



CHRIS CHRISTIE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON, NJ 08625-0080

JOHN J. HOFFMAN
Acting Attorney General

KIM GUADAGNO
Lieutenant Governor

TO: Director, Division of Criminal Justice
Superintendent, New Jersey State Police
Chairman, State Parole Board
All County Sheriffs
All Police Chiefs and Directors

FROM: John J. Hoffman, Acting Attorney General

DATE: March 3, 2016

RE: Directive Revising the Attorney General Supplemental Policy on Conducted Energy Devices

1. REASONS FOR UPDATING THE ATTORNEY GENERAL SUPPLEMENTAL POLICY ON CONDUCTED ENERGY DEVICES

New Jersey's policy governing the use of conducted energy devices (CEDs) is designed to provide police officers with a less-lethal option to respond to police-citizen confrontations that might quickly escalate to a deadly-force situation. I recently instructed members of my staff to undertake a thorough examination of all CED deployments by law enforcement officers in New Jersey, for the purpose of assessing the efficacy of the existing CED policy and considering any necessary changes to that policy. That examination showed that, since November 2012, there have been over 50 CED deployments by law enforcement officers in New Jersey. The examination revealed that, in every instance when a CED was fired or discharged, officers complied with the Attorney General Supplemental Policy on Conducted Energy Devices. Further, in all of these cases, the CED discharge either prevented the officer from having to resort to deadly force, or de-escalated a situation that may have escalated rapidly to the point where such deadly force would have been warranted. In short, New Jersey's experience shows that CEDs offer a safe and effective alternative that has saved lives.

Members of my staff and I have met with many community leaders and law enforcement executives to discuss a wide range of topics on how to enhance both police-community relations and public confidence relating to the police use of force. Those meetings have been extremely



constructive and productive.

During the course of those conversations, it was brought to my attention that the current CED policy prohibits officers from using this device against a person resisting arrest unless the officer can establish that the suspect will cause death or serious bodily injury to the officer or another person. The practical problem, as explained by experienced law enforcement professionals, is that it is unrealistic to expect officers in the field to be able to predict the degree of injury that a person might cause in the future. (Note that if a suspect is armed with a firearm, a CED is not an appropriate option. CEDs, rather, are used to deal with persons armed with non-firearm weapons, or who threaten to inflict physical harm through other means.) When the threat of death or serious injury is imminent, the standard that applies before deadly force may be used under the Attorney General Use of Force Guidelines, officers are able to make the critical decision without difficulty. Precisely because the threat is imminent, the suspect would have manifested the precise nature and extent of injury (e.g., approaching the officer with a knife and coming within striking range). But when the threat of physical assault is not imminent, but rather is reasonably anticipated at some point during what might be a prolonged encounter, it is much more difficult for an officer to predict the amount or timing of injury likely to result.

Police executives advise that this current policy restriction, requiring officers to speculate on the precise degree of injury that will be caused at some point down the road, has had the unintended effect of chilling officers from deploying CEDs in circumstances where such deployment would be appropriate as a means to stop a threat *before* the confrontation escalates to the point where death or serious injury is likely. This restriction also discourages police departments from equipping officers with CEDs.

Unlike the policies adopted in many other jurisdictions, New Jersey's CED policy prohibits, and will still prohibit, officers from using these devices in response to passive resistance. (A common example of passive resistance is when a person refuses a police command to exit a vehicle and grabs on to the steering wheel to prevent being removed by physical force.) In this State, CEDs may not be used as a so-called pain compliance device. For sound policy reasons, a CED cannot be fired/discharged whenever an officer is authorized to use physical force, such as grabbing a person's arm, or applying a wrestling hold to apply handcuffs.

The restriction against using a CED against a person who is passively resisting arrest must be retained, and nothing in this supplemental Directive should be construed in any way to authorize a CED to be used against such person. However, after discussing the situation with community leaders and law enforcement professionals, I am convinced that we need a better, more realistic way to distinguish passive resistance, in response to which a CED cannot be fired, and active resistance, where a CED may save a suspect's life by resolving the confrontation before deadly force is authorized and appropriately used.

Fortunately, the New Jersey Code of Criminal Justice provides helpful guidance on how to distinguish passive resistance from active resistance. The grading provisions of the offense of resisting arrest distinguish between resistance that poses a substantial risk of injury on the one hand, and unlawful resistance that does not pose that risk on the other hand. Specifically, N.J.S.A. 2C:29-2 upgrades the disorderly-persons offense of resisting arrest to an indictable crime if the person “uses or threatens to use physical force or violence against the law enforcement officer or another,” or “uses any other means to create a substantial risk of causing physical injury to the public servant or another.” Under this statutory framework, resistance that poses a risk of physical injury is graded more seriously than resistance that does not pose that risk.

It is critical to note that this statutory gradation provision focuses on the threat of physical injury without requiring the officer or a jury to speculate on whether that injury would constitute “serious bodily injury,” as distinct from “significant bodily injury” or “bodily injury” as those terms are defined in N.J.S.A. 2C:12-1. It also bears noting that police officers already are familiar with this statute, and have been trained on making charging decisions that distinguish between resisting arrest conduct that constitutes an indictable crime, and resisting arrest conduct that constitutes a disorderly persons offense.

Aside from providing more clear and realistic guidance on when an officer is authorized to fire/discharge a CED, it also is important to use this opportunity to launch statewide training on how CED-equipped officers interact with persons of different cultures and backgrounds. As noted above, CEDs are an important law enforcement tool because they provide a force-option to use in lieu of deadly force. It follows that officers equipped with these less-lethal weapons also should be trained on how to defuse a volatile confrontation so that it can be resolved without having to employ *any* form of actual force.

Finally, this Directive authorizes an exception to the general requirement that CEDs be fitted with an internal video camera to record the circumstances justifying the firing/discharge of the device. Police departments will hereinafter be authorized to purchase CEDs that do not have internal video recording systems, subject to the condition that such CEDs may be carried and used only by officers who are equipped with a functioning body worn camera.

As part of the ongoing conversation with community leaders and law enforcement executives on how to enhance police-community relations, I recently issued an Attorney General Law Enforcement Directive that encourages police departments to deploy body worn cameras. That Directive provides uniform statewide guidance on the use of police-worn video/audio recording systems. It is important to take full advantage of this important new law enforcement technology.

It remains the policy of this State that all CED events must be electronically recorded to ensure that these devices are used only in appropriate circumstances. The following Directive recognizes that, as compared to the recordings produced by internal CED cameras, body worn

cameras provide a more complete record of the circumstances leading up to the decision to fire a CED, and a more complete record of the circumstances following the firing and discharge of a CED. The revision to the Supplemental Policy on Conducted Energy Devices to allow body worn cameras to be used in lieu of an internal CED camera is intended both to reduce the purchase costs of CEDs, and to encourage departments to acquire and deploy body worn cameras.

2. REVISIONS TO SUPPLEMENTAL POLICY ON CONDUCTED ENERGY DEVICES

Sections I, V, VI, VII, VIII, and XI of the Attorney General Supplemental Policy on Conducted Energy Devices (approved on October 7, 2010) are hereby amended to read as follows¹:

Section I. Scope

The following supplemental policy governs the use of conducted energy devices. The original policy concerning these devices that had been issued on November 23, 2009 [is hereby] **was** revised and replaced **in 2010** based upon the recommendations of the County Prosecutors, the New Jersey Association of Chiefs of Police, and other law enforcement professionals. [These] **Those** professionals expressed concern that the original policy was too restrictive both in terms of the number of officers who might be authorized to carry and use a conducted energy device, and the circumstances when the device might be deployed. In some instances, the original policy would have prohibited the use of a conducted energy device even though an officer would be allowed to use *deadly* force. The [following] revised supplemental policy **issued on October 7, 2010**, developed in consultation with State, county and local law enforcement executives, [brings] **brought** the rules governing the use of conducted energy devices more closely in line with the policy governing the use of less lethal ammunition (dated March 19, 2008). Under the [following revised] **2010 revisions to the** supplemental policy, conducted energy devices, like less-lethal ammunition, are considered to be a form of “enhanced” mechanical force.

The following revised supplemental policy, developed in consultation with community leaders in addition to law enforcement executives, addresses the practical problems that have arisen because the previous policy required officers to speculate on the degree of injury that a person might cause when he or she actively resists a lawful arrest. Under the policy issued in 2010, an officer could not fire/discharge a CED against a person who was actively resisting arrest (e.g., striking, kicking, or biting) unless the officer reasonably believed that the suspect’s

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New material is underlined and boldfaced, **thus**;

Deletions are bracketed, [thus]

A copy of the supplemental policy in its entirety, incorporating the revisions made by this Directive, is appended.

resistance would cause death or serious bodily injury to the officer. Under New Jersey law, the term “serious bodily injury” is defined to mean “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” N.J.S.A. 2C:11-1(b). (Note that bodily injury involving the temporary loss of any one of the five senses (e.g., unconsciousness) constitutes only “significant” bodily injury, not serious bodily injury. See N.J.S.A. 2C:11-1(d). Accordingly, the threat of being temporarily stunned by the suspect during a fistfight would not necessarily satisfy the standard for firing/discharging a CED.)

The revised policy now closely follows New Jersey statutory law defining the offense of resisting arrest, see N.J.S.A. 2C:29-2, which upgrades the disorderly persons offense to an indictable crime if the suspect “uses or threatens to use physical force or violence against the law enforcement officer or another,” or “uses any other means to create a substantial risk of causing physical injury to the public servant or another.” This approach re-affirms and strengthens New Jersey’s policy of prohibiting the use of a CED for pain compliance or in response to passive resistance. By incorporating the statutory criteria for upgrading the resisting-arrest offense, the revised policy makes clear that a CED may be discharged only in response to active resistance (e.g., fighting) that poses a substantial risk of physical injury to the arresting officer, a victim, or innocent bystander.

The term “conducted energy device” is defined in Section III of this policy. These weapons fall under the broader category of “stun guns,” as that term is defined in the New Jersey Code of Criminal Justice. Specifically, N.J.S.A. 2C:39-1(t) provides that the term stun gun means “any weapon or other device which emits an electrical charge or current intended to temporarily or permanently disable a person.”

Pursuant to N.J.S.A. 2C:39-3(h), any person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree. N.J.S.A. 2C:39-3(g)(1) further provides in pertinent part that, “[n]othing in subsection h. (generally prohibiting the knowing possession of stun guns) shall apply to any law enforcement officer who is exempted from the provisions of that subsection by the Attorney General.” This supplemental policy shall constitute an exemption from the provisions of N.J.S.A. 2C:39-3(h) for any law enforcement officer authorized pursuant to this policy to deploy or use a conducted energy device during an actual law enforcement operation, and for any officer who is participating in a training program pursuant to this policy.

Section V. Authorization to Use Conducted Energy Devices

1. An officer authorized to use a conducted energy device pursuant to this supplemental policy may fire and/or discharge the device during an actual operation only where:

- a. i) the officer believes such force is reasonably necessary to prevent the person against whom the device is targeted from causing death or serious bodily injury to him/herself, an officer, or any other person; or

ii) the person against whom the device is targeted is armed with an object that the officer reasonably believes could be used as a deadly weapon, and the person refuses the officer's command to put down or surrender the object after having been given a reasonable opportunity to do so; or

[ii)] **iii) the officer believes such force is reasonably necessary to prevent the immediate flight of an individual whom the officer has probable cause to believe has committed an offense in which the suspect caused or attempted to cause death or serious bodily injury; [and] or**

iv) the person against whom the device is targeted resists a lawful arrest by using or threatening to use physical force or violence against the officer or another in a manner and to a degree that the officer reasonably believes creates a substantial risk of causing bodily injury to the officer, a victim, or a bystander; and

- b. the individual will not voluntarily submit to custody after having been given a reasonable opportunity to do so considering the exigency of the situation and the immediacy of the need to employ law enforcement force [to prevent the individual from causing death or serious bodily injury to him/herself or any other person].

2. An officer shall not direct an electrical charge or current against a person who has already received an electrical charge from a conducted energy device unless the person, despite the initial discharge, continues to pose a [threat] **substantial risk** of causing [death or serious] bodily injury to him/herself, an officer, or any other person. The person shall be given a reasonable opportunity to submit to law enforcement authority and to comply with law enforcement commands before being subjected to a second or subsequent discharge, unless the person's conduct after the initial discharge creates a risk of [death or serious] bodily injury that is so immediate that any delay in applying a second or subsequent discharge would likely result in [death or serious] bodily injury. **The person's refusal to comply with law enforcement commands after having been given a reasonable opportunity to do so shall not be a basis for a second or subsequent discharge unless the person continues to refuse to put down or surrender an object that the officer reasonably believes could be used as a deadly weapon, or unless the person continues to use or threaten to use physical force or violence against the officer, or another, in a manner and to a degree that reasonably creates a substantial**

risk of causing bodily injury to the officer or another. Furthermore, the person's attempt instinctively to reduce the leverage of a wristlock, hammerlock, or other pain compliance hold applied by the officer while attempting to apply handcuffs, or the person's bracing or pulling against an officer's attempt to pull/move him or her, shall not be a basis for discharging the device unless such resistance reasonably creates a substantial risk of causing bodily injury to the officer.

In the event that a second or subsequent discharge is authorized and necessary, **unless the officer is equipped with and activates a body worn camera as defined in Attorney General Law Enforcement Directive No. 2015-1 so that the circumstances justifying a second or subsequent discharge are recorded by the body worn camera,** the officer shall, when feasible, point the main body of the device so that the focus of the device's internal video camera is centered on the person in order to record the circumstances justifying any such second or subsequent discharge.

3. An officer shall not direct an electrical charge or current against a person who is restrained by handcuffs unless:
 - a) the officer reasonably believes based on the suspect's conduct while handcuffed that such force is immediately necessary to protect the officer, the suspect, or another person from imminent danger of death or serious bodily injury; and,
 - b) the use of physical or mechanical force (*e.g.*, a baton or pepper spray) is not immediately available to be employed, has been tried and failed to stop the imminent threat of death or serious bodily injury, reasonably appears to be unlikely to stop the imminent threat if tried, or would be too dangerous to the officer or an innocent person to employ.

In the event that a conducted energy device is discharged against a person who is restrained by handcuffs, **unless the officer is equipped with and activates a body worn camera as defined in Attorney General Law Enforcement Directive No. 2015-1 so that the circumstances justifying the discharge are recorded by the body worn camera,** the officer shall point the main body of the device so that the focus of the device's internal video camera is centered on the person in order to record the circumstances justifying the discharge.

4. NO CHANGE TO EXISTING TEXT
5. NO CHANGE TO EXISTING TEXT

Section VI. Unauthorized Uses of Conducted Energy Devices

The following uses are prohibited:

1. A conducted energy device shall not be used or threatened to be used to retaliate for any past conduct or to impose punishment.
2. A conducted energy device shall not be fired or discharged against a person who is exhibiting only passive resistance to an officer's command to move from or to a place, to get onto the ground, or to exit a vehicle. **A conducted energy device shall not be fired or discharged against a person, for example, who is attempting instinctively to reduce the leverage of a wristlock, hammerlock, or other pain-compliance hold applied by an officer, or who is bracing or pulling against an officer's attempt to pull/move him or her.**
3. A conducted energy device shall not be fired or discharged [to prevent] **for the sole purpose of preventing** a person from committing property damage.
4. A conducted energy device shall not be fired or discharged against the operator of a moving vehicle **unless the use of deadly force against the operator would be authorized.**
5. Two or more conducted energy devices shall not be discharged upon a person at the same time.

Section VII. Training and Qualification

1. No officer shall be authorized to carry or use a conducted energy device during an actual operation until having completed a training course and qualification procedure approved by the Police Training Commission in the proper use and deployment of conducted energy devices. The training program shall include a component on **techniques to de-escalate a confrontation with a person from a different culture or background. The training program also shall include a component on** how to interact with an emotionally disturbed person, how to recognize mental illness, and techniques to de-escalate a psychiatric crisis to prevent injury and death.
2. NO CHANGE TO EXISTING TEXT
3. NO CHANGE TO EXISTING TEXT

Section VIII. Deployment Techniques

1. An officer issued a conducted energy device shall determine and record on an appropriate log, prior to field deployment, that the device, including the video recording function, is functional, **provided, however, that if the officer is equipped with a body worn camera as defined in Attorney General Law Enforcement Directive No. 2015-1 that will be used to record the circumstances of the firing/discharge of the conducted energy device in lieu of an internal video camera, the officer shall determine and record on an appropriate log that the body worn camera is functional.**

2. NO CHANGE TO EXISTING TEXT

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Section XI. Approved Conducted Energy Devices

The New Jersey State Police, in consultation with the Division of Criminal Justice, shall develop a list of specifications and characteristics of conducted energy devices that may be deployed and used pursuant to this supplemental policy. Those specifications will include the following requirements:

1. The device must be capable of making a date- and time-stamped digital record of each occurrence when the darts/electrodes are fired, and of each occurrence when an electrical current is discharged.
2. The device must be capable of making a digital video recording of each such firing and electrical discharge, where the focus of the internal camera is centered on the person against whom the conducted energy device was targeted, **except that an agency is authorized to purchase and deploy a conducted energy device that does not have the capability of making a digital video recording provided that such device may only be carried and used by an officer who is equipped with a body worn camera as defined in Attorney General Law Enforcement Directive No. 2015-1, and further provided that, notwithstanding any other provision of this supplemental policy, such device shall not be fired or discharged during an actual operation unless the officer has activated the body worn camera. Nothing herein shall be construed to preclude the officer from firing or discharging the device in the event that the officer's body worn camera malfunctions unforeseeably, or if the exigency of the situation made it unsafe or infeasible for the officer to activate the body worn camera before firing the device.**
3. The device must safeguard all such digital data and video recordings to ensure that they can be accessed or erased only by appropriate supervisory personnel in accordance with rules, regulations, standing operating procedures or orders promulgated pursuant to this supplemental policy.

The list of specifications and characteristics shall be submitted to the Attorney General for approval and dissemination. No law enforcement agency shall purchase, possess, deploy, fire, or discharge any conducted energy device pursuant to this supplemental policy unless the device satisfies the specifications and characteristics approved by the Attorney General. The private ownership or possession of a conducted energy device or any other form of stun gun is strictly prohibited and is subject to criminal prosecution.

3. DEVELOPMENT OF TRAINING PROGRAM TO EXPLAIN SUPPLEMENTAL POLICY REVISIONS

The Division of Criminal Justice within 120 days of the effective date of this Directive shall develop a supplemental training program to explain the provisions of this Directive and the revisions made to the Supplemental Policy on Conducted Energy Devices. This supplemental training program shall be made available to all officers who are authorized to carry and use a conducted energy device, and also shall be incorporated into the training course and qualification procedure established pursuant to Section VII of the Supplemental Policy on Conducted Energy Devices.

4. REVISED LIST OF APPROVED DEVICES

The New Jersey State Police, in consultation with the Division of Criminal Justice, within 120 days shall identify conducted energy device models that satisfy the requirements of the Supplemental Policy on Conducted Energy Devices as amended by this Directive, taking into account that an agency is authorized pursuant to this Directive to purchase and deploy a conducted energy device that does not have the capability of making a digital video recording provided that any such device is used and carried only by an officer equipped with a body worn camera as defined in Attorney General Law Enforcement Directive No. 2015-1.

5. EFFECTIVE DATE AND SUPPLEMENTAL TRAINING PREREQUISITE

The provisions of this Directive shall take effect immediately, provided, however, that an officer authorized to carry and use a conducted energy device is not authorized to fire or discharge the device pursuant to paragraphs (ii) or (iv) of Section 1(a) of the Supplemental Policy on Conducted Energy Devices, as amended herein (*i.e.*, the two new authorization provisions), until the officer has received the supplemental training developed by the Division of Criminal Justice pursuant to Section 3 of this Directive. Prior to receiving such supplemental training, an officer is authorized to fire or discharge a conducted energy device only pursuant paragraphs (i) or (iii) of Section 1(a) of the Supplemental Policy on Conducted Energy Devices, as amended herein (*i.e.*, the pre-existing authorization provisions on which the officers already will have been trained).

6. REVIEW OF REVISED CED POLICY

The Director of the Division of Criminal Justice, in consultation with the County Prosecutors, New Jersey State Police, and the New Jersey Chiefs of Police Association, shall within six months report to the Attorney General on the implementation and impact of this Directive. The report shall include an analysis of the impact of this Directive on the number of departments that deploy CEDs, the number of officers authorized to carry/use CEDs, and the number of use-of-force incidents where CEDs were fired/discharged. In addition, the Director shall solicit input on the implementation and effects of this Directive from the Advisory Group established pursuant to Section 13 of the Law Enforcement Directive Regarding Police Body-Worn Cameras (July 28, 2015) and Section 10 of the Supplemental Law Enforcement Directive Regarding Uniform Statewide Procedures and Best Practices for Conducting Police Use-of-Force Investigations (July 28, 2015).

7. QUESTIONS

All questions concerning the interpretation and implementation of this Directive shall be addressed to the Director of the Division of Criminal Justice or his designee.



John J. Hoffman
Acting Attorney General

ATTEST:



Elie Honig
Director, Division of Criminal Justice
Issued on: March 3, 2016