

**Ethics Review Board**

**City of New Orleans**

**February 26, 2018**

**2:00 p.m.**

**Norman Mayer Library | 3001 Gentilly Blvd. | New Orleans, Louisiana 70122**

**Minutes**

Present: Mr. Allen Miller, Chair; Mr. James Brown, Vice Chair; Dr. Joe Ricks; Dr. Michael Cowan; Rev. Brandon Boutin; Mr. Howard Rodgers; Ms. Elizabeth Livingston de Calderon

At 2:34 p.m., a quorum being present, the Chair called the meeting to order. Mr. Brown moved to approve the minutes of January 31, 2018, Mr. Rodgers seconded. The board voted on the minutes: 7 yays, 0 nays, the minutes were approved.

Independent Police Monitor's Report

The Independent Police Monitor (IPM), Susan Hutson, introduced Ms. Tonya McClary, the Office of the Independent Police Monitor's (OIPM) Chief Monitor. Ms. McClary started with the OIPM in May 2017.

The IPM reported the OIPM's year-to-date activities for 2018: monitored 1 case, reviewed 1 case, took 4 citizen complaints, liaised 1 criminal case, and participated in 9 disciplinary hearings.

The IPM told the Board that the OIPM has received approval from the City of New Orleans' Civil Service Commission to open an Attorney position. Additionally the OPIM's Auditor position is now re-opened.

The IPM advised the Board that the OIPM is looking to hire a part-time Community Relations Director.

In response to Mr. Miller, the IPM told the Board that she currently has 6 employees.

Chief McClary reported the OIPM observations on NOPD's "Use of Conducted Electrical Weapons" (aka Tasers) and provided a power point presentation containing 13 slides on the topic (see attached).

Chief McClary told the Board that while reviewing she has identified discrepancies where the NOPD's policies and Consent Decree are not in compliance.

Dr. Cowan advised the Board that the ERB Chairman Allen Miller, appointed Dr. Cowan, Mr. Rodgers and Rev. Boutin to the OIPM Working Group to put together a proposal for the ERB on oversight of the OIPM.

In response to Ms. Livingston de Calderon, Dr. Cowan told the Board that the OIPM Working Group discusses the procedures and steps that the ERB will take to oversee the OIPM.

Mr. Miller clarified to the Board by providing an example that the Quality Assurance Review Advisory Committee (QARAC) for the Office of Inspector General (OIG) performs an annual quality assurance review of the OIG.

In response to Ms. Livingston de Calderon and Mr. Brown, Dr. Cowan told the Board that internally the three members have referred to themselves as a “Working Group.”

Mr. Miller told the Board that Mr. Harper started on February 26, 2018.

Mr. Miller told the Board that the ERB should start the planning of a Strategic Planning Session so that the ERB ensures that the ERB, OIG and OIPM are maximizing what the citizens are expecting of them.

Mr. Miller and the members of the Board discussed the ERB Term End Dates.

At 3:33 p.m., Dr. Cowan moved that the meeting adjourn, Mr. Brown seconded. The Board voted that the meeting adjourn 7 yays, 0 nays, the meeting adjourned.

# Office of the Independent Police Monitor City of New Orleans



## OIPM Observations on NOPD's Use of Conducted Electrical Weapons (aka Tasers)

Susan Hutson  
Independent Police Monitor

### A NOTE FROM THE INDEPENDENT POLICE MONITOR

Pursuant to New Orleans City Code Section 2-1121 (16) (the Police Monitor's Ordinance), the OIPM publishes reports "detailing its monitoring and review activities," "problems it has identified," and recommendations made to the NOPD.

This report summarizes a part of the OIPM's review of major use of force investigations that were closed by the NOPD in 2016. The report also highlights a number of 2015, 2016, and 2017 incidents related to NOPD's use of Conducted Electrical Weapons ("CEWs"), colloquially called "Tasers."

## OIPM OBSERVATIONS ON NOPD'S USE OF CONDUCTED ELECTRICAL WEAPONS (AKA TASERS)

### INTRODUCTION

- ▶ In the 2012 Consent Decree, NOPD agreed to “develop and implement a Use of Force Review Board [UFRB] to review all serious uses of force and other Force Investigation Team (FIT) investigations.”<sup>1</sup> NOPD convened its first UFRB in 2014.<sup>2</sup> However, NOPD had to reform its UFRB policies/procedures to establish the current version of the UFRB at the end of 2015, and OIPM integrated itself into the UFRB process. Prior to each UFRB, OIPM personnel review the file of a use of force and meet or correspond with Public Integrity Bureau (PIB) FIT members to discuss identified areas of concern. OIPM personnel then frequently raise these concerns directly to NOPD leadership at the UFRB hearings.
  - ▶ OIPM’s review of UFRB investigations led it to question the outcome of some 2015, 2016, and 2017 cases related to NOPD officers’ use of Conducted Electrical Weapons (“CEWs”), colloquially called “Tasers”.
- ▶ *U.S. v. City of New Orleans*, E.D. La. 12-cv-1924, R. Doc. 2-1 at 32.
- ▶ See, OIPM Administrative Review Report of Wendell Allen Shooting Death, August 4, 2015.

## BACKGROUND ON CEW RESEARCH AND NATIONAL ISSUES

The CEW was introduced as a low-risk device that could be used as a substitute for lethal force and could save lives. While the Department of Justice has concluded that there is considerable evidence that deployment of CEWs is associated with reductions in officer and offender injuries, adverse effects related to the use of CEWs have also been documented, including injuries from the probes and injuries from falls.

Given the numerous injuries and deaths that have been caused by and/or linked to CEWs, Axon updated its training guidelines for CEW use to incorporate many new safety precautions.

The new training guidelines of January 1, 2016 specifically warn against using CEWs on people who are perceived to or actually suffer from a mental illness or on those who have elevated risks, such as pregnant women, persons of small stature or with lower body-mass index, the infirm, and the elderly. Because Axon has not tested CEWs on such vulnerable populations, the company cautions: “CEW use of [sic] these individuals could increase the risk of death or serious injury.”

Axon further cautions against directing CEWs at an individual’s “head, throat, breast, chest or area of the heart, genitals, or pre-existing known injury areas without legal justification.” In total, Axon’s 2016 training update included 20 pages of warnings about CEW use.

## OIPM'S CONCERNS REGARDING PATTERNS OF CEW USE

### A. NOPD's Use of CEWs Against Handcuffed Subjects

The Consent Decree requires that "CEWs shall not be used on handcuffed subjects, unless doing so is necessary to prevent them from causing serious physical injury to themselves or others, and if lesser attempts of control have been ineffective." Similarly, the NOPD Operations Manual states that force (including CEW use) is not authorized against a person in handcuffs "except to prevent imminent bodily harm to the officer, or another person, or to physically move the subject who has become passively resistant." Imminent means "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."

### A. NOPD's Use of CEWs Against Handcuffed Subjects (CONT'D)

**Table 1: The Standards for Use of CEW on a Handcuffed Person and the Standard for Deadly Force.**

<p><b>Standard for CEW Use Against Subject in Handcuffs (Unless Passively Resistant)</b> Ops Manual Ch. 1.3 § 30, 1.71 § 49(f); Consent Decree § 62.</p>	<p>Only authorized if:</p> <ul style="list-style-type: none"> <li>• <b>Necessary to prevent serious physical injury.</b></li> </ul>
<p><b>Standard for Deadly Force</b> Ops Manual Ch. 1.3 §§ 13, 21.</p>	<p>Only authorized if:</p> <ul style="list-style-type: none"> <li>• There is an <b>imminent danger of death or serious physical injury to the officer or another person</b>; or</li> <li>• To prevent the escape of a fleeing subject if there is probable cause to believe:             <ul style="list-style-type: none"> <li>○ The subject has committed a felony involving the infliction or threatened infliction of serious bodily injury or death; and</li> <li>○ The escape of the subject would pose an <b>imminent danger of death or serious bodily injury to the officer or to another person.</b></li> </ul> </li> </ul>

## A. NOPD's Use of CEWs Against Handcuffed Subjects (CONT'D)

- ▶ It is unclear in each incident of CEW use on a handcuffed subject as to whether the officer clearly stated a case for preventing serious injuries. Such incidents include the following:
  - ▶ In an incident on February 19, 2015, Officer Latoya Hamilton used a CEW in drive stun mode (which is separately banned by the Consent Decree) against a handcuffed suspected person. The suspected person attempted to leave custody and was being handled by five NOPD officers. Officer Hamilton reported that she was kicked in the knee and stomach. Officer Hamilton removed the cartridge from her CEW and used it in drive stun mode on the suspected person. She reported using her CEW on him three times. Despite the Consent Decree and Ops Manual's restrictions, PIB did not provide any analysis in its written report regarding the use of a CEW against a handcuffed subject. PIB and the UFRB subsequently found that Officer Hamilton did not violate the rule on "Unauthorized Force."

## B. CEW Use Against Fleeing Suspected Persons

CEWs may be used "in situations in which a subject exhibits aggressive resistance and in situations in which the subject presents an imminent threat" but "fleeing should not be the sole justification" for CEW use. Fleeing does not constitute active resistance, and it is worth noting that even foot pursuit by an officer is only authorized in "rare" circumstances. Nevertheless, OIPM has observed several incidents where NOPD officers appeared to use CEWs for little reason other than to prevent a suspected person from fleeing.

## B. CEW Use Against Fleeing Suspected Persons (CONT'D)

- ▶ One incident in particular bears close examination. On January 27, 2016, Officers Troy Williams and Ladarius Johnson responded to a report of two black men selling narcotics on a certain street block. They immediately targeted two black men they saw there. Officer Johnson detained and searched one man; Officer Williams approached the other and yelled, "I'm gonna tase you brah, I'm gonna tase you. Come over here." The suspected person responded, "For what?" Officer Williams then grabbed the suspected person's arm but the suspected person broke free and started to run away. Officer Williams immediately discharged his CEW, striking the suspected person at close range in the face. One prong of the CEW penetrated the suspected person's skull and lodged a centimeter into the suspected person's brain. The CEW delivered volts of electricity, and the suspected person began to have seizures. Officer Williams later stated that he felt that the suspected person may have been armed, as Officer Williams could not see one of the suspected person's hands. PIB concluded that Officer Williams's CEW deployment did not violate any laws or NOPD policies.
- ▶ At the Use of Force Review Board hearing, PIB stated that there was **"no" reason to believe the CEW prong in the brain caused the suspect's seizures.** PIB's investigator said that this was based on their review of medical information. OIPM asked to be provided with this medical information; PIB provided only a single email from Dr. Ho of Axon. Dr. Ho confirmed that the CEW "could have been a cause of inducing a seizure," but that it was "very difficult to say with any conclusive certainty" which of several factors caused the seizure. The UFRB ultimately ruled the use of force to be unjustified on a 2 to 1 vote, although one of the votes for "unjustified" thought it was a "close call." Most of the non-voting NOPD officers who spoke at the UFRB meeting argued that it was justified.

## C. CEW Use Against Suspected Persons After They Say They Have Medical Problems

The Consent Decree requires that "CEWs shall not be used against visibly pregnant women, elderly persons, young children, or visibly frail persons, except where lethal force would be permitted, or where the officer has reasonable cause to believe there is an imminent risk of serious physical injury. Officers shall determine the reasonableness of CEW use based upon all circumstances, including the subject's age, size, physical condition, and the feasibility of lesser force options. Officers shall be trained in the increased risks that CEWs may present to the above-listed vulnerable populations. "The Ops Manual contains similar language.

- In another case, NOPD officers used CEWs on a suspected person for more than 20 seconds, with more than one CEW simultaneously. Afterwards, as the suspected person in handcuffs laid on the street, he said, "Dude, I can't breathe." An officer responded, "I don't care, stay down." Later, the suspected person said again, "I can't breathe," and an officer instructed the suspected person to "quit talking."<sup>38</sup> This is very troubling. After the July 17, 2014 death of Eric Garner in New York, it is a basic expectation that police take claims of possible asphyxia seriously. In fact, such seriousness is required by the Consent Decree, which requires officer training on their responsibilities following CEW use, including "the risk of positional asphyxia, and training officers to use a restraint technique that does not impair the subject's respiration following an CEW application.

## D. Failure to Provide Warning and Time to Comply Before CEW Use

The NOPD Operations Manual Ch. 1.7.1 § 29 provides that, "Unless prohibited by circumstances or officer safety concerns, a VERBAL WARNING of the intended use of a CEW should precede each CEW application." Additionally, it states that, "Where feasible the officer will defer CEW application for a reasonable time to allow the subject to comply with the warning." (*Id.* at § 30; see also Consent Decree at § 55.) In OIPM's review, however, officers have been less than consistent with providing warnings and time to comply. At times, officers report having given a warning, while further review of body-worn video or other footage does not substantiate such a claim.

In addition, even when the officers do provide warnings, sometimes the warnings themselves are problematic. In FTN 2015-083, the PIB report states that "Officer Hamilton warned [the suspected person] to stop or he could be exposed to a CEW." Officer Hamilton's actual words were less clear. On video, Officer Hamilton is recorded saying, "I'm telling you, you about to get it. You about to eat this. You about to eat this."<sup>41</sup> She then used her CEW on the subject even after he indicated he would comply.

## RECOMMENDATIONS & OUTCOMES OF RECOMEMNDATIONS

The issues and patterns identified directly impact people who have been subject to CEW use, affect the New Orleans community's relationship with NOPD, and expose the City of New Orleans to potential financial liability. The OIPM recommended that NOPD take the following steps to address the issues regarding CEW use:

- ▶ NOPD PIB and OIPM meet by March 30, 2018 to discuss a more robust review process for CEW deployment and use. Following that meeting, NOPD and OIPM will work together to develop the review protocol. The development of the review protocol will include a date for completion of the process and a date for implementation.
  - ▶ There have been a few discussions between OIPM and NOPD regarding the findings of this report. OIPM is working with PIB to arrange a date for the meeting requested above that will focus on a more robust review process for CEW use.
- ▶ In addition to the first recommendation, OIPM would like to be invited to engage in a discussion at a UFRB hearing regarding the standards for CEW use and case review with the broader leadership of NOPD. We request this discussion on or before the March 2018 UFRB hearing. A discussion regarding the legal and policy standards for CEW use would benefit both the OIPM and NOPD.
  - ▶ PIB and Compliance Bureau are working on revisions to the CEW policy, given OIPM's concerns and discussions at UFRB hearings.

## RECOMMENDATIONS & OUTCOMES OF RECOMEMNDATIONS (CONT'D)

Assess and document findings regarding whether NOPD officers are receiving sufficient training and guidance concerning the legal and policy constraints on the use of CEWs and the risks associated with CEW use. Share the assessment methodology and findings with OIPM.

Have the NOPD Operations Team assess and document their findings whether the CEW tactics that officers are instructed in are appropriate given the pattern of issues identified above. Share the assessment methodology and findings with OIPM.

OIPM plans to meet with the NOPD Operations Team and the head of the NOPD Training Academy to work out a system in which they provide this information to OIPM.

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