



U.S. Department of Justice

Civil Rights Division

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DJ 207-57-5

*Special Litigation Section - PHB  
950 Pennsylvania Ave, NW  
Washington DC 20530*

May 16, 2012

**Via Electronic Mail and First Class Mail**

The Honorable Chase Ritenauer  
Mayor  
City of Lorain  
200 West Erie Avenue  
Lorain, OH 44052-1647

Chief Cel Rivera  
Lorain Police Department  
100 West Erie Avenue  
Lorain, OH 44052-1646

Re: Lorain Police Department

Dear Mayor Ritenauer and Chief Rivera:

On November 20, 2008, the Civil Rights Division initiated an investigation of the City of Lorain, Ohio Police Department ("LPD"), pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), to determine whether LPD engages in a pattern or practice of use of excessive force. In response to serious allegations of misconduct, our investigation considered: (1) whether there is a pattern or practice of the excessive use of force in the course of routine public safety activities; and (2) whether there is a pattern or practice of sexual abuse by officers of female citizens under the color of law.

We have completed our investigation. It revealed problems regarding the use of force by LPD. Though inadequate training, lack of accountability, and multiple instances of uses of excessive force often indicate the existence of a pattern or practice of use of excessive force, at this time, we do not find that LPD officers continue to engage in such a pattern or practice of use of excessive force. Accordingly, we are closing our investigation. Nevertheless, we recommend that Lorain and LPD promptly take the following actions to help ensure that LPD provides the best possible police service to the people of Lorain, while simultaneously respecting the constitutional rights of all Lorain residents: (1) implement policy and training consistent with the technical assistance contained in this letter and the attached Technical Assistance Report; and (2) investigate and remedy command deficiencies that permitted LPD's past use of excessive force.

If not remedied, the weaknesses in LPD's police practices could lead to a pattern or practice of constitutional violations, and could undermine public trust in the police department

thereby diminishing public safety. Continued remediation of these concerns will not only address potential constitutional violations, but make Lorain a safer community. If we discover that LPD engages in a pattern or practice of constitutional violations in the future, we will consider, as part of that investigation, whether LPD failed to remediate the deficiencies described in this letter. We hope that the need for additional investigation does not arise.

## **I. SCOPE OF INVESTIGATION**

In our investigation, we reviewed LPD policies and procedures and conducted interviews with Lorain officials, LPD command staff, a cross-section of LPD line officers and supervisors, representatives of the Fraternal Order of Police, community leaders, and other citizens. Along with expert consultants, we conducted an on-site investigative tour of LPD. Thereafter, we requested and received additional documents from LPD, and continued to receive witness accounts. Also, we met with City and LPD officials to discuss LPD's responses to public allegations made against LPD and LPD's response to the recommendations of our expert consultants. Finally, we also carefully considered information – including factual and historical background – provided by LPD and Lorain explaining its practices and procedures. We would like to take this opportunity to express our appreciation for the cooperation we have received from the Lorain and LPD during the course of our investigation.

At the beginning of our investigation, we committed to providing LPD with technical assistance, where appropriate, to enhance LPD practices and procedures and to ensure compliance with constitutional standards. At the close of our tour, our expert consultants provided LPD with preliminary technical assistance. In this letter and the attached technical assistance report, we convey our formal recommendations regarding some of LPD's practices and its written policies and procedures, including the revised policies provided to us during the course of the investigation.

## **II. INVESTIGATIVE FINDINGS**

### **1. LPD Should Remedy Deficiencies in Its Management of Use of Force**

Police officers may be required to use force in constitutionally appropriate manners in the course of enforcing the law. The proper use of force enhances officer safety. In contrast, the improper use of force diminishes public trust in law enforcement and can create unnecessary risk to both officers and the public.

Serious allegations of the use of excessive force by LPD officers, along with complaints that women were being sexually abused by LPD officers under the color of law, prompted our investigation. During our investigation, we found that there were instances of excessive force in the years preceding our investigation, along with allegations of sexual misconduct. LPD's management did not adequately address this misconduct, and failures in LPD's accountability and discipline systems may have allowed the use of excessive force and sexual misconduct to continue.

In reaching these conclusions, we reviewed use-of-force reports that LPD provided to us to determine whether, as captured in LPD's own reports, there is reasonable cause to believe that

there is a pattern or practice of use of excessive force. In analysis of reported use-of-force incidents, we applied the legal standard of objective reasonableness. *See Graham v. Connor*, 490 U.S. 386, 388 (1989); *Lanman v. Hinson*, 529 F.3d 673, 680 (6th Cir. 2008) (citing *Graham*, 490 U.S. at 395). Based on LPD's reports, we determined that LPD's use of force had previously been inordinately high, but that reported uses of force began diminishing in 2009. Similarly, numerous credible witnesses presented accounts of historical uses of excessive force by LPD. Many of these incidents occurred prior to the start of our investigation, but we have received fewer allegations regarding incidents in the last two years. Accordingly, while LPD's own records and witness accounts demonstrate a history of use of excessive force on certain occasions, we did not find present evidence of a pattern or practice of excessive force.

Even with these decreases, LPD has not yet fully implemented necessary measures to ensure that a pattern or practice of excessive force does not occur. LPD has failed to discipline the managers who have permitted LPD officers to employ excessive force, failed to develop adequate training or policies, and has not implemented necessary measures for accountability.

#### **A. Legal Standards Governing the Use of Force**

Whether a particular use of force by an officer in the course of seizing an individual is constitutional is governed by the Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 388; *Lanman*, 529 F.3d at 680. Uses of excessive force by police officers in the course of arrest, investigatory stop, or other seizure are violations of the Fourth Amendment.<sup>1</sup> *Id.* The analysis requires a balancing of the quality of intrusion on the individual's Fourth Amendment interests against the governmental interests. *Graham*, 490 U.S. at 396; *Ciminillo v. Streicher*, 434 F.3d 461, 466-67 (6th Cir. 2006) (citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). The criteria courts apply to assess an excessive force claim include the severity of the crime at issue, whether the suspect presents an immediate safety threat to the officers or others, and whether the suspect is actively resisting or attempting to evade arrest. *Ciminillo*, 434 F.3d at 467 (citing *Graham*, 490 U.S. at 396). Lack of specific policy guidance on appropriate uses of force may lead officers to believe that they are justified in using force in situations in which it would be unreasonable or unnecessary. Conversely, unclear or overly general policies may result in officers refraining from using necessary and appropriate force out of an unwarranted fear of using excessive force.

LPD's use-of-force management and policy fails to comport with these legal standards in certain respects. Accordingly, as discussed in further detail below, we recommend that LPD remedy its management of uses of force and revise its use-of-force policy to incorporate these constitutional standards.

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<sup>1</sup> A seizure – i.e., by means of physical force or show of authority – is the event that triggers Fourth Amendment protections. *Ciminillo v. Streicher*, 434 F.3d 461, 465 (6th Cir. 2006) (citing *Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998)).

## B. LPD's Failure to Address Allegations of Officer Sexual Assault

LPD has failed to respond adequately to allegations of sexual misconduct committed by officers acting under the color of law. This failure has occurred, in part, because LPD has attempted to frame its use of force only in terms of *force reported* by its officers in the course of policing. This definition of "use of force" is unduly narrow. In fact, under the Constitution, LPD's use of force includes force used by LPD officers based on their law enforcement authority, force imposed with threat of withholding law enforcement protection or threat of baseless arrest, as well as official uniformed and/or armed uses of force, whether or not reported by its officers, even if the officers commit the uses of force off duty but under color of law. *See Ciminillo*, 434 F.3d at 465 (physical force or show of authority triggers Fourth Amendment protections). Unreasonable force used by LPD officers under the color of law is an unlawful violation of the Fourth Amendment, whether that force is used during an arrest or to commit a sexual assault.<sup>2</sup> *Graham*, 490 U.S. at 388. Even though one would not expect an officer to have filed a use of force report form concerning sexual misconduct, such conduct committed in the course of policing is still a use of force that may give rise to both a criminal prosecution and a cause of action for violation of civil rights. Based on LPD's own records, sworn testimony, and interviews with witnesses, we have concluded that there were specific credible reports of sexually assaultive behavior under color of law by certain members of LPD. LPD management failed to fully understand and address these incidents

Although we did not find a current pattern or practice of constitutional violations, LPD's policies and management of use of force have not changed substantially and could result in future constitutional violations. Indeed, LPD management has not taken serious measures to address allegations of sexual assault by LPD officers. In cases where LPD took action, it often did not take place until years after LPD had knowledge of the allegations. Even for those incidents that allegedly took place outside the scope of employment, LPD's failure to investigate and seek prosecution demonstrates, at best, LPD's passive attitude toward allegations of sexually assaultive behavior by its officers. At worst, LPD's failure to timely investigate and pursue prosecution against the offenders demonstrates a double standard for conduct by LPD officers that would not be tolerated from civilians, and permits LPD officers to escape just prosecution.

LPD's passive approach to allegations of sexual misconduct may have contributed to poor outcomes in criminal investigations and prosecutions of these incidents. LPD must adopt a zero-tolerance approach to allegations of sexually assaultive behavior by its officers, including prompt, aggressive criminal investigations of such allegations and of allegations of unlawful actions to cover up such conduct.

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<sup>2</sup> Additionally, allegations of sexual assault by LPD officers, when true, may constitute separate state and federal crimes. Allegations of sexual assault by government actors may also rise to the level of separate violations of subjects' Fourteenth Amendment right to bodily integrity. *Doe v. Clairborne County*, 103 F.3d 495, 506 (6th Cir. 1996); *Cahill v. Walker*, Docket No. 3:03 CV 00257, 2005 WL 1566494 (E.D. Tenn. July 5, 2005).

### C. LPD's Failure to Sufficiently Address Allegations of Excessive Force

Our investigation also revealed incidents of excessive force and a failure to hold officers fully accountable for these incidents. Although we did not find a current pattern or practice of use of excessive force, we found numerous examples of uses of excessive force that took place before 2008. We found little evidence that steps had been taken to prevent such violations from recurring. Similar to our findings regarding allegations of sexual misconduct by LPD officers, we found that LPD failed to investigate allegations of excessive force adequately, failed to take disciplinary action against officers involved, and, in some instances, appears to have taken steps to conceal the use of excessive force by LPD officers. We also found that LPD failed to sufficiently offer medical care to victims of force, excessive or permitted, even where it was undisputed that the victim was injured.

### D. LPD's Uses of Force in Response to Minor Incidents

We also found that, in the past, LPD has too frequently utilized force in response to minor violations of law. Assessing the reasonableness of an officer's use of force requires a balancing of the government's legitimate interest in enforcing law against the individual's right to be free from unreasonable government seizure of his/her person. *Graham*, 490 U.S. at 396. Circuit Courts that have addressed the issue have found that minor infractions of law generally do not justify the use of force. *See, e.g., Young v. County of Los Angeles*, 2011 U.S. App. LEXIS 17829 (9th Cir. Aug. 26, 2011) (stating: "failure to wear a seatbelt was a run-of-the-mill traffic violation that clearly provided little, if any, support for the use of force"); *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009) (finding: "[t]raffic violations generally will not support the use of a significant level of force"). Accordingly, LPD's use of force in response to minor infractions may, likewise, be unjustified.

Indeed, we noted several incidents in which LPD officers deployed ECWs<sup>3</sup> to apprehend subjects in situations in which LPD officer's only recorded knowledge at the time of deployment was that the subject was fleeing for an unknown reason after a minor infraction, such as walking in the roadway or jaywalking. Similarly, LPD has deployed its canine in find-and-bite apprehensions when subjects fled but did not offer any resistance. In one such situation, LPD use-of-force reports show that LPD had its canine pursue and eventually bite one subject who fled from a car pulled over only for a window-tint violation, but when there was no additional articulated suspicion of wrongdoing by the subject. In another situation, LPD deployed its canine, which bit at a subject – though only catching clothing – wanted only for riding a bicycle

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<sup>3</sup> "ECWs" is an abbreviation for "electronic control weapons." Such weapons are sometimes referred to by a brand name, "TASER," or simply called "stun guns." For consistency purposes, we refer in this letter to all such weapons used by LPD as "ECWs." ECWs and other non-firearms are "less lethal" weapons. "Less lethal" is a term of art that refers to weapons and tactics that are designed to temporarily disable or stop a suspect without killing, thereby providing law enforcement with an alternative to lethal force. These weapons and tactics should not be referred to as "less than lethal" because they have resulted in fatalities and in general have a greater potential for lethality than lower-level uses of force such as, for example, soft hands or hard hands.

without a light. Such use of force against individuals for minor infractions not only is legally unsupported, but also could alienate LPD from the community.

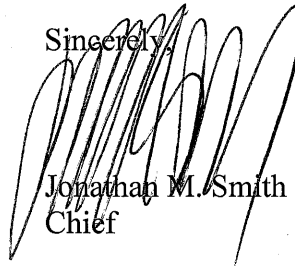
**E. LPD's Escalation of Avoidable Uses of Force**

In addition to those uses of force that were excessive, we found cases in which the force used, while potentially justifiable, could have been avoided had the officer utilized different tactics. There are a number of instances in which officers stopped individuals for relatively minor offenses and took action (verbal or otherwise) that escalated the situation to a use-of-force confrontation. Again, courts that have dealt with this issue have found that officers' escalation of situations may not justify a use of force: "police tactic[s] that needlessly or unreasonably create a dangerous situation necessitating an escalation in the use of force" to be "a course of action this circuit has expressly refused to endorse." *Deorle v. Rutherford*, 272 F.3d 1272, 1282 (9th Cir. 2001) (citing *Cunningham v. Gates*, 229 F.3d 1271, 1291 n.23 (9th Cir. 2000)). Similarly, the Sixth Circuit engages in a decision-point analysis that would assess the officer's actions leading up to the use of force. *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (noting that "the proper approach under Sixth Circuit precedent is to view excessive force claims in segments"). Accordingly, LPD's uses of force are unlawful when the officer's actions precipitate the need to use force.

**III. CONCLUSION**

While LPD has made a number of advances in revising its policies in the recent past, we strongly urge LPD to consider and adopt the technical assistance recommendations in the attached Technical Assistance Report. If you have any questions, please do not hesitate to contact me at (202) 514-6258, or Jonas Geissler, the attorney handling this matter, at (202) 353-8866.

Sincerely,



Jonathan M. Smith  
Chief

cc: Steven M. Dettelbach  
United States Attorney  
for the Northern District of Ohio

Michelle Heyer  
Assistant United States Attorney  
for the Northern District of Ohio

(via Electronic Mail)