calling on the classifier of complaints to divine the potential ultimate outcome of a complaint before any investigation is a poor way to classify complaints. The current classification system permits too much “gray area” in which some serious complaints may be minimized or disposed of informally without adequate investigation and resolution.

LPD should apply consistent, objective criteria in the categorization of complaints as major -- and subject to full OPS investigation -- or minor -- and subject to chain-of-command investigation. We recommend that LPD cross reference its policies that describe gross misconduct, SOP 03.01, to define the misconduct that comes within the scope of major complaints. We also recommend that LPD specify that all allegations in any of the following categories automatically come within the scope of major complaints: use of excessive force; sexually assaultive behavior; and failure to investigate alleged employee misconduct; failure to provide medical treatment; purported unlawful police action, e.g., unlawful arrest, harassment, retaliation; false reporting or fabrication; and evidence of discriminatory policing or bias. LPD's revised policy currently includes allegations of criminal misconduct as an example of gross misconduct. SOP 03.12. The policy should be clear that all allegations of conduct that, if true, would result in criminal charges or automatic dismissal are presumptively major complaints, as well.

LPD may develop other objective criteria for the assignment of complaints to OPS. Whatever criteria LPD ultimately uses, it should be promulgated in policy and, therefore, known to all personnel and complainants. The use of such criteria is not intended to eliminate the exercise of discretion in the assignment of complaints. Rather, the use of identifiable criteria should make the assignment of complaints more consistent and objective. Objective criteria should also instill a sense of confidence in the complaint system in complainants and a sense of fairness among personnel. Objective criteria would also permit quality control in later audits of the assignment system and OPS investigations.

Further, we recommend that LPD add to its policy a provision that the classification of a complaint be elevated from minor to major if additional allegations of wrongdoing are uncovered in the course of a minor investigation that would bring the investigation within the scope of the defined major offenses.

D. Chain-of-Command Investigations

LPD's policy assigns to an officer's first-line supervisor the responsibility of investigating minor complaints. SOP 03.12, "CLASSIFICATION OF COMPLAINTS." After the policy's statement that a first-line supervisor usually handles minor complaints, however, the policy is silent on the process and oversight, if any, for minor complaints. We recommend that LPD specify in its policy that LPD's OPS retains the responsibility to oversee both the quality and timeliness of the chain-of-command investigation of minor complaints.

To ensure that the chain-of-command is equipped to investigate and resolve complaints referred to them, we recommend that LPD provide appropriate training, with an emphasis on interpersonal skills. Further, we recommend that LPD provide training to supervisors who are responsible for investigating and deciding the outcome of a complaint on: (1) appropriate burdens of proof, i.e., preponderance of the evidence; and (2) the factors to consider when

evaluating complaint or witness credibility (to ensure that their recommendations regarding dispositions are unbiased, uniform, and legally appropriate).

Not every complaint will merit a complete OPS investigation, but every complaint deserves the level of investigation merited by the circumstances of the complaint. If, during the course of any chain-of-command investigation, the supervisor determines a complaint meets the objective criteria for a full OPS investigation, the case should be referred back to OPS. The chain of command should reach a finding after investigation of all complaints it receives, regardless of the seriousness of the allegation. All findings of potential policy violations should then be reviewed by second-level supervisors before findings are submitted to OPS supervisor for final approval. Any disagreements with respect to the finding should be memorialized in the investigative record.

Finally, we recommend that LPD implement a uniform system for recording in an officer's personnel files all complaints resolved through the chain of command. We also suggest that LPD implement a policy regarding complaint disposition that requires all minor complaints to be recorded in an EIS. We further recommend that LPD implement oversight, e.g., an audit or quality assurance mechanism, to review a sampling of chain of command complaint investigations to ensure that complaints are properly classified and appropriately resolved.

E. Outside Referral of Potentially Criminal Allegations

LPD's new complaint policy appropriately requires that LPD notify the relevant prosecutor's office when a complaint involves possible criminal conduct. SOP 03.12, "PROCEDURES," F. The policy generally states, though, that LPD should make such a notice prior to starting an administrative investigation and then follow the advice of the prosecutor. *Id.* When an incident or complaint of officer misconduct indicates the possibility of criminal conduct by the officer, LPD should refer the matter to the prosecutor's office and support, as needed, a criminal investigation. An ongoing criminal investigation, however, should not foreclose LPD's ability to conduct a parallel administrative investigation, which should proceed on a concurrent track, to the extent it is able to do so without interfering with the criminal investigation. LPD policy should provide clear guidance to investigators regarding procedures for when and how to compel statements from officers for the purposes of an investigation in conformity with *Garrity v. New Jersey*, 385 U.S. 493 (1967). *See, e.g.*, Department of Justice Technical Assistance Letter on *Garrity* Issues to Seattle Police Department, November 23, 2011, available at http://www.justice.gov/crt/about/spl/documents/seattlepd_TA_11-23-11.pdf.

We also recommend that LPD subject all its records of allegations of officer misconduct to critical oversight by the Lorain Safety Director to assess whether such prosecutorial referrals are properly occurring. Additionally, the Lorain County Prosecutor should consider occasional audits of LPD's misconduct investigations to determine whether, in the Prosecutor's discretion, any non-referred allegations should be taken up by the Prosecutor's Office.

2. Office of Professional Standards

The internal affairs component of a law enforcement agency should seek to ensure that the integrity of the department is maintained through a system of internal discipline (or corrective action) where fairness and justice are attained by objective and impartial investigations. OPS is LPD's internal affairs component. LPD should acknowledge and continue to support the core mission of OPS, which is to monitor the behavior of police officers for misconduct, while maintaining its objectivity and autonomy.

A. Staffing and Training

Based on our interviews with LPD executives, in the past a single Lieutenant had been charged with managing LPD's OPS, including both the revision of LPD policies and the conduct of OPS investigations. According to LPD's policy, the OPS enters and tracks misconduct complaints, but the Chief is to assign complaints to any given supervisor. SOP 03.12. The policy contains no restrictions or guidance concerning to which supervisors the Chief should refer a complaint. Nor does the policy require that the assigned supervisors have any training in conducting OPS investigations. As a practical matter, however, the sole OPS Lieutenant appeared to have investigated most complaints about which LPD members spoke to us. We recommend that LPD revise its policy to require that LPD's OPS investigate complaints of officer misconduct, subject to the review and management of the supervisor of that office, and, ultimately, the Chief. LPD should have sufficient personnel resources to receive, investigate and track major complaints, and to receive, assign, oversee, and approve minor complaints. The staff size should be sufficient to ensure that these tasks are accomplished credibly and within the time limits prescribed in policy.

We recommend that LPD require in its policy that all who are assigned to OPS and its supervisory chain of command have specific training on the conduct of OPS investigations. To ensure consistency and investigative integrity, we recommend that all LPD officers responsible for investigating complaints of misconduct receive specialized training in OPS investigations, interviewing and interrogation skills, ethics, and LPD administrative and disciplinary procedure. We also recommend that LPD provide its OPS supervisors with training in management of administrative investigations from a certified police internal affairs training program. We suggest that LPD provide continuing law enforcement training to both OPS investigators and supervisors, concentrating on internal-affairs-specific topics. Additionally, OPS should provide in-service training to first-line supervisors regarding their roles in the complaint process and OPS investigations.

Further, LPD should develop a policy defining criteria for its selection of officers that participate in OPS investigations. Training and staffing are critical to the success of an effective internal affairs system. We recommend that LPD develop clear selection criteria for all OPS investigators, including an evaluation of the applicant's performance and complaint and disciplinary histories, to ensure that only officers with integrity and ethics are selected to serve as

OPS investigators and supervisors. LPD should also take measures to assign officers with extensive investigative skills to OPS. We further recommend that LPD remove investigators whose conduct while serving as OPS investigators would have disqualified them from selection for the position.

B. Investigative Process

The current LPD policy on the processing of complaints, SOP 03.12, "PROCEDURES," C, offers very little guidance on the requirements for investigation of an OPS complaint. Also, the current policy fails to set forth the burden of proof that the investigator must meet to reach a finding. The lack of formal, structured, and consistent policies poses difficulties to the complainants as well as the involved officers. Both complainants and involved officers are entitled to advanced notice of their rights and responsibilities in the course of an OPS investigation.

In defining the scope and nature of OPS investigations, LPD policy should provide that any investigation include an interview with the complainant and all relevant witnesses, citizens, or police personnel. The policy should require that LPD obtain and analyze all available forensic evidence. The policy should require that (non-involved) supervisors or OPS personnel on the scene of an incident take pictures, collect evidence, and conduct interviews. The policy should require all involved *and* witness officers produce all statements, reports, and notes completed in the course of duty that are related to the investigation. OPS investigators should keep all of these items in the investigative file, along with the investigator's notes. We recommend that the policy require audio or video recording of all interviews for OPS investigations; currently the policy lists recording only as an option for the subject officer. SOP 03.12, "PROCEDURES," E.

The current LPD policy includes "Procedural Guidelines for Conducting an Interview," *id.*, but each of the ten points listed apply only to interviews of LPD employees. The misconduct policy is bereft of any requirements or protections that should be afforded in the interview of complainants. We recommend that LPD revise its policy to include guidance on interviewing non-LPD employees, both complainants and others. Such revision should include a provision either requiring that the interview be recorded or a signed declination to record from the witness. Also, to the extent reasonable, the interviews should take place at the witnesses' convenience. Witnesses should be permitted to have a friend or legal counsel present. We also recommend that LPD memorialize in policy a statement that LPD should never request a witness to waive any of his or her rights, e.g., to seek judicial intervention following an incident, in an interview.

When considering the information gathered in the course of an OPS investigation, we recommend that LPD adopt in policy and practice a preponderance of evidence standard to reach a finding for a complaint. We also recommend that LPD clarify the definitions of those possible findings in LPD's policy. The current policy includes in its definition of "exonerated," a statement that the subject officer's actions were "proper." We recommend that the exonerated finding state that the subject officer's actions occurred, but that the actions were legal and did not

violate policy or training. This should not automatically lead to the conclusion that the officer's actions were proper. LPD's policy also currently includes a "partially sustained" finding when an incident includes two or more allegations. This does not comport with standard policing practices. We recommend that LPD revise its policy to eliminate the "partially sustained" finding and require that the OPS investigator reach a separate finding on each separate allegation within an investigation. Similarly, the policy currently lists "other misconduct" as a finding that the OPS investigation uncovered misconduct other than that initially alleged, yet this is not an acceptable finding. If LPD discovers additional or ancillary misconduct during the course of an OPS investigation, the OPS investigator should reach a finding for each separate incidence of misconduct. The current LPD policy also specifically permits a finding of "withdrawn." This, too, does not comport with acceptable policing practices. If a complainant requests to withdraw his or her complaint, we recommend that LPD continue its internal investigation to determine whether or not a violation of policy occurred. LPD should reach findings even on withdrawn complaints. It is inappropriate for a complainant to unilaterally terminate a complaint without an investigation, though it is appropriate to note in the investigative file whether the complainant refused to cooperate any further with the investigation.

The current LPD policy requires that the supervisor assigned to investigate a complaint forward his or her findings to the respective division commander of the subject employee for review and endorsement. SOP 03.12, "PROCEDURES," C.5. The policy is silent with respect to the responsibilities of the supervisor in reviewing the investigative report, or the possible actions, other than endorsement of the investigation. We recommend that LPD revise its policy, consistent with our prior recommendations, to require that OPS personnel investigate major complaints, and that the supervisor of that office engage in meaningful and critical review of the investigative record and recommended findings of the OPS investigator. The supervisor should determine whether any further investigative steps are necessary and, if so, return the investigation for completion. Once completed, the supervisor should memorialize his or her agreement or disagreement with the recommended finding, and submit the finalized investigation to the Chief. The current LPD policy implies, though not clearly, that the Chief will conduct a substantive review of recommended findings. SOP 03.12, "PROCEDURES," C.8. We recommend that LPD revise its policy to require the same sort of substantive review and formal, memorialized statement from the Chief as we recommend from the supervisor of OPS.

We also recommend that each step of the investigation have a policy-specific deadline. Currently the policy requires that LPD complete all major incident investigations within 30 days and all minor incident investigation within 15 days. SOP 03.12, "PROCEDURES," D. Our expert consultants determined that these deadlines may be too short, though the current policy does permit extension of these deadlines through a request to the Chief. We recommend that LPD revise its policy to require that OPS submit such requests for extensions to the Chief in writing before the expiration of the current deadline, with a brief basis for the extension, and that the Chief, likewise, respond in writing and state a basis if the extension is not granted. Extensions should only be granted for defined periods of time, rather than being open-ended.

Also, preferably, LPD should advise the complainant of any extension or delay in responding to the complaint.

If, during the course of an OPS investigation, collateral misconduct is discovered, OPS should investigate of such misconduct. This is implied in the current policy through the mere finding of “other misconduct,” SOP 03.12, “PROCEDURES,” C.4.e, but is not explicit in the policy. The misconduct policy should be clear that if a policy violation is uncovered, OPS will identify that violation and investigate or refer it as appropriate. Likewise, the policy should state that any criminal conduct uncovered will also lead to a referral for criminal investigation.

If a complaint is ultimately sustained, LPD should go back to the documentation regarding the incident from which the complaint was generated to assess supervisory and management accountability. LPD should review these documents to ensure proper supervisory review of the incident and reporting of any identifiable policy violations for OPS investigation. If the subject officer’s supervisor failed to report a known policy violation, for example, he or she should then be held responsible for failure to report.

C. Proactive Investigations

We recommend that LPD’s OPS proactively review records to identify potential misconduct issues. Proactive OPS investigations should include both integrity tests and record reviews to identify potential misconduct or training issues. LPD should review use-of-force reports on a quarterly basis to identify whether a basis exists to investigate any reported uses of force for potential violations of policy or for referral, if necessary, for criminal investigation. Additionally, OPS should perform an annual check of sworn officers’ state driving records for violations or suspended licenses. OPS should also perform annual checks of local court dockets for civil suits that may have bearing on officers’ behavior on duty. LPD also should have a formalized process to solicit from the county prosecutor and City Attorney’s Office information on LPD officers’ performance in judicial proceedings, e.g., showing up for court, successful motions to suppress based on officers’ conduct, or perceived truthfulness of officers’ court or deposition testimony. None of the affirmative steps outlined above should relieve LPD officers of their own duty to self report, currently contained in SOP 03.09, nor should they relieve supervisors of their duty to report known misconduct.

LPD should develop a system to monitor, evaluate, and conduct affirmative investigations using targeted integrity tests. The integrity tests should be targeted to determine whether evidence of criminal misconduct that violates policy exists when there is an accusation or reason to believe that the subject officer may have violated the law or LPD policy. Any such system should be memorialized in a policy to provide clear guidance regarding the proper and appropriate use of integrity tests.

3. Discipline

LPD currently divides its disciplinary process among multiple different policies. We recommend merging and laying out in a more orderly fashion the processes for disciplinary action. It is critical that LPD have a transparent and fair disciplinary system and that officers are clearly informed of potential consequences of various actions.

LPD's current disciplinary policy includes a list of factors on which to base the imposition of discipline. SOP 03.17.01, "FACTORS AFFECTING THE LEVEL OF DISCIPLINE." Among these factors, LPD considers an officer's seniority in determining whether or not to impose discipline and, if so, the level of discipline. *Id.* This is inconsistent with accepted policing practices and actually memorializes preferential treatment of senior officers for offenses that may result in the imposition of discipline for junior officers. We recommend removing this factor.

III. SUPERVISORY OVERSIGHT

LPD should ensure that clear chain of command supervision and direction is provided to LPD personnel.

In addition to the previously discussed recommendations that LPD supervisors go on-site and review all use-of-force incidents (above unresisted handcuffing), we recommend that LPD implement policies and procedures for LPD supervisors to routinely review all aspects of LPD officer conduct. LPD supervisors should review the following for officers under their command: (1) all uses of force, as set forth above; (2) probable cause for arrests and the appropriateness of charges filed; (3) reasonable suspicion for stops and searches that do not result in an arrest; and (4) a random sampling of a specified number of mobile video recording device ("MVR") recordings each month. Lastly, LPD policy should require supervisors to review and approve all arrest reports and search-and-seizure reports, and to record their approval on the arrest or incident reports by handwritten or electronic signature.

We further recommend that senior supervisors meet annually with every LPD officer to discuss positive aspects of his or her police work, his or her complaint history, if any, and to discuss any problems or concerns officers may have concerning the department.

IV. EARLY INTERVENTION SYSTEM

LPD command staff should examine and review officer conduct on a regular basis as a proactive measure to minimize and detect misconduct, and to identify training and policy issues.

LPD does not use of an EIS.¹⁰ Absent a formalized tool, LPD is left with ad hoc, subjective, and incomplete judgments of LPD supervisors to try to detect problematic trends in officer behavior or to identify training needs of individual officers or units.

We recommend that LPD implement policies and procedures to collect data on individual officers for the purpose of maintaining, integrating, and retrieving information necessary for effective supervision and management of LPD personnel through the use of an EIS. The EIS should contain information on all investigations and complaints, including non-sustained complaints and complaints prior to final disposition, discipline and other supervisory corrective measures, uses of force, arrests and charges, searches and seizures, service calls, training, awards and commendations, sick leave, civil lawsuits, and other items relevant to an officer's conduct. The effective gathering of data will require the support of other City departments. The City Law Office should report to LPD when an officer is named in a civil complaint relating to policing work or risk factors, such as allegations of violent behavior. Similarly, the Lorain County Prosecutor's Office should report to LPD on any matters relating to an officer's integrity or credibility. These reports should trigger an OPS investigation into the allegation as well.

To use an EIS effectively as a management tool, LPD should regularly assess the data. We recommend that LPD make data available to supervisors on a quarterly basis for review, or whenever a triggering event occurs, i.e., an event which indicates an officer is above a threshold level. LPD supervisors should use the EIS to: (1) promote best professional police practices; (2) improve accountability and management; (3) manage the risk of police misconduct and potential liability; (4) evaluate and audit the performance of all levels of LPD, its members, and its units; (5) evaluate and assess the effectiveness of training and policy; and (6) recognize and commend positive officer performance. Specifically, LPD should be able to gather and assess data by officer on all of the officer's arrests, compared with the portion of those in which charges include resisting arrest, disorderly conduct, obstruction, and assaulting a police officer. Also,

¹⁰ An EIS, also known as an early warning system, is a data-based police management tool designated to identify potentially problematic behavior and allow early intervention to correct misconduct and assist in identifying deficiencies in supervision, management, and policies. Police departments typically use EIS data to promote best professional police practices, accountability and proactive management; to manage the risk of police misconduct and potential liability; to evaluate and audit the performance of officers and units; and to identify, manage, and control at-risk officers, conduct, and situations.

LPD should be able to use the EIS to gather and track data for each officer's arrests by demographic characteristics of the subject.

We recommend that LPD require supervisors, including command staff, to review this data for every officer they supervise on a regular, predetermined basis, such as during annual reviews. When supervisors review their subordinates' EIS data, we recommend that LPD utilize comparisons to peers. Supervisors should compare their subordinates' data concerning complaints, use-of-force reports, and other pertinent information about a particular officer with the same categories of information from all other officers on patrol. Similarly, command staff should review the EIS data for the units they command and compare these data with peer units. In addition, the policy should provide explicit guidance to supervisory officers reviewing reports to ensure that patterns of possible misconduct are identified, analyzed, and addressed properly. The aim of this process is to give supervisors valuable information that, if received early, could identify potential problem officers before misconduct actually develops.

To use an EIS effectively as a predictive model tool, the EIS must have defined triggers for management intervention. The policy implementing these recommendations should also establish guidelines regarding specific events that will trigger an additional supervisory review, such as: more than one citizen complaint in a twelve-month period; a specific number of uses of force within a discrete period; a proportion of arrests that involve use of force; and a proportion of arrests that include charges for obstruction. Once an officer has been selected for this additional review, a report should be prepared for his or her supervisor that details of the EIS data. The officer's immediate supervisor and command staff should then meet to discuss the report and determine if any corrective action is warranted. The supervisor's and command staff's recommendations should then be forwarded to the appropriate Division Commander for his or her timely review and implementation. The effectiveness of the implemented recommendations should be determined by monitoring the officer and drafting written reports on the officer's conduct on a monthly basis. The officer's supervisor should retain the supervisory recommendations and the written monthly report in his or her supervisory file.

V. UNLAWFUL SEARCHES, SEIZURES, AND ARRESTS

LPD should revise and update its search-and-seizure policies to be consistent and comprehensive, and to provide clear guidance.

A police department's search-and-seizure policy provides guidance used in officer training and in the conduct of officers' regular law enforcement duties. Accordingly, it is essential that LPD's search and seizure policies and procedures clearly set forth standards for appropriate searches and seizures that meet constitutional requirements. As an initial matter, LPD's search-and-seizure policy is contained within the chapters regarding its use-of-force policy. The reason for this categorization is unclear. Search and seizure is a discrete area. We recommend that LPD reorganize its policies and procedures, placing policies governing search

and seizure in a separate, distinct section. This will decrease the likelihood of providing unclear guidance to police officers.

In general, a search-and-seizure policy should begin with a preamble or general statement setting forth the police department's basic doctrine on search and seizure. We found no such preamble in LPD's current policy. SOP 04.05.01, 04.05.02. The basic rule of law concerning the reasonableness of a warrantless search is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). We recommend LPD revise its search-and-seizure policy to include a general statement that incorporates this basic rule.

LPD's policy and procedure governing the permissible circumstances under which officers can detain a person on a stop is also unclear. The absence of a clear policy limiting officers' discretion in effecting street stops and frisks increases the chances that officers will go beyond the legal bounds of reasonable suspicion. Accordingly, we recommend that LPD revise its policy on street stops to provide clear guidance to officers. In order to make a stop, an officer needs reasonable suspicion based on "particularized and objective basis" for believing the person being stopped is committing or did commit a violation. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). A subsequent frisk of the individual must be based on separate articulable reasonable suspicion that the individual is armed and dangerous and must be confined in scope to an intrusion reasonably designed to discover such weapons. *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968). LPD should document, at least on a field contact card, all stops, and include thereon the brief justification for the stop, a notation whether the subject was restrained, and reasons for any frisk or restraint.

LPD's policy regarding consent searches states: "Officers should always attempt to obtain consent in writing." We recommend that LPD policy also require officers to document an individual's refusal to consent to search.

LPD's policy and procedures lack discussion of critical issues related to search and seizure or are not updated to reflect the current state of the law on police practices. For instance, LPD's policy on motor vehicle searches and searches incident to arrest contains no discussion of the rule articulated in the recent Supreme Court case, *Arizona v. Gant*, 129 S.Ct. 1710 (2009). In *Gant*, the Supreme Court limited the circumstances in which police officers may search a vehicle incident to a recent occupant's arrest to "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 1719. The Supreme Court's holding in *Gant* limited the doctrine established in *New York v. Belton* that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile." *Belton*, 453 U.S. 454, 460 (1981). It is imperative that LPD keep its policies and procedures updated to reflect the current state of the law. We also recommend that LPD make clear that the *Gant* and *Belton* holdings refer to the passenger compartment of a vehicle and not a locked trunk. LPD's search and

seizure policies do not comport with these legal standards. Lack of updated policy guidance on the appropriate circumstances under which officers may conduct searches incident to arrest may lead officers to believe that they are justified in searching a motor vehicle in situations in which it would be unlawful. Accordingly, as discussed above, we recommend that LPD revise its search and seizure policy to incorporate these constitutional standards and to comport with generally accepted police practices.

LPD policy currently does not require a supervisor to review officers' stops and arrest reports. We recommend that supervisors review all officers' stops to obtain data regarding searches and seizures being conducted by officers. The aim of this process is to provide supervisors with valuable information that could be used to deter improper searches and seizures by officers, and to spot problems with the sufficiency of probable cause.

VI. BODY-CAVITY SEARCHES AND STRIP SEARCHES

LPD should revise and separate its body-cavity and strip search policies to provide clear guidance that they are distinct subjects.

SOP 04.05.02, contains LPD's guidance on the use of body-cavity and strip searches. Generally, we found the body-cavity and strip searches guidance difficult to follow as written, in part because the policies are combined in the same section. Body-cavity and strip searches are distinct subjects with separate requirements, which officers must understand. We recommend that LPD revise its body-cavity and strip search policies to place these topics in two different sections.

LPD's policy on body-cavity and strip searches also does not provide enough technical and practical detail to provide officers with clear directives. No examples of what constitutes a body-cavity and strip search are provided. Acceptable body-cavity and strip search policies should clearly define critical terms such as what constitutes a body-cavity search and strip search. We recommend that LPD define each type of search correctly and succinctly at the beginning of each separate policy. LPD should also use the defined terminology consistently when referencing body-cavity and strip searches throughout its policies and procedures. For instance, a search of an individual's mouth is not a body-cavity search. Also, if an individual is asked to drop his or her underwear and spread their buttocks, this constitutes a strip search.

The Fourth Amendment requires that the more intrusive the search, the amount of suspicion necessary to justify the search correspondingly increases. *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984). A more intrusive search requires a particularized reasonable suspicion, not a mere suspicion or subjective response. *Id.* (citing *United States v. Himmelwright*, 551 F.2d 991, 995 (5th Cir.)). Body-cavity searches are more invasive than standard strip searches and, thus, have more stringent standards. They should be conducted under extremely limited circumstances. Generally, a warrant should be required to conduct a body-cavity search of an individual. Although LPD's policy states that a warrant is required to

conduct a body-cavity search, the policy should more clearly explain the order of the steps officers must take to obtain authorization for each type of search. For instance, the policy should clarify that a warrant application must be authorized in writing by the senior command officer on duty and include the commanding officer's written justification for his or her decision.

We note that LPD policy states that body-cavity searches should be conducted by a medical professional. We recommend that the policy also specify that body-cavity searches must be conducted at an appropriate medical facility, unless an articulable exigency of circumstances is present. The policy should also state clearly that strip searches should be conducted in a private area. *See Timberlake by Timberlake v. Benton*, 786 F. Supp. 676 (M.D. Tenn. 1992). In *Timberlake*, the court stated that “[i]t is self-evident that a strip search must be conducted in such a way as to safeguard the individual’s privacy.” *Id.* at 692. LPD’s search-and-seizure policies concerning strip and body-cavity searches do not meet the full contours of applicable constitutional standards. Accordingly, we recommend that LPD draft new, separate strip search and body-cavity search policies consistent with this letter.

We recommend LPD regularly brief and train all officers, including all command officers, on its search and seizure policy, including body-cavity and strip searches. We recommend that only instructors who have been trained and certified to be instructors, and who are competent in the subject matter, conduct the training for all officers. LPD also should document all training to clearly identify who was trained, the date they were trained, and how the training was conducted. Finally LPD’s chain of command should conduct regular audits of incident reports and signed authorizations/refusals to permit warrantless searches to ensure compliance with the procedures.

VII. OFFICER TRAINING

LPD should develop comprehensive, ongoing training programs for current LPD officers.

Much of the technical assistance offered in this report calls for the creation of new policy or revision of existing policy. We recommend that as LPD updates or creates each new policy, LPD re-train all LPD personnel, including command staff, on each new policy and its effects. Such training should be comprehensive to cover all aspects of the change in policy so that LPD personnel are aware of what would no longer be within policy, as well as what new material would then be included in LPD’s revised policies.

Policy re-training should be competency-based. Accordingly, once trained, each LPD member should demonstrate competency of his or her knowledge of the new subject matter through performance or examination. Each member of LPD, including command staff, should be required to pass competency-based performance tests or examinations for each new policy.

Also, we recommend that LPD's training for firearm qualification not focus only on skills in shooting. That training time also should include review of applicable case law and tactics. Similarly, LPD should provide such legal and tactics training for their officers on the use of less lethal weapons and force in general.

We note that one potential resource for LPD in establishing and improving training programs may be the longstanding training and grant programs administered by other components of the Department of Justice, such as the Office of Justice Programs. While these programs are separate and independent of the Civil Rights Division's investigations, we would be pleased to provide you with contact information for exploring the possibility of such assistance.