

**POLICE DEPARTMENT
MEMORANDUM**



Date: 04/12/2018

To: File

From: Sgt. James Nordenger

A handwritten signature in blue ink, appearing to be "J. Nordenger".

Reference: 18-INT-01 Counseling

At the request of Commander O'Neil I sat down with Officer K. Lyman to debrief and discuss several use of force incidents he had been involved with. The intent of this counseling session was to discuss the force used in relation to our policy, the elements of Graham V. Connor, Crisis Intervention and De-escalation, and Felony Stops. The materials used were prior force reports authored by Officer Lyman, the 18-INT-01 Findings Memo, current case law documents, The Auburn Police Department's Use of Force Policy, Report #18-01927, the interview conducted under the previously mentioned Internal Investigation with Commander Caillier, and a Halogen entry dated 02/26/2018 reference Officer Lyman using a VNR.

I first had Officer Lyman tell me, in detail, the events that occurred in 18-Force-039, which initiated 18-INT-01. We also watched the COBAN video of the incident, which is also found under the Internal Investigation folder. This incident was of a subject thought to be DUI, but more likely than not, going through a psychotic episode, and the force used by Lyman was outside of training. Lyman told me about the incident, which followed closely with his written force report. While discussing the events he did tell me that the punch he initially threw should not have been done, and that looking back on the incident he and his "crew" could have done things much different.

At the end we discussed boxing in the car and starting off with a Felony Stop type contact. Lyman stated that since the suspect didn't pull over immediately, they (his crew) decided to give the driver verbal commands from behind their vehicles. Lyman stated that the suspect kept reaching around the vehicle and he feared the suspect could produce a weapon. Lyman explained that it took the suspect quit sometime to comply with the officers and they (the crew) ordered him out of the vehicle. Lyman states that when the suspect exited the vehicle he failed to comply with instructions immediately. Lyman stated the suspect exhibited behavior that he'd never seen before, but he believed the suspect was looking around the area as if he wanted to escape. Lyman could not offer any other explanation as to the suspects actions, only that they were odd, and that he'd never seen it before.

I asked him why he and the other officers went "hands on" so quickly. Lyman stated that due to the suspect looking around as if to find an escape route, he feared the suspect was going to run, and that he (Lyman) was "done talking" at that point. Lyman believed they had talked enough with the suspect but he was failing to cooperate with them. I asked whose decision it

was to contact the suspect. He stated that no one really said anything, that he and his crew were on the "same page". I then had Lyman discuss why, when he went hands on, he immediately took the suspect to the ground. Lyman explained that the suspect put his hands "towards his waist" and he feared he may have had a weapon. I asked Lyman if he had any other indication that the suspect was armed? Lyman stated he did not. I then had Lyman explain why he threw the punch at the suspect as he was falling to the ground. Lyman explained that he wanted to "end it as quickly as possible". Lyman did state that looking at the incident that he probably should not have thrown the punch.

I then asked Lyman about the knee strikes to the suspect's face while he laid on the ground. Again, Lyman stated he feared the suspect may have been armed due to his hands being underneath him, and wanted to end the confrontation quickly. I then read from his report that he wanted to "get his attention" when he administered the knee strikes, and he agreed the report was poorly written.

Once we discussed the incident itself I went into detail about my observations, and what is being taught in our department. I first discussed the Felony Stop the officers first initiated. I asked Lyman if he had ever been taught to approach the suspect vehicle in a felony stop and/or approach the driver of the vehicle at the driver's door. He stated no, and stated that they should have called him back to them, as they remained behind cover.

I then asked why he didn't talk with him more, and use his CIT training that he had been taught. Lyman stated that he didn't think talking was doing any good, and he believed the suspect was going to flee. I discussed looking at the bigger picture and that there was no immediate reason to go hands on with the suspect. I pointed out that his report did not give any reasonable and articulable facts to believe he was being resistive. I then discussed that he gave the driver a total of 23 seconds to comply, and that he exhibited "behavior I'd never seen before". We then discussed talking with the suspect from behind cover. I stated he should have used his CIT training and asked open ended questions, speak in short sentences, use empathy as it appeared the suspect was confused, and used calming voices instead of yelling at him. We discussed that 23 seconds was too quick to approach the suspect, and since the suspect was acting "odd", he should have slowed the situation down and tried to talk with the suspect. Lyman did agree that they (he and the other officers) were quick to go hands on.

I then discussed the specific force used, the punch to the face and the knee strikes to the face. I had him think about past training, when a suspect is on the ground, what techniques could he have used to get the suspect's hands behind his back as he laid on the ground. Lyman stated that he could have used face cranks, pressure points and pain compliance techniques that are used during DT training, and what was recently taught in DT training. I then discussed that knee strikes to the face are taught, but in looking at the totality of the circumstances in this case, they were not warranted. I then asked Lyman to briefly describe a time when knee strikes to the face would be acceptable. Lyman stated that if he was being assaulted, or was being physically attacked. I explained that each circumstance was different, but he needed to look at the totality of the circumstances at the time of the incident.

This lead us into Graham V. Connor and the three main elements that courts look at when determining whether the force was appropriate. We discussed that force situations are ever changing, rapidly evolving and very dynamic. We discussed the "Graham" factors of 1) The severity of the crime, 2) The suspect actively resisting and the threat to officers or others at that time, and 3) whether the suspect is attempting to evade arrest. We also discussed several

other factors listed out in Lexipol policy 300.3.1. We discussed that several factors need to be taken into consideration when determining force, but in this instance, you had a suspect of a misdemeanor crime, who was only being passive, and was not attempting to evade arrest. You agreed that based upon the totality of the circumstances, the attempted punch and knee strikes to the suspect's face were not warranted and outside of his training.

Lyman and I then discussed the force used under 18-Force-022, an incident at the Muckleshoot casino. Here an unruly, intoxicated patron refused commands from officers and attempted to re-enter the Casino. Officer Lyman writes in his report, "I believed it was imperative to stop Rudy before he entered the Casino....." Further Lyman writes Rudy had already shown a willingness to flee and possibly fight, so Lyman comes up to Rudy (the suspect) from behind, and puts him in a VNR restraint to where it rendered Rudy unconscious. In this report we discussed Lyman not telling the suspect he was under arrest, nor giving any type of warning to the suspect prior to using force. Lyman explained that since the suspect was not listening to him, and that he had already "struggled" with security, he believed he immediately had to stop the suspect. Lyman offered no other exigent circumstances.

I then showed Lyman RCW 10.31.050 **Officers may use force**. This RCW states, "If after notice of intention to arrest the defendant, he or she either flee or forcibly resist, the officer may use all necessary means to effect the arrest." I discussed the fact that he and another officer (Officer Fry) had spoken to the suspect for quite some time, and that they had already developed PC to arrest him. Since there was no reasonable exigent circumstance at that time, he needed to tell the suspect he was under arrest. Officer Lyman agreed that he had time to do so. It should be noted that Commander O'Neil provided a Coaching Tip in Lyman's Halogen file about the need to tell suspect(s) they are under arrest prior to using force. I also provided Lyman a partial face sheet of the court ruling from *DEORLE V. RUTHERFORD*, a Ninth Circuit case from 2001. In that case the court gives several examples of recent court cases dealing with suspects being warned prior to force being used. They were:

Garner, 471 U.S:

Quintanilla V City of Downey: Police gave warning before setting dog on suspect

Mendoza, 27 F. 3d: Determine whether officer had given warning before K9 application

Forrester V City of Sand Diego: Protesters warned they would be subject to pain compliance

Headwaters Forest, 211 F.3d: Police warned protesters before pepper spray

Katz, 194 F.3d: Grabbing protester, without warning and throwing them was a violation

I then discussed with Lyman case #18-01927, an arrest at the library of a subject with a felony warrant. Here, Lyman contacts a known subject with a warrant who he describes as usually being uncooperative and defiant towards law enforcement. Lyman contacts the suspect by himself and suspect becomes static resistive. Lyman puts the suspect in an LVNR, and puts the suspects onto the ground and renders him unconscious. The warrant was a DOC warrant for escape community custody, for Burglary 2nd.

I asked why he didn't ask for another officer to assist him if he knew the suspect was going to be uncooperative. He stated that dayshift was very busy, and that he can handle things himself. I advised him that he needed to look at the big picture. This suspect was not evading him, rather he was acting as if he was asleep, thus he had plenty of time to ask for a second officer. Further, I advised him that officer routinely ask for a backup when dealing with felony warrant suspects, and that based upon his inability to wait, he put himself into a position of needing to use significant force.

I then asked him about the VNR application. Lyman stated that he was by himself, and that the suspect just wasn't going with the program. I asked Lyman when he could use VNR? Lyman stated he, at the time of the call, he was under the understanding that he could use a Vascular Neck Restraint if a suspect was passive aggressive. I explained that any Vascular Neck Restraint is a significant use of force by policy, and that he needed reasonable and articulable facts that the suspect was going to be assaultive. I also explained that not all situations are the same, and that some factors make it to where we can use more force. But, based upon the facts that he had written, he should have tried a lower level of force first, or even better, waited for another officer to arrive to assist him.

At the end of the counseling session I asked Lyman to tell me what Necessary means, and what Objectively Reasonable means, as it pertains to the use of force. Lyman was hesitant to give me the definitions of each. We then discussed Necessary, the amount of force needed to overcome the actual resistance and to effect it's lawful intended purpose. I also discussed that Objectively Reasonable means that an officer in the same situation, with the same training and experience, would act in the same or similar fashion. Lyman stated he understood the definitions and the importance of knowing them when using force.

I provided Lyman with the Use of Force Policy #300 and we discussed it. I also later provided him a copy of policy 303, Control Devices and Techniques.

At the end, I reiterated the need of using not only the necessary amount of force, but using force as its taught in training. We discussed warning suspects prior to using force and going hands on with them, and telling suspects that they were under arrest prior to using force.

Lyman was generally receptive to the conversation.