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7/2/2021 11:40 AM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: 14 Other Civil

Minnesota Chiefs of Police Association, Minnesota Sheriffs' Association, Minnesota Police and Peace Officers Association, and Law Enforcement Labor Services, Inc.,

Plaintiffs,

vs.

Governor Timothy Walz and State of Minnesota,

Defendants.

Case No. _____

DECLARATORY JUDGMENT COMPLAINT

COMES NOW Plaintiffs, Minnesota Chiefs of Police Association ("Chiefs"), Minnesota Sheriffs' Association ("Sheriffs"), Minnesota Police and Peace Officers Association ("MPPOA"), and Law Enforcement Labor Services, Inc. ("LELS"), for their Complaint against Defendants Governor Timothy Walz and State of Minnesota, state and allege as follows:

INTRODUCTION

1. This case seeks a declaration that the newly enacted Minn. Stat. § 609.066 is facially unconstitutional as it places a requirement on police officers to forfeit their right to refuse to testify under the Fifth Amendment to the United States Constitution or

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

Art. 1, § 7 of the Minnesota Constitution. Plaintiffs also seek an injunction delaying implementation of certain requirements of this statute that were intended to require training and for which there has been insufficient time and opportunity to engage in the requisite training.

JURISDICTION AND VENUE

2. Pursuant to Minn. Stat. § 555.01, the Uniform Declaratory Judgments Act, which grants the Court the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed," this Court has jurisdiction over this action.

3. The Court has personal jurisdiction over the parties.

4. Venue is proper under Minn. Stat. § 542.18 in that the State of Minnesota and an officer thereof is a party.

THE PARTIES

5. Plaintiff Law Enforcement Labor Services, Inc. (LELS) is an employee organization as defined by the Public Employment Labor Relations Act, (PELRA) Minn. Stat. § 179A.03, subd. 6.

6. LELS was founded in 1977 as a 501(c)(5) labor organization and has a principal place of business located at 2700 Freeway Boulevard, Suite 700, Brooklyn Center, Minnesota.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

7. LELS provides legal representation, contract negotiation, discipline, mediation representation and grievance representation, arbitration, and labor advocacy for its 410 locals throughout the State of Minnesota. LELS locals are comprised of public sector essential employees.

8. LELS is the largest public safety labor union in the State of Minnesota, representing nearly 6,400 licensed peace officers, firefighters, corrections officers, emergency dispatchers and public safety support staff.

9. The Minnesota Sheriffs' Association is over 125 years old and consists of the 87 Minnesota Sheriffs and their staffs. The Association represents the elected Sheriffs at the Legislature and provides training and support for chief county law enforcement officers. Sheriffs are responsible for the training, supervision and discipline of the law enforcement officers under their care.

10. The Minnesota Chiefs of Police Association represents hundreds of law enforcement and public safety leaders. The Association represents its members on legislative, regulatory and community issues related to crime, public safety and law enforcement.

11. Plaintiff Minnesota Police and Peace Officers Association (MPPOA) is a statewide professional association that has represented over 8,500 police officers, who are public employees, from the state, local and federal levels in Minnesota since 1922. It

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

has a principal place of business located at 525 Park Street, Suite 250, Saint Paul, Minnesota.

12. MPPOA is the largest association representing police officers in Minnesota, with approximately 10,500 members. It organizes and coordinates the activities of all police officers in Minnesota; promotes efficiency in police work; maintains the highest standards of ethics, integrity, honor, and courtesy; and encourages and supports the effective, practical and thorough training of police officers. MPPOA provides its membership with numerous services, including legislative advocacy and legal advocacy through its Legal Defense Fund.

13. Plaintiffs have standing to seek this Court's declaratory authority under Minn. Stat. § 555.01 *et seq.* because the decision of the Court "will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 422 U.S. 490, 515 (1975); *see also State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 498 (Minn. 1996) ("our approach is consistent with federal cases which relax requirements for associational standing where the relief sought is equitable only.").

14. Plaintiffs, which are associations, have standing because the statute at issue poses an impediment to their activities and mission. *See Rukavina v. Pawlenty*, 684 N.W.2d 525, 533 (Minn. Ct. App. 2004). Plaintiffs and their constituents have a direct interest in the validity of the use of force statute that is different in character from the interest of the citizenry in general.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

15. Defendant Governor Timothy Walz was elected as the 41st Governor of the State of Minnesota in 2018 and at all times relevant to this matter has been the Governor of the State of Minnesota, responsible for the execution of the laws of the State and the administration of the Executive Branch of government for the State of Minnesota. Governor Walz principally resides in the County of Ramsey, State of Minnesota.

AMENDED MINNESOTA STATUTES § 609.066 IMPOSES A REQUIREMENT ON POLICE OFFICERS THAT VIOLATES THE U.S. CONSTITUTION.

16. In America, it is said no one is above the law, or below the law either. This is true in the State of Minnesota too.

17. In the summer of 2020, the Minnesota Legislature amended the statutes that describe the acceptable uses of force for police officers, including Minn. Stat. §§ 609.06 and 609.066.

18. Minnesota Statutes § 609.066 establishes an affirmative defense for a criminal charge related to the use of force by a police officer, establishing the parameters for the right to use deadly force in protection of the officer or others.

19. Prior to the most recent amendment, which became effective March 1, 2021, Minn. Stat. § 609.066, subd. 2 stated:

> Notwithstanding the provisions of section 609.06 or 609.065, the use of deadly force by a peace officer in the line of duty is justified only when necessary:
>
> > (1) to protect the peace officer or another from **apparent** death or great bodily harm;

> (2) to effect the arrest or capture, or prevent the escape, of a person whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force; or
>
> (3) to effect the arrest or capture, or prevent the escape, of a person whom the officer knows or has reasonable grounds to believe has committed or attempted to commit a felony if the officer reasonably believes that the person will cause death or great bodily harm if the person's apprehension is delayed.

(emphasis added to show difference from current statute).

20. On July 23, 2020, Governor Walz signed into law Second Special Session H.F. 1, with relevant sections to become effective March 1, 2021, which among other enactments changed the first condition in subdivision 2 to eliminate the word "apparent," so that it now reads "to protect the peace officer or another from death or great bodily harm," Three additional sub-conditions were also added.

21. The new version requires that a threat of death or great bodily harm:

> (i) can be articulated with specificity by the law enforcement officer;
>
> (ii) is reasonably likely to occur absent action by the law enforcement officer; and
>
> (iii) must be addressed through the use of deadly force without unreasonable delay;

Minn. Stat. § 609.066, subd. 2(a)(1)(i)-(iii).

22. The first of these sub-conditions places an obligation on the officer to articulate with specificity his or her perception of the threat—for this to be articulated "by the law enforcement officer"—in order to put forward the affirmative defense that

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

is either congruent with, or at least overlapping with, the traditional doctrine of self-defense.

23. It is a fundamental right that a person cannot be compelled to testify against themselves in a criminal proceeding. *See* U.S. Const. amend. V; Minn. Const. Art. 1 § 7 ("No person shall… be compelled in any criminal case to be a witness against himself.").)

24. Under longstanding jurisprudence, a person invoking an affirmative defense in a criminal context is not required to testify, or to personally articulate the defense. *See State v. Johnson*, 719 N.W.2d 619, 630 (Minn. 2006) ("We do not adopt the restrictive view that a defendant must testify and provide direct evidence of his or her state of mind in order to be entitled to an instruction on self-defense. We believe that a self-defense instruction may be warranted when the evidence on self-defense is entirely circumstantial.").

25. Because the amendment to Minn. Stat. § 609.066 requires a person charged with a criminal offense to specifically articulate a defense, and for that articulation to be "by the law enforcement officer," the Minnesota Legislature has enacted a statute that requires a police officer to forfeit her or his constitutional right not to testify at a trial.

26. Moreover, the right to self-defense is embodied in centuries of Anglo-American law and non-police officers presenting an affirmative defense of self-defense to a charge of the unauthorized use of deadly force maintain their constitutional rights

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

not to testify. Therefore, a police officer faced with the same circumstances as a non-police officer is afforded fewer rights than a similarly situated civilian.

27. Minnesota law affords a person the justification for taking a life "when necessary in resisting or preventing an offense which the actor reasonably believes exposes the actor or another to great bodily harm or death, or preventing the commission of a felony in the actor's place of abode." Minn. Stat. § 609.065.

28. Minnesota Statutes Sec. 609.065, which applies to all persons in the State of Minnesota, does not require the actor to specifically articulate the reasons and permits the assertion of the affirmative defense without implicating the person's constitutional rights under the Fifth Amendment to the U. S. Constitution or Art. 1, § 7 of the Minnesota Constitution.

29. As such, the newly enacted Minn. Stat. § 609.066, subd. 2 puts Minnesota police officers with fewer rights than ordinary citizens, and it requires an unconstitutional forfeiture of basic liberties.

PLAINTIFFS HAVE NOT HAD AN OPPORTUNITY TO TRAIN ON THE NEW REQUIREMENTS OF THE LAW AND GUIDANCE WAS NOT PROVIDED UNTIL LESS THAN TWO WEEKS BEFORE IMPLEMENTATION WAS TO OCCUR.

30. While the Minnesota Legislature passed amendments to the statutes regulating the use of force in 2020, law enforcement officers, and chief law enforcement officers such as Police Chiefs and Sheriffs, have been awaiting guidance and instruction from the State, specifically the Department of Public Safety ("DPS").

31. The effective date of the changes to the use of force statutes was March 1, 2021; however DPS only provided instruction on the implementation of these changes on February 18, 2021, and did not provide law enforcement officers, agencies and chief law enforcement officers sufficient time, or in fact any time, to establish and conduct training on these new principles.

32. According to the Commissioner of DPS, the circumstances that authorize the use of deadly force have been "substantially rewritten." *See* Ex. 1, Memo to Minnesota Law Enforcement from Commissioner John M. Harrington (Implementation of New Statutes Pertaining to the Authorized Use of Force and Deadly Force by Peace Officers), dated Feb. 18, 2021 ("Harrington Memo").

33. Commissioner Harrington succinctly describes some of the key elements of this rewriting, explaining that the legislation "added a third-party standard, and the law now authorizes deadly force only when an *objectively reasonable peace officer* would believe that the circumstances pose a threat of death or great bodily harm. In addition, the Legislature has added three 'threat criteria' for evaluating both the sufficiency of the threat and the need to respond with deadly force." (Ex. 1 at 4 (emphasis in the original).) The new legislation also outlawed certain restraints, such as choke holds, unless deadly force is authorized. *See* Minn. Stat. § 609.06.

34. Added to Minn. Stat. § 609.066 is a statement of the legislative intent of the statute, which the Office of the Attorney General of Minnesota has stated should be

regarded as part of the "objectively reasonable officer" standard. (*Id.* at 2 ("The Minnesota Attorney General's Office (AGO) has expressed the opinion that law enforcement should regard these statements as part of the objectively reasonable peace officer standard.").)

35. This statement includes four principles:

> (1) that the authority to use deadly force, conferred on peace officers by this section, is a critical responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law;
>
> (2) as set forth below, it is the intent of the legislature that peace officers use deadly force only when necessary in defense of human life or to prevent great bodily harm. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case;
>
> (3) that the decision by a peace officer to use deadly force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using deadly force; and
>
> (4) that peace officers should exercise special care when interacting with individuals with known physical, mental health, developmental, or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands from peace officers.

Minn. Stat. § 609.066, subd. 1a.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

36. A major element of these new principles is that "peace officers use deadly force only when necessary in defense of human life or to prevent great bodily harm," which represents a change from the prior law that permitted use of deadly force "only when necessary" to arrest, capture or prevent the escape of someone "whom the peace officer knows or has reasonable grounds to believe has committed or attempted to commit a felony involving the use or threatened use of deadly force." Minn. Stat. § 609.066 (2018).

37. The complexity of the new statutory scheme, and need for officer training, cannot be doubted. According to the Attorney General's Office review of Minn. Stat. § 609.066, subd. 2, "the authority to use deadly force is not determined by whether a peace officer is being objectively reasonable in some general sense, but rather, whether the peace officer reasonably concludes that the *statutory criteria* for using deadly force, listed in subdivision 2, are present." (Harrington Memo at 4 (emphasis in the original).)

38. As the Attorney General and Commissioner note, an officer must not rely on a general sense of what is reasonable, but she or he must learn this 229-word statement of principles in order to follow the statutory guidance. *Id.* ("The incorporation of this standard into Minnesota law should encourage peace officers to pay even closer attention during training, and to reflect on their experiences in the field. Peace officers are obligated to evaluate the level of threat faced in any encounter through the lens of training and experience. Peace officers should avoid utilizing rules

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

of thumb and must evaluate their use of force on the totality of the circumstances from the perspective of a reasonable peace officer.")

39. In addition to the four principles used to define an "objectively reasonable officer," Minn. Stat. § 609.066 also now includes what the Commissioner and the Attorney General's Office has referred to as "the three threat criteria."

40. Under these criteria, "before a threat of death or great bodily harm will justify the use of deadly force, it must be one that, according to the statute: (1) Can be articulated with specificity by the peace officer; and (2) Is reasonably likely to occur, absent action by the peace officer; and (3) Must be countered through the use of deadly force without unreasonable delay."[1] (Harrington Memo at 5-6.)

41. Commissioner Harrington, in his Memo, alerted law enforcement to the fact that this is a major change and that "understanding the implications of this change is of critical importance." However, he gave them 10 days to do so, including to establish and implement training around this change. This was and is not possible.

42. The Harrington Memo did not sugarcoat the complexity of the new standard. In describing what constitutes an articulable threat, the Commissioner states:

> The prior version of the statute allowed peace officers to respond to an "apparent" threat of death or great bodily harm. In common usage, "apparent" may mean either an obvious threat, or one that appears to the perceiver as actual. In simpler terms, the previous standard accepted the idea that a threat did not have to be real, merely the appearance of reality. Under the new language, the threat must be one that a reasonable peace

[1] As discussed above, the first criterion is unconstitutional.

> officer can articulate with specificity. Courts often use the plain meaning of a word to define terminology. In this case, to be specific means free from ambiguity. Finally, something is ambiguous if it can be interpreted in more than one way.
>
> Interpreting the statute in this manner creates a zone of considerable uncertainty. For example, if a suspect suddenly turns on a peace officer with an object in their hands that could be a gun or could be a cellphone, does this qualify as a threat that can be articulated with specificity? As the law now stands, that is an issue that the courts will need to resolve. Subdivision 1a of the section 609.066 provides that the evaluation of peace officer decisions to use deadly force "shall account for occasions when peace officers may be forced to make quick judgments. . . ." Even objectively reasonable peace officers can arrive at mistaken conclusions. Yet this uncertainty, combined with the sanctity of life principle, should encourage peace officers to avoid rushing into ambiguous situations where "one wrong move" by the suspect could prompt the peace officer to take an irreversible action—unless there are sound reasons for doing so.]

(*Id.* at 6.)

43. Among responsibilities of Chiefs of Police and Sheriffs is that they must see that the officers under their command are properly trained, the training meets the demands of the community and the training correctly inculcates officers with a sort of "muscle memory" for doing the correct thing. This involves both classroom curricula and situational training.

44. To develop the best training curriculum, Plaintiffs need to engage supervisors, use of force instructors, and command personnel, as well as obtaining feedback from community associations and political agencies in order to ensure that the training and its goals meets the needs of their communities and the provisions of the statute.

45. The time frame for development of such curricula is measured in months, rather than the days allotted Plaintiffs, with a likely timeframe of at least six months to overhaul the current training curricula.

46. Implementing training is also not an instantaneous matter. Officer training in general has been hampered by the COVID-19 pandemic, as certain training modules that require larger groups of officers would have been unsafe under the circumstances. Even so, an agency such as in the City of Bloomington, which has approximately 125 peace officers, would require rotation of officers to maintain an active on-duty force during training. Officers would either be required to train on off-duty days or be pulled from their regular duties to train, necessitating additional overtime to cover the training time.

47. Included in the strategies for achieving optimal training is the development of scenario-based tools for hands-on training. Police agencies frequently engage third party specialists, industry experts, to assist with this training, or the development of the scenarios, based on their experience in developing police training programs, but these industry experts have yet to develop curricula or comprehensive programming for the provisions of the new use of force statute.

48. The changes to the use of force statute are nuanced, raising the need for more extensive and properly focused training in order to develop the necessary reactive capacity to meet the dynamic situations police officers confront in the community.

Inadequate training leads to confusion, uncertainty, indecision, and ultimately can result in physical harm to the police and/or the public. The variety of situations that require training, including for instance a wide gamut of possibilities from a threat or violence to a canine officer, which was developed under the previous version of the statute, or how to interpret the statute for a sniper, who is relying on third party reports of situations on the ground, or the more common situation with an armed felon fleeing a police encounter into a populated setting. Hesitant, untrained and uncertain responses will likely lead to bad outcomes for both the officer and the public they serve.

49. The prior use of force training principles have been in place for decades, developed as they were around the United States Supreme Court cases of *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). In order to respond quickly, efficiently and effectively, police officers are conditioned to "let the training take over." Without the ability to train to allow that to happen, police officers will revert to their prior training, undermining the purpose of the statutory changes and setting Minnesota's police officers up to fail. The consequences of the bad outcomes that can result from insufficient training include, for officers, effects such as: personal liability, potential job loss, licensure issues, anxiety, reduced job satisfaction, depression, traumatic stress or death. Communities can see their police force lose experienced officers to the anxiety and stress of uncertain requirements and trained experience that is now not attuned to these new requirements.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

50. Border jurisdictions in Minnesota, such as in the Fargo/Moorhead area, are known to receive assistance from agencies outside Minnesota. On information and belief, Governor Walz received notice in the form of a letter from the City of West Fargo on or about April 30, 2021, stating it and other North Dakota jurisdictions would be discontinuing mutual aid and cross-border law enforcement resource sharing with Minnesota communities.

51. The City expressed concerns in line with the constitutional issues brought forth in this Complaint.

> The recently revised and implemented Minnesota Statute Section 609.066 (2020) governing Use of Force exposes law enforcement officers to criminal prosecution (prison) and presumes guilt of an officer using deadly force unless the officer provides, and the court accepts, a statement covering a three-part test documenting the necessity of deadly force. The three-part test is subject to interpretation and does not appear to reflect basic due process protections included in the Fifth and Sixth Amendments to the U. S. Constitution, including compelling the government to produce witnesses and evidence to prove the alleged crime and not compelling a defendant (here a police officer) to be a witness against themselves. Prior to this change, Minnesota's statute on use of force was very similar to North Dakota's, following federal case law Graham vs. Connor.

52. Also included in the concerns expressed by the City of West Fargo were issues of training.

> The West Fargo Police Department has reviewed options thoroughly. It is not feasible to require our officers to discern between two state standards on use of force in often times rapidly evolving situations where most times officers divert back to how they are trained. We see strong potential for our officers being seriously harmed by the confusion caused by the differences in MN/ND laws. We will not subject our officers to this risk.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

53. Uncertainty regarding dangerous situations enhances the danger to Minnesota's peace officers and the public. Minnesota's law enforcement officers require training and development of a curriculum to put the new standards into practice. Minnesota's Chiefs of Police and Sheriffs bear a responsibility not only to these officers, but to the public to see that this training is developed and then accomplished. Untrained and uncertain officers are a danger to themselves and cannot optimally ensure that the public safety is maintained.

54. The Commissioner's statements, and the reality of the new laws, might generate an argument about vagueness and placing law enforcement officers in positions where their actions in compliance with the new law is not clear. Yet Plaintiffs are not making this claim; Plaintiffs are sworn to uphold the law and wish to do so.

55. Instead, Plaintiffs seek an injunction to delay implementation of the new standards that were to become effective March 1, 2021, in light of the fact that the guidance from the State was not forthcoming until February 18, 2021, and there has not been sufficient time for Plaintiffs to develop, distribute and implement training sufficient to meet these new requirements.

CLAIM FOR RELIEF

DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

56. Plaintiffs incorporate by reference all preceding paragraphs.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

57. Minnesota Statutes Section 609.066 applies use of force restrictions on Minnesota police officers that violate their constitutional rights.

58. The police and peace officers of Minnesota, as represented by Plaintiffs Minnesota Police and Peace Officers Association, Law Enforcement Legal Services, Inc., the Minnesota Chiefs of Police, and the Minnesota Sheriff's Association all have a substantial interest in protecting the rights of police officers, and ultimately the public, from this legislation, and seek a declaration that it is facially unconstitutional.

59. Plaintiffs are entitled to declaratory judgment that the requirement in Minn. Stat. § 609.066 that a police officer specifically articulate an affirmative defense is unconstitutional.

60. The Minnesota Legislature has drastically altered the landscape of law enforcement use of force requirements without providing sufficient time for law enforcement stakeholders to develop, implement and complete training that the Commissioner of Public Safety and Attorney General's Office have deemed necessary.

61. An inability to train and incorporate the changed state policies will lead to indecision and uncertainty in law enforcement, which operates to create an enhanced risk to the health, safety and the very lives of Minnesota's police and peace officers, and ultimately the public.

62. Plaintiffs are therefore entitled to injunctive relief, requiring that the State of Minnesota, and Governor Walz, as the Chief Executive of the State, are enjoined from

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

enforcing the newly enacted provisions of Minn. Stat. § 609.066, subd. 2 and to provide additional time for the implementation of the remaining elements of Minn. Stat. § 609.066.

63. Plaintiffs are entitled to costs pursuant to Minn. Stat. § 555.10.

WHEREFORE, Plaintiffs respectfully request the following relief from the Court:

A. A declaratory judgment stating that Minn. Stat. § 609.066, subd 2 is unconstitutional inasmuch as it requires a police officer to testify to justify the use of force as an affirmative defense.

B. Injunctive relief delaying implementation of the amendments to Minn. Stat. § 609.066 until such time as training can be developed and implemented.

C. An award to Plaintiffs for their costs and disbursements incurred in bringing this action, including attorney fees.

D. Such other and further relief as the Court deems just, equitable and appropriate under the circumstances.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

CHESTNUT CAMBRONNE PA

Dated: July 1, 2021

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Dated: July 1, 2021

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Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

ACKNOWLEDGMENT REGARDING SANCTIONS

Pursuant to Minn. Stat. § 549.211, subd. 1, the undersigned acknowledge that non-monetary sanctions and monetary sanctions, such as costs, disbursements, and reasonable attorney and witness fees, may be imposed under Minn. Stat. § 549.211, subd. 3.

Filed in District Court
State of Minnesota
7/2/2021 11:40 AM

CHESTNUT CAMBRONNE PA

Dated: July 1, 2021

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This document is an overview and not meant to substitute for legal advice that should be sought prior to any changes in policy or procedure based on the discussed 2020 statutory changes. It includes opinions by the Attorney General's Office, for which DPS has waived the attorney-client privilege.

TO: MINNESOTA LAW ENFORCEMENT

FROM: John M. Harrington, Commissioner

SUBJECT: Implementation of New Statutes Pertaining to the Authorized Use of Force and Deadly Force by Peace Officers

DATE: February 18, 2021

The Minnesota Department of Public Safety has been asked to provide guidance to Minnesota law enforcement agencies and peace officers regarding the implementation of new statutes regulating the use of deadly force by peace officers.

I. BACKGROUND

In 2020, the Minnesota Legislature made substantial changes to state law regulating the authorized use of deadly force by peace officers.[1] The net effect of these amendments is to narrow and more clearly define the circumstances in which peace officers may lawfully use deadly force[2]. The effective date for these changes is March 1, 2021.[3]

Prior to the 2020 amendments, Minnesota's deadly force law arguably imposed a tighter standard than federal case law as to when deadly force could be used. Following the changes, it is clear that the state standard is more restrictive. Going forward, peace officers in Minnesota are unmistakably limited to using deadly force *only* when a reasonable peace officer in the same circumstances would believe it to be *necessary* to protect human life or prevent great bodily harm.[4] In addition, peace officers must consider the sanctity of life in connection with all decisions about the use of deadly

[1] 2020 Laws of Minnesota, 2nd Special Session, chapter 1, sections 8-10.
[2] Minnesota Statutes section 609.066 (2020).
[3] 2020 Minn. Laws, 2nd Spec. Sess, ch. 1, §§ 8-10
[4] Minn. Stat. § 609.066, subds. 1a(2), 2.

EXHIBIT 1

force.[5]

II. STATEMENTS OF LEGISLATIVE INTENT

The 2020 amendments include a new subdivision that sets forth the Legislature's intent in amending the statute.[6] These declarations of intent serve as a guide for reading and interpreting the statute[7]:

1. The first declaration provides that the "authority to use deadly force . . . shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life;"

2. The second declaration of intent provides that peace officers may use deadly force "only when necessary in defense of human life or to prevent great bodily harm;"

3. The third declaration of intent pulls in *some* concepts from *Graham v. Connor* to be applied when reviewing peace officers' decisions to use deadly force. These decisions are to be evaluated "from the perspective of a reasonable peace officer in the same situation," based on the totality of the circumstances as they were "known to or perceived by the peace officer at the time," and without the benefit of hindsight; and

4. The fourth and final declaration of intent provides that "peace officers should exercise special care when interacting with individuals with known physical, mental health, developmental or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands from peace officers."[8]

The Minnesota Attorney General's Office (AGO) has expressed the opinion that law enforcement should regard these statements as part of the objectively reasonable peace officer standard.[9] That is, reasonable peace officers will evaluate situations and make decisions guided by the principle that every human life is sacred, use deadly force only when necessary to preserve life or prevent great bodily harm, and use special care when dealing with persons known to have a disability, as that disability could contribute to the dangers of a situation.

III. DEFINITIONS OF DEADLY FORCE

Subdivision 1, of section 609.066, which defines deadly force, has not been changed. The amendments to section 609.06, however, have effectively expanded the definition of deadly force to include particular methods of restraint. As things now stand, sections 609.066 and 609.06 provide three definitions of what constitutes deadly force - a legal test based on a peace officer's intent and the likely outcome of that peace officer's actions and a legal rule related to the discharge of firearms towards others are contained in section 609.066 and restrictions on

[5] *Id.* at § 609.066, subd. 1a(1).
[6] *Id.* at § 609.066, subd. 1a.
[7] *Id.* at § 645.16.
[8] *Id.* at § 609.066, subd. 1a (1)-(4).
[9] Office of the Attorney General, January 29, 2021 Memorandum to BCA Superintendent at 4 (hereinafter, "AGO Memo")

particular methods of restraint are in section 609.06.

Peace Officer's Intent and Likely Outcome of Actions (609.066)

The first definition is a legal test for determining whether actions by a peace officer rise to the level of deadly force, which is defined as:

… force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm.[10] Using this test, whether the peace officer was armed is not at issue, but whether that peace officer intended to cause death or great bodily harm, or acted in a way in which it was reasonable to assume that would be the likely result.

Discharge of Firearms Towards Others (609.066)

Subdivision 1 in section 609.066 also defines "deadly force" as the intentionally discharging a firearm in the direction of another person, or at a vehicle in which another person is believed to be.[11] These actions are deadly force because the law says they are—it makes no legal difference if the rounds the peace officer fires are unlikely to kill or injure anyone. However, Minnesota law expressly exempts "less lethal munitions" from this definition of deadly force. Under subdivision 1, firing at another person with less lethal munitions is not considered to be deadly force as they are defined as "projectiles which are designed to stun, temporarily incapacitate, or cause temporary discomfort to a person."[12]

Restrictions on Particular Methods of Restraint (609.06)

A new amendment to section 609.06, effective August 1, 2020,[13] restricts the use of certain methods of restraint by allowing them only when deadly force is authorized. The restricted methods include choke holds, hog-tying, and transporting persons face-down in a vehicle.[14]

The amendment does not actually use the term "hog-tying." Instead, it describes the restricted method as "tying all of the person's limbs together behind the person's back to render the person immobile."[15] The definition of "choke hold" includes both pressure to the windpipe that makes breathing more difficult, as well as neck holds like the lateral vascular neck restraint that target arteries on either side of the windpipe.[16]

IV. CIRCUMSTANCES AUTHORIZING THE USE OF DEADLY FORCE

Subdivision 2 of the new version of section 609.066 sets forth the circumstances that authorize

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[10] *Id.*
[11] *Id.*; *see also State v. Amick*, No. A13-2312, 2015 WL 732455, at *6 (Minn. Ct. App. Feb. 23, 2015), *review denied* (Minn. May 19, 2015) (discharging firearm intentionally in the direction of another person is deadly force).
[12] *Id.*
[13] 2020 Minn. Laws 2nd Special Session, Ch. 1, secs. 7 and 8.
[14] Minn. Stat. § 609.06, subd. 3.
[15] *Id.*
[16] *Id.*

the use of deadly force by peace officers.[17] It has been substantially rewritten.[18] The Legislature added a third-party standard, and the law now authorizes deadly force only when an *objectively reasonable peace officer* would believe that the circumstances pose a threat of death or great bodily harm.[19] In addition, the Legislature has added three "threat criteria" for evaluating both the sufficiency of the threat and the need to respond with deadly force.[20]

The Objectively Reasonable Peace Officer

As amended, subdivision 2 begins by describing to whom a peace officer's decision to use deadly force will be measured against—an objectively reasonable peace officer in the same circumstances, knowing what the peace officer knew at the time, and without the benefit of hindsight.[21] The AGO notes that the authority to use deadly force is not determined by whether a peace officer is being objectively reasonable in some general sense, but rather, whether the peace officer reasonably concludes that the *statutory criteria* for using deadly force, listed in subdivision 2, are present.[22]

The incorporation of this standard into Minnesota law should encourage peace officers to pay even closer attention during training, and to reflect on their experiences in the field. Peace officers are obligated to evaluate the level of threat faced in any encounter through the lens of training and experience. Peace officers should avoid utilizing rules of thumb and must evaluate their use of force on the totality of the circumstances from the perspective of a reasonable peace officer.[23]

Authorizing Conditions

In addition to setting the reasonable officer standard, the new subdivision 2 also specifies the conditions that authorize peace officers to use deadly force.

The first part of subdivision 2 describes when deadly force may be used for defense, that is, to protect the peace officer or another against an incoming threat to protect the peace officer or another from death or great bodily harm.[24] The second part of the subdivision establishes when deadly force may be used for control—to effect the arrest or capture, or to prevent the escape of another.[25] In both cases, deadly force may only be used when necessary to protect the peace

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[17] Minn. Stat. § 609.066, subd. 2.
[18] 2020 Minn. Laws 2nd Special Session, Ch. 1, sec. 10.
[19] *Id.*
[20] *Id.*
[21] Minn. Stat. § 609.06, subd. 2.
[22] AGO Memo, *supra* note 9, at 3-4. Additionally, in a video released by the California POST Board, a California prosecutor commenting on the addition of the objective reasonableness standard into that state's law, noted that an objectively reasonable peace officer is one who is assumed to have both training and experience as a law enforcement peace officer. *AB 392 and Peace Officer Use of Force Standards*, POST COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING (Sept. 30, 2020, 9:44 AM), https://post.ca.gov/Use-of-Force-Standards#UseOfForce.
[23] *See Maras v. City of Brainerd*, 502 N.W.2d 69 (Minn. Ct. App. 2002) (deadly force not reasonable even though suspect had a knife and was between five and fourteen feet from peace officer, because suspect was drunk, could barely stand, and never raised knife above waist).
[24] Minn. Stat. § 609.066, subd. 2(a)(1).
[25] *Id.* § 609.066, subd. 2(a)(2).

officer or others from death or great bodily harm, according to the three threat criteria.

Necessity

The amended statute provides that deadly force may be used "only when necessary."[26] As a general rule, a particular level of force is reasonably necessary when lesser levels are insufficient to meet the needs of the situation.[27] A force technique should be considered reasonably necessary when:

1. The peace officer tried lower levels of force, but those levels did not work to accomplish the defense or control objective at hand;[28] or

2. As the peace officer assessed the situation, it was reasonable to believe that lower-level techniques would not be effective for defense or control;[29] or

3. The peace officer believed that attempting lower-level techniques would have exposed the peace officer to an unreasonable risk of danger.[30]

Reduced to a basic principle, this means that peace officers are not permitted to use deadly force when there reasonably appears to be another feasible alternative for defending against the threat of death or great bodily harm.

Use of Deadly Force for Defense

The statute, as it did in the past, permits peace officers to use deadly force when necessary to protect themselves or another from death or great bodily harm. The amendments, however, set a new benchmark for the clarity of the threat, and the likelihood that it will come to pass, before deadly force is authorized.

As the statute was written before, it allowed peace officers to use deadly force when necessary to counter an "apparent" threat of death or great bodily harm.[31] In 2020, the Legislature struck the word "apparent" and replaced it with a three-part test. Now, before a threat of death or great bodily harm will justify the use of deadly force, it must be one that, according to the statute:

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[26] *Id.* § 609.066, subds. 1a(2), 2(a).

[27] *See, e.g., Orsak v. Metro. Airports Comm'n Police Dep't*, 675 F. Supp. 2d 944, 961 (D. Minn. 2009) (use of Taser® is permitted only when "less painful" means of effecting control were not available). The decision in *Orsak* is reflective of judicial comments over the last two decades indicating that the "availability of alternative methods of capturing or subduing a suspect may be a factor to consider" in evaluating a peace officer's use of force. *See also Harrington v. City of Redwood City*, 7 F. App'x. 740, 742 n.5 (9th Cir. 2001) (quoting *Chew v. Gates*, 27 F.3d 1432, 1440 n. 5 (9th Cir. 1994)); *Bryan v. MacPherson*, 630 F.3d 805, 813 (9th Cir. 2010) ("[T]he presence of feasible alternatives" is to be considered in determining whether the force used was reasonable.).

[28] *See, e.g., Landy v. Irizarry*, 884 F. Supp. 788, 799-800 (S.D.N.Y. 1995) (peace officer's use of force was reasonable as a matter of law when he worked his way up in a graduated fashion through various force options that proved to be ineffective).

[29] *See, e.g., McKenney* v. *Harrison*, 635 F.3d 354, 360 (8th Cir. 2011) (an attempt to tackle the fleeing suspect would have likely been ineffective).

[30] *Id.* (an attempt to tackle the fleeing suspect would have likely resulted in injury to the peace officer); *see also Tom v. Voida*, 963 F.2d 952, 962 (7th Cir. 1992) (peace officer had valid reasons for rejecting lesser alternatives, including a fear that attempting to use chemical irritant would have exposed her to greater risk).

[31] Minn. Stat. § 609.066, subd. 2(1) (2019).

1. Can be articulated with specificity by the peace officer; and

2. Is reasonably likely to occur, absent action by the peace officer; and

3. Must be countered through the use of deadly force without unreasonable delay.[32]

This is a new standard that displaces the old one, and understanding the implications of this change is of critical importance.

The threat can be articulated with specificity by the peace officer[33]

The fact that a situation placed a peace officer in fear for their life in some vague or general way is likely not enough to justify using deadly force. Rather, there must be specific circumstances and behaviors that would cause a reasonable peace officer in the same circumstances to believe that the prospect of death or great bodily harm is at hand.

Courts may also construe the "articulated with specificity" standard as addressing the level of certainty that a peace officer must have about the threat itself. The prior version of the statute allowed peace officers to respond to an "apparent" threat of death or great bodily harm. In common usage, "apparent" may mean either an obvious threat, or one that appears to the perceiver as actual.[34] In simpler terms, the previous standard accepted the idea that a threat did not have to be real, merely the appearance of reality. Under the new language, the threat must be one that a reasonable peace officer can *articulate with specificity*. Courts often use the plain meaning of a word to define terminology. In this case, to be specific means free from ambiguity.[35] Finally, something is ambiguous if it can be interpreted in more than one way.[36]

Interpreting the statute in this manner creates a zone of considerable uncertainty. For example, if a suspect suddenly turns on a peace officer with an object in their hands that *could be a gun* or *could be a cellphone*, does this qualify as a threat that can be articulated with specificity? As the law now stands, that is an issue that the courts will need to resolve. Subdivision 1a of the section 609.066 provides that the evaluation of peace officer decisions to use deadly force "shall account for occasions when peace officers may be forced to make quick judgments. . . ." Even objectively reasonable peace officers can arrive at mistaken conclusions. Yet this uncertainty, combined with the sanctity of life principle, should encourage peace officers to avoid rushing into ambiguous situations where "one wrong move" by the suspect could prompt the peace officer to take an irreversible action—unless there are sound reasons for doing so.

Death or great bodily harm is likely to occur absent action by the peace officer

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[32] Minn. Stat. § 609.066, subd. 2(a)(i)-(iii) (2020).
[33] The AGO noted that this requirement may be unconstitutional as it is unclear how "the law enforcement peace officer" suspected of a crime can be compelled to articulate anything without violating their right against self-incrimination. Courts could save this provision by construing it as meaning that an objectively reasonable peace officer would be able to articulate the threat with specificity. AGO Memo, *supra* note 9, at 2, n. 4.
[34] https://www.merriam-webster.com/dictionary/apparent
[35] https://www.merriam-webster.com/dictionary/specific
[36] https://www.merriam-webster.com/dictionary/ambiguous

This language limits the use of deadly force to circumstances where the trajectory of the suspect's behavior reasonably appears to be headed toward lethality or grave injury. Objectively reasonable peace officers understand that they cannot use deadly force merely because someone happens to possess a gun, knife, or other weapon. Rather, the authority to use deadly force is, and historically has been, conditioned on the reasonable belief that the suspect is likely to gravely harm the peace officer or someone else, unless action is taken to intervene.[37]

The threat must be addressed with deadly force without unreasonable delay

This last prong places two ideas in tension with one another. The first is that peace officers should not use deadly force before it is necessary to do so, in order to protect themselves or someone else from death or great bodily harm. This accords with the sanctity of life principle. The second, which includes the qualifier, "without unreasonable delay," signifies that the statute permits peace officers to act when delaying action would be unreasonably risky.

Use of Deadly Force for Control

Before the recent amendments, subdivisions 2(2) and (3) of section 609.066 listed the circumstances allowing peace officers with authority to use deadly force for control purposes - to capture, arrest, or prevent the escape of suspects.[38] These two subparts have been collapsed into one, an amended subdivision 2(a)(2).[39]

Notably, the Legislature *eliminated* the authority to use deadly force for the capture of a person whom the peace officer knew or reasonably believed had committed or attempted to commit a felony involving the use or threatened use of deadly force. As amended, peace officers are permitted to use deadly force for capture only when the peace officer:

1. Knows or has reasonable grounds to believe the suspect has committed or attempted to commit a felony; and

2. Reasonably believes that the person will cause death or great bodily harm to another—based on the three threat criteria discussed above.[40]

For instance, the former version of the statue would have arguably permitted peace officers to use deadly force to capture an armed murder suspect who was fleeing from the scene into a deserted forest, assuming its use was necessary. The amended version of the statute would likely not permit this, absent grounds to believe that the suspect would cause death or great bodily harm unless captured right away. As in defense situations, peace officers are only permitted to use deadly force when necessary to prevent a suspect from causing death or great bodily harm to another, as determined by reference to the three threat criteria.

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[37] *See generally, e.g., Maras v. City of Brainerd*, 502 N.W.2d 69 (Minn. Ct. App. 2002).
[38] Minn. Stat. § 609.066, subd. 2(2), 2(3) (2019).
[39] Minn. Stat. § 609.066, subd. 2(a)(2) (2020).
[40] *Id.*

V. DANGER TO SELF ONLY

The Legislature also added a new provision to the deadly force statute that sets down a rule against peace officers using deadly force when the subject poses a danger only to himself or herself.[41] Now, no peace officer may use deadly force against someone who poses a danger to themselves if a reasonable peace officer would not think the person's actions pose a threat to the peace officer or others.[42]

VI. SPECIAL CARE WHEN DEALING WITH PERSONS KNOWN TO HAVE A DISABILITY

Subdivision 1a(4) of the amended statute provides that peace officers "should exercise special care when interacting with individuals with known physical, mental health, developmental, or intellectual disabilities as an individual's disability may affect the individual's ability to understand or comply with commands . . . ." The AGO has expressed the opinion that courts are likely to treat an individual's known disability as part of the reasonable peace officer standard, regardless of whether courts treat the word "should" as creating a mandate or merely a suggestion.[43] Peace officers should be taught when and how to access this type of sensitive information, which may be available when responding to calls, and that they must, whenever feasible, take special care when dealing with individuals whom they know to have a disability.

VII. WARNING REQUIREMENT

In addition to the new requirements set forth by the Legislature, the warning requirement from *Tennessee v. Garner* is still applicable.[44] According to *Garner*, if feasible, peace officers must give some warning before using deadly force.[45] The reason for giving a verbal warning is to enable innocent persons to exit the area and give suspects an opportunity to surrender.[46] A warning is likely feasible if there is time to give one, and providing the warning would not expose the peace officers or others to serious danger.

VIII. ADDITIONAL CONSIDERATIONS

Intervention, Reporting, and Consequences

Federal courts in the Eighth Circuit Court of Appeals have long recognized that peace officers have a legal duty to intervene when they know another peace officer is using excessive force.[47] In 2020, Minnesota lawmakers made this duty statutory. The new section, 626.8475, requires that peace officers intervene, when it is possible to do so, to stop the use of excessive force.[48] The statute provides that, regardless of tenure or rank, a peace officer must intercede when:

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[41] *Id.* § 609.066, subd. 2(b).
[42] AGO Memo, *supra* note 9, at 3.
[43] *Id.* at 6.
[44] *See Tennessee v. Garner*, 471 U.S. 1 (1985).
[45] *Id.* at 11-12.
[46] *Kuha v. City of Minnetonka*, 365 F.3d 590, 599 (8th Cir. 2004).
[47] *Livers v. Schenck*, 700 F.3d 340, 360 (8th Cir. 2012) (citing *Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981)).
[48] 2020 Minn. Laws 2nd Special Session, Ch. 1, sec. 23.

1. Present and observing another peace officer using force in violation of section 609.066, subdivision 2, or otherwise beyond that which is objectively reasonable under the circumstances; and

2. Physically or verbally able to do so.

In addition, this section also requires peace officers to prepare a written report to their chief law enforcement peace officer within 24 hours of observing the use of excessive force by another peace officer.[49] A peace officer who violates these requirements is subject to disciplinary action by the POST Board.[50]

Implications for Policy and Training

Agencies may wish to consider what changes in policy and training are appropriate in view of these legislative developments, based on their assessment of current training and resources. Questions that merit consideration include:

- The extent to which policy and training prioritizes assessing, slowing things down, and employing sound tactics when confronting situations with an apparent risk of escalating.

- The extent to which policy should restrict, discourage, or set parameters for peace officer involvement in activities where an appreciable risk of sudden escalation is present (e.g., foot pursuits, intervention with suicidal individuals who are armed and pose a risk of harm only to themselves).

What procedures can and should peace officers use to promote the safety of all concerned, and reduce the ambiguity and dangers in citizen encounters (e.g., using clear commands to discourage behavior.

[49] Minn. Stat. § 626.8475(b) (2020).
[50] *Id.* § 626.8475(c).