

INTRADEPARTMENTAL CORRESPONDENCE

February 12, 2014
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BPC 14-0033

TO: The Honorable Board of Police Commissioners

FROM: Inspector General, Police Commission

SUBJECT: REVIEW OF CATEGORICAL USE OF FORCE POLICY

RECOMMENDED ACTION

REVIEW and APPROVE the Office of the Inspector General's (OIG) Review of Categorical Use of Force Policy.

DISCUSSION

The California Supreme Court opinion in *Hayes v. County of San Diego*, 2013 Cal. LEXIS 6652 has prompted the Office of the Inspector General (OIG) to reexamine current policies governing Categorical Use of Force incidents and their adjudication by the Los Angeles Board of Police Commissioners (Commission).

In *Hayes*, the California Supreme Court found that, under California negligence law, an officer's preshooting conduct leading up to a deadly use of force may affect whether a use of force is ultimately reasonable and therefore may be considered in the analysis of any use of deadly force. As part of its examination, the OIG reviewed the historical record behind the Department's current use of force policies and procedures to determine the intent behind the Commission's existing practices and to understand and potentially reconcile any dissonance between those practices and *Hayes*.

The OIG's review determined that the Commission's intent in creating the existing adjudication system, including their desire to examine the totality of circumstances surrounding a serious use of force, parallels the concerns and findings by the California Supreme Court in *Hayes*. Although the Commission has examined preshooting conduct in some cases for the purpose of deciding whether an officer's use of force should be determined in- or out-of-policy, certain aspects of the existing process are not clearly codified in policy.

The OIG has concluded that a simple clarification of the Department's use of force policy will both reinforce the original intent behind the enactment of current practices and align those practices with *Hayes*.

The Honorable Board of Police Commissioners

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I am available to provide any information the Board may require.

E-Copy – Original Signature on File with the Police Commission

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Attachment

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LOS ANGELES POLICE COMMISSION

***Review of Categorical Use of
Force Policy***



OFFICE OF THE INSPECTOR GENERAL

ALEXANDER A. BUSTAMANTE
Inspector General

February 12, 2014

REVIEW OF CATEGORICAL USE OF FORCE POLICY

I. INTRODUCTION

The California Supreme Court opinion in *Hayes v. County of San Diego*, 2013 Cal. LEXIS 6652 has prompted the Office of the Inspector General (OIG) to reexamine current policies governing Categorical Use of Force (CUOF) incidents and their adjudication by the Los Angeles Board of Police Commissioners (“Commission” or “Board”).

In *Hayes*, the California Supreme Court found that, under California negligence law, an officer’s preshooting conduct leading up to a deadly use of force may affect whether a use of force is ultimately reasonable and therefore may be considered in the analysis of any use of deadly force. As part of its examination, the OIG reviewed the historical record behind the Department’s current use of force policies and procedures to determine the intent behind the Commission’s existing practices and to understand and potentially reconcile any dissonance between those practices and *Hayes*.

The OIG’s review determined that the Commission’s intent in creating the existing adjudication system, including their desire to examine the totality of circumstances surrounding a serious use of force, parallels the concerns and findings by the California Supreme Court in *Hayes*. Although the Commission has examined preshooting conduct in some cases for the purpose of deciding whether an officer’s use of force should be determined in- or out-of-policy, certain aspects of the existing process are not clearly codified in policy.

The OIG has concluded that a simple clarification of the Department’s use of force policy will both reinforce the original intent behind the enactment of current practices and align those practices with *Hayes*.

II. BACKGROUND: THE HAYES OPINION

In August of 2013, the California Supreme Court (“the Court”) issued its opinion in *Hayes v. County of San Diego*. Shane Hayes was shot and killed in 2006 by two San Diego County sheriff’s deputies who responded to a call reporting that screams had been heard. Upon arrival at the call, the deputies spoke with Hayes’ girlfriend, who advised them that Hayes had tried to kill himself earlier that day and that she was worried about his safety. The deputies entered the house where Hayes was located in order to determine whether he was a danger to himself. As they entered the living room, they saw Hayes and ordered him to show his hands. Hayes moved toward the deputies while holding a large knife, and was shot and killed. Hayes’ 12-year-old daughter subsequently filed a lawsuit asserting a state claim of negligence based, in part, on a contention that the officers’ preshooting conduct provoked the situation that led to the shooting of Hayes. The lawsuit also included an additional claim of negligence against the County of San Diego and alleged violations of Hayes’ rights under the Fourth and Fourteenth Amendments of the Constitution.

The California Supreme Court’s holding in this case was a response to a request by the U.S. Court of Appeals for the Ninth Circuit that the Court determine whether, under California law, “deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a

welfare check on him.”¹ This question was based on a finding by a district court that no such duty -- a required element of negligence -- existed with regard to the deputies’ preshooting conduct and decisions, and the court’s rejection of claims that the deputies negligently provoked the shooting of Hayes. In certifying the question, the Ninth Circuit Court noted that a recent decision by the California Supreme Court appeared to indicate that the Court would not adopt a broad rule that no such duty was owed.

In granting that request, the California Supreme Court reframed the issue as a question of “[w]hether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force.”² The Court concluded that “such liability can arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of circumstances, that the use of deadly force was unreasonable.” Notably, the Court found that the “reasonableness of the deputies’ preshooting conduct should not be considered in isolation [...]; rather, it should be considered as *part of the totality of circumstances* surrounding the fatal shooting of [Hayes].”

In explaining its decision, the Court noted that “state negligence law, which considers the totality of circumstances surrounding any use of deadly force [...], is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used [...].” The Court furthermore found “no sound reason to divide plaintiff’s cause of action artificially into a series of decisional moments (the two deputies’ decision not to call for a psychiatric expert before entering [Hayes’] house, their decision to enter the house, their decision to speak to [Hayes], their decision to use deadly force in response to [Hayes’] apparently threatening behavior toward them with a large knife, etc.), and then to permit plaintiff to litigate each decision in isolation, when each is part of a continuum of circumstances surrounding a single use of deadly force by the deputies.”

Ultimately, the Court found that “[l]aw enforcement personnel’s tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.” Following this clarification, the Ninth Circuit panel reversed the district court’s summary judgment regarding the plaintiff’s claim of negligence under state law and remanded the case back to the district court for further proceedings.³ The panel also noted that, as a result of the California Supreme Court’s opinion in *Hayes*, the law is no longer unclear with regard to the deputies’ preshooting duty of reasonable care.

¹ *Hayes v. County of San Diego*, 658 F.3d 867 (9th Cir. 2011).

² *Hayes v. County of San Diego*, No. S193997 (Cal. Aug. 19, 2013).

³ *Hayes v. County of San Diego*, No. 09-55644 (9th Cir. Dec. 2, 2013).

In light of *Hayes*, the OIG performed an extensive review of the Department's policies and practices relating to the evaluation of preshooting conduct and the use of deadly force.⁴ In examining those practices, it found no policy or memorandum preventing the Commission's consideration of preshooting conduct as part of the totality of circumstances relevant to a use of deadly force. Indeed, the OIG has noted instances in which the Commission has engaged in such consideration during its adjudication of categorical uses of force. During this review, the OIG found indications that the Department's current adjudication system for shootings and other serious uses of force -- which requires the explicit evaluation of preshooting tactics -- was guided in substantial part by the Commission's desire to ensure that each incident was evaluated as a continuum of events rather than as an isolated decision to use force.

The OIG also found that the current system of developing separate findings for tactics, drawing, and the use of force could also lead to outcomes that are at odds with *Hayes*. In the OIG's experience, separate evaluations of each of those aspects is likely appropriate for the vast majority of incidents. There may be, however, rare incidents where officers' preshooting conduct precipitates a shooting that is negligent under California law. Likewise, there may be incidents where an officer's preshooting conduct supports the reasonableness of a subsequent decision to use deadly force. To ensure that such instances are properly evaluated, the OIG recommends that the use of force policy reference the adjudicators' ability to consider the officers' preshooting conduct when determining reasonableness.

The following sections of this report provide an overview of the Department's system for adjudicating officer-involved shootings and other serious uses of force. First, the report describes, through the lens of the Commission's hearings and report on the 1979 shooting of Eulia Love, the historical background and intent behind the current system, which was first developed as a result of that incident. The report then provides a description of present-day practices in the application of that system, including the Department's policies and processes with regard to the investigation and adjudication of those events, collectively known as Categorical Use of Force incidents. Finally, the report provides an assessment of current Department policies in light of *Hayes* and recommends a course of action to bring those policies in line with California law.

III. THE SHOOTING OF EULIA LOVE AND RELATED REVISIONS TO DEPARTMENT POLICY

The OIG examined the historical background behind the Commission's current deadly force adjudication practices through discussions with the Department and a review of historical documents surrounding the development of the current policy. This research revealed that the impetus behind the implementation of that policy was the high-profile, fatal shooting of Eulia Love, a 39-year-old black woman, by two LAPD officers in 1979.

⁴ For convenience, this report uses the term "preshooting conduct" to refer to "tactical conduct and decisions leading up to the use of deadly force." Both terms are used in the *Hayes* decision, which referred specifically to a fatal shooting. It should be noted that officer-involved shootings make up the majority of LAPD incidents involving the use of deadly force, but there may be other types of force that also fall into this category.

As a result of that controversial shooting and the subsequent public outcry, the Love-era Commission completed its own review of the incident and conducted a series of public hearings examining the Department's policies governing the investigation and adjudication of the use of force, as well as associated training, deployment, and hiring practices. The Commission then issued a report detailing its findings in the Love shooting, which it found to violate Department policy, and – among other changes – outlined a new policy framework for the adjudication of shootings and other serious uses of force.

The OIG reviewed the Commission's report on the topic, as well as transcripts of each of the public hearings and other associated documents, and found that much of the Commission's inquiry centered on the question of how best to ensure that the evaluation of an officer-involved shooting considers the entire series of events surrounding the use of deadly force, rather than just the moment that deadly force is used. The OIG also noted that the actual evaluation of the use of deadly force in the Love case rested not on the question of whether the use of force was authorized at the moment of the shooting, but on the use of "rapid fire" by the officers, a tactic that was found to violate the Department's then-policy on "minimizing the risk of death." The Commission also found that, to the extent that officers were in a situation where the use of deadly force was necessary to defend themselves, this was "in substantial part" because they had placed themselves in that situation by prematurely escalating the encounter. It is clear that the intent of the Commission in instituting the new adjudication policy -- and in its decision on Love -- was to emphasize the role of preshooting conduct in the evaluation of a use of deadly force, rather than to isolate it.

A. The Eulia Love Shooting

On the morning of January 3, 1979, a gas company employee went to the home of Eulia Love, and, after speaking with her, went to the side of the house to disconnect the gas due to non-payment.⁵ Love approached him, informed him that she would not let him turn off her gas, and hit him on the arm with a shovel. According to the employee, John Ramirez, she prepared to hit him again, and he left the area and went back to his office.

The LAPD was subsequently contacted about the incident and Ramirez signed a crime report for assault with a deadly weapon (ADW). Two additional gas company employees then went to Love's home, having requested that an LAPD patrol car join them at the location. During that same period, Love went to a market and attempted to pay her bill but was told that she could not do so at that location. She instead purchased a money order for \$22.09, the minimum payment required by the gas company to prevent her gas service from being disconnected.

When the gas company employees arrived at her home, Love informed them that she would not pay the full amount due but would pay "\$20.00." She then went into her house, emerged with a knife, and began hacking at a tree in her front lawn.

⁵ All facts are summarized from the Commission's final report on the incident. For a full accounting of the events surrounding the shooting, please see "The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force," 1979.

Soon after, two LAPD officers stopped next to the gas company vehicles. They spoke with one of the gas company employees, who informed them of Love's earlier assault and asked them to stand by as he attempted to collect the bill or turn off the gas. At that time, the officers reportedly observed Love walking back and forth with a knife and yelling at the gas company employees. The officers subsequently drove to the front of the house and exited the patrol car, drawing their firearms as they did so.

Love appeared agitated, insisted that her gas would not be shut off, and reportedly "uttered a number of obscene remarks" at the officers.⁶ The officers commanded her to drop her knife and, upon seeing her teenage daughter come out of the house, instructed the daughter to go back inside. At that time, Love began to retreat toward her house while thrusting the knife at one of the officers, who was approximately six feet from Love, and who continued to advance toward her with his gun and baton drawn. During this period, witnesses saw the other officer motion the gas company employees to "come on."⁷ The officers also reported that they saw a second daughter come out of the house and heard the voices of children.

After a short period, Love stopped and faced the officers with the knife in her right hand. The officers were five and ten feet away from her. The officers held their guns pointed toward her, and one officer also had his baton in his left hand. As she began to lower the hand with the knife, the officer hit her hand with the baton and knocked the knife out of her hand, then backed away. She subsequently picked up the knife and drew her arm back as if to throw it. She was warned not to throw the knife, and at that time, the officer dropped his baton and held his firearm with both hands. Each officer then fired six rounds "in a rapid-fire sequence" as Love threw the knife. At the time shots were fired, the officers were twelve and eight feet from Love, respectively. The investigation yielded a number of differing accounts of Love's actions and the trajectory and final position of the knife, including some witnesses who reported that they did not see Love throw the knife.⁸ As a result, the Commission ultimately found that "the order of these events [the shooting and the throwing of the knife] is uncertain, as the events were almost simultaneous and witness reports are in conflict."⁹ Love was hit 8 times and subsequently pronounced dead. The knife was recovered 68 feet away from her body.

Following the shooting, three separate reviews of the incident were completed. The District Attorney's office evaluated the incident and determined that no criminal charges would be filed against the involved officers. Likewise, the United States Attorney for the Central District of California determined that there was no basis for prosecution of the officers for civil rights

⁶ "The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force ('Report')," Part I, 1979, pg. 6.

⁷ *Id.*, pg. 7.

⁸ District Attorney's Report, pgs. 19-23.

⁹ *Id.*, pg. 8.

violations. Finally, under existing procedures at that time, the Department's Shooting Review Board completed an administrative evaluation of the incident and found that the officer's actions were "in policy," in that they complied with the Department's policies related to the use of firearms and deadly force. A minority report was also issued and concluded that, although the officers' actions were in policy, they "failed to meet Department standards."

The shooting and subsequent reviews were met with widespread outrage and public protests. As a result, Mayor Tom Bradley requested that the Commission "initiate an immediate review of [the] case including meetings with the citizens in various parts of the City with the objective of making changes in the policies, procedures and tactics utilized by the Los Angeles Police Department in the training, performance, and supervision of its officers."¹⁰ Beginning in April 1979, the Commission embarked upon a series of hearings with the community and the Department as part of that process.

B. The Commission's Report

Following the hearings and the completion of its independent evaluation, the Commission completed a four-part public report titled, "The Report of the Board of Police Commissioners Concerning the Shooting of Eulia Love and the Use of Deadly Force." The report touched on a number of issues related to the incident and the Department's practices, two of which were particularly relevant to the OIG's historical review. First, with regard to the shooting itself, the Commission found that the officers' actions were in violation of the Department's policies regarding the use of firearms and deadly force. Second, the Commission set forth a new procedure for the adjudication of all officer-involved shooting (OIS) incidents and incidents involving death or serious injury; namely, that the Commission would assume responsibility for their adjudication and that each case would be evaluated according to the Tactics, Drawing, and Use of Force classifications still in use today.

1. Evaluation of the Shooting of Eulia Love

In evaluating the shooting, the Commission first sought to establish the facts of the incident. By using evidence from the Department's original investigation, along with facts obtained in a supplemental investigation requested by the Commission, the Board settled on a set of facts that differed in some respects from the conclusions relied upon by the majority of the Shooting Review Board. Specifically, the Commission disagreed with the majority's factual findings regarding the officers' intent as they left the car, their concern for the safety of Love's children, and the length of time elapsed during the incident.

With respect to its assessment of the officers' actions, the Commission set forth two central questions. First, the Board considered whether "the decisions to draw weapons and to advance as Mrs. Love retreated [were] consistent with Department policy." Second, it considered whether "the use of deadly force and the extent of deadly force used [were] consistent with Department policy."¹¹

¹⁰ Transcript of "Eula Love Hearing," April 25, 1979, Los Angeles Board of Police Commissioners, pg. 2.

¹¹ Report, Part I, pg. 16.

a. The Decision to Draw and Advance

The report was very critical of the fact that the officers drew their weapons as they exited their vehicle. The Commission found that this decision was premature based on the information known to the officers and that it had the effect of escalating the situation while limiting the officers' other options. The Commission was also critical of the officers' decision to advance toward Love as she held the knife:

Once the stage for the use of force was set, the officers continued to escalate the situation by their actions. By advancing on Mrs. Love as she attempted to retreat, they put themselves in a situation of increased danger. The justification given for the continued pursuit (concern for the safety of children) was, as has been shown above, without basis in any of the reported facts. The decision to draw and point their weapons immediately, and to advance as Mrs. Love retreated, locked the officers, before all reasonable alternatives had been exhausted, into a situation which precipitated the use of deadly force.¹²

The Commission ultimately found, based on their factual findings, that the officers' drawing of their weapons in the Eulia Love case violated the relevant Department policy at the time, which was identical to the current policy on drawing a firearm.

b. The Use of Deadly Force

The Commission also found that the officers' use of deadly force violated Department policies in place at the time. The report noted that the use of deadly force was allowable for the purposes of "protection of self or others from an immediate threat of death or serious bodily injury" and that this was a "conceivable basis for its use in this case."¹³ In evaluating this question, however, the Commission found that Love "did not appear to be an immediate threat to anyone" at the time that the officers left their car. The report further noted that while "the inconsistencies in the witness statements about this series of events cannot be satisfactorily resolved," it would appear that the shooting and Love's throwing of the knife "occurred almost simultaneously." The Commission thus came to the following conclusion regarding the moment that the force was used:

If at that time the officers were justified in using deadly force in self-defense -- and the facts before the Commission do not enable us to make a final determination as to that question -- it was in substantial part because they had themselves prematurely escalated the confrontation and placed themselves in a situation where the use of deadly force became necessary. Moreover, since we conclude below that the officers violated

¹² *Id.*, pg. 22.

¹³ *Id.*, pg. 23.

Departmental policies by using rapid fire under the circumstances of this case, it is not necessary that we determine which shots violated those policies.¹⁴

The report went on to discuss the officers' use of rapid fire in the context of the Department's policy and training, which placed an emphasis on "limiting the number of shots" and on "observing the effect, if any, of the first shot before refiring." It also noted that the Department's firearms policy at that time required that "the risk of death to any person should be minimized."¹⁵ In light of this policy and its factual findings regarding the sequence of shots fired, the Commission found that "the firing of twelve shots in rapid-fire sequence was excessive and cannot be justified."¹⁶

2. Modifications to the Adjudication Policy for CUOF Incidents

Along with its review of the Eulia Love shooting, the Commission also evaluated the Department's procedures at the time ("pre-Love") for the investigation and adjudication of OIS incidents in order to determine what, if any, changes should be made. As a result of this process, it created a new policy that included a number of significant modifications to Department procedures in this area, two of which were particularly relevant to the OIG's review:¹⁷ First, the Commission assumed the role of final adjudicator in every OIS incident. Prior to this revision, that responsibility rested with the Assistant Chief, Office of Special Services, or -- in cases involving potential disciplinary action -- the Chief of Police. The Commission also determined that cases involving death or serious injury to a person in the custody of the Department, or resulting from police contact, would be adjudicated under the same procedure as OIS incidents. Second, as described below, the Commission set forth a new set of classifications under which each use of force incident was to be evaluated.

¹⁴ *Id.*, pg. 24.

¹⁵ *Id.*, pg. 25-26. This section has since been removed from the Manual.

¹⁶ *Id.*, pg. 26.

¹⁷ The Commission also set forth a number of additional changes to the LAPD's policy for investigating and evaluating OIS incidents and other serious uses of force. Those changes are detailed in Part II of the Commission's report.

a. Pre-Love Adjudication Categories

At the time of the Eulia Love incident, OIS incidents were adjudicated to be either a) in policy, b) in policy but fails to meet Department standards, or c) out of policy.¹⁸ Public testimony from Department officials regarding the application of this system revealed that it lacked definition and was ineffective in delineating those cases where officers' substandard tactics or decision-making were significant factors in an incident. Rather, the finding was primarily based upon an officer's decision to discharge a weapon, resulting in "in policy" findings even in cases where tactical or other decisions were problematic.

The Commission spent substantial time during its public hearings attempting to clearly define the difference between a shooting that was simply in policy and one in which the officers' actions failed to meet Department standards, and the extent to which poor tactics or other preshooting conduct played into these findings. In particular, much of the questioning focused on whether the evaluation was designed to encompass the entire incident or just the act of shooting. During an illustrative exchange between Commissioner Reva Tooley and Chief of Police Daryl Gates, the commissioner commented that the then-existing system of classifications was a "very critical" issue "because the public interprets the shooting – a shooting as an incident from beginning to end. And I think either we need to change our terminology or they need to be apprised of the fact that when the Department classifies a shooting [as in policy or out of policy] it is really only classifying shots and not the total incident."¹⁹

Ultimately, the Commission determined that the system in place at the time did not clearly provide for separate assessments of the decision to draw a weapon and the decision to fire, and that the intermediate classification -- "in policy but fails to meet Department standards" -- was unclear and produced inconsistent results. Finally, the Commission found that those classifications did not "permit or require formal evaluation of the entire pattern of officer conduct in incidents of officer-involved shootings."²⁰

b. Revised Adjudication Policy

In order to remedy the problems identified with the adjudication system, the Commission adopted a new series of classifications. Under the new system, an officer-involved shooting or other serious use of force would be adjudicated using three classifications: Tactics, Drawing/Reholstering of Weapon, and Use of Force.²¹ Although refinements have been made to

¹⁸ If unintentional, a shooting could also be classified as "accidental."

¹⁹ Transcript of session "Re: Eulia Love Reports," May 29, 1979, Los Angeles Board of Police Commissioners, pg. 81.

²⁰ Report, Part II, pg. 21.

²¹ Drawing/Reholstering of Weapon is now called Drawing/Exhibiting. The Commission also designated an "Additional Considerations" section for the discussion of any other issues not addressed in the first three categories.

the processes by which uses of force are adjudicated since 1979, the three adjudicative classifications remain unchanged.

According to the report, the new process was designed to “assist both the Department and the Police Commission in ensuring review of officer-involved shooting incidents in a manner which is uniform and consistent, which has direct application to departmental practice and which can earn widespread community acceptance.”²²

At the time the policy was implemented, the finding in each of the first three classifications could result in a recommendation of either no action or referral for divisional training or discipline. Those options were later clarified and refined as part of the Department’s 2008 Use of Force Directive, which created a finding of “Tactical Debrief” and set a standard for determining when deficiencies in tactics will result in administrative disapproval.

c. The Commission’s Intent

As set forth by the Commission, the revised classifications did not preclude the consideration of preshooting tactics or other conduct as part of the evaluation of the totality of circumstances relevant to the decision to use force. The OIG’s review of the Eulia Love materials found indications that the Commission’s intent in modifying the existing policy was to ensure, instead, that the use of force was evaluated as part of a continuum of officer actions and decisions.

The commissioners spent significant time discussing their preference in evaluating each use of force case as a whole, rather than a series of isolated components. The commissioners also paid special attention to the potentially causal relationship between preshooting conduct and the use of force. In setting forth the rationale for the new policy, the Commission’s report explicitly states that one drawback of the pre-Love system was, specifically, that “the present categories do not provide for those cases where the officer has placed himself in a position of an ‘in policy’ use of deadly force by reason of a deficient tactical approach to a police problem.”²³ This concern was highlighted in the Commission’s evaluation of the Love shooting, which found not only that “the officers made serious errors in judgement, and in their choice of tactics, which contributed to [the shooting],” but that those tactics “locked the officers [...] into a situation which precipitated the use of deadly force.”²⁴ As referenced earlier, the Commission further implied that while the officers in that case may have been justified in using deadly force as self-defense, this was only the case because they had placed themselves in such a situation by prematurely escalating the confrontation. As such, it appears unlikely that the Commission intended for tactics and the use of force to be evaluated in isolation from each other.

²² Report, Part II, pg. 25.

²³ *Id.*, pg. 22.

²⁴ Report, Part I, pgs. 30, 22.

Another indication of the Commission's intent is found in its analysis of the use of deadly force in the Love incident itself, which focused not on the circumstances present at the moment the force was used but on related tactical questions. In its evaluation of whether the force was authorized, the Commission's review emphasized the fact that Love did not pose an immediate threat of death or serious bodily injury at the time the officers exited their car, but did not come to a conclusion about whether such a threat was present at the moment of the shooting. Instead, the report focused on the officers' escalation of the incident and implied that at least some of the shots fired could have been out of policy on that basis. Furthermore, the Commission found that the use of rapid fire as Love fell violated the Department's firearms policy on the minimization of the risk of death, making the use of force out of policy.

Nowhere in its discussions or report did the Commission indicate that it intended the three adjudicative classifications to be considered in isolation from one another. Indeed, the Commission's finding that the prior system did not provide for an assessment of "the entire pattern of officer conduct" strongly suggests that the revised (and still-current) system of classifications was designed to facilitate a comprehensive review of an incident.

IV. THE LAPD'S PROCESS FOR INVESTIGATING AND ADJUDICATING CUOF INCIDENTS

The third component of the OIG's examination of this issue was a review of the Department's current practices with regard to the investigation and adjudication of the use of deadly force by LAPD officers. In completing this review, the OIG considered the extent to which current practice is aligned with the Love-era Commission's intent in creating the system, as well as with the Court's findings in *Hayes*.

As stated above, LAPD policy classifies shootings and other serious uses of force as Categorical Use of Force (CUOF) incidents, which include those incidents involving one or more of the following types of events:

- Officer-Involved Shooting (OIS): Any incident where one or more LAPD officers intentionally fires a weapon at a person, whether or not a person is hit. This category also includes warning shots.
- Head Strikes: Any strike to the head with an impact weapon. Inadvertent strikes without significant injury may be excluded from this category.
- Officer-Involved Animal Shooting: Any incident where one or more LAPD officers intentionally discharges a firearm at an animal.²⁵
- Carotid Restraint Control Hold (CRCH): Any use of the CRCH technique, which involves the application of pressure to the sides of a subject's neck and can render the subject unconscious.

²⁵ Although Non-Tactical Unintentional Discharges and Officer-Involved Animal Shootings are adjudicated by the Commission, the investigation and evaluation processes for these incidents are more limited than those of other CUOF incidents.

- Use of Deadly Force: Any other use of lethal force not captured by the previous categories, such as the deliberate striking of a person with a vehicle.
- Unintentional Discharge (UD): An event where a Department employee unintentionally discharges a firearm.
- In-Custody Death (ICD): Any incident where a person dies while in the custody of the LAPD and/or following the use of force by a Department employee.²⁶
- Law-Enforcement-Related Injury (LERI): Any incident where a person is admitted to a medical facility as the result of a use of force by a Department employee.
- Canine Contact: A canine contact that results in the hospitalization of the subject.

Because CUOF incidents represent some of the Department's most significant events, the protocols for their investigation and adjudication are detailed and rigorous. As described in the following sections, each CUOF incident is carefully documented and scrutinized by multiple entities across the Department, including the OIG and the Commission.²⁷ All other reportable uses of force are classified as Non-Categorical Use of Force (NCUOF) incidents. In contrast to CUOF incidents, NCUOF incidents are reviewed by the involved officers' chain of command, with final adjudication by the Commanding Officer of the Use of Force Review Division (UOFRD). More information about the investigation and adjudication of NCUOF incidents can be found in the OIG's June 2013 report on the topic.

A. Investigation of CUOF Incidents

1. Incident Response

Department employees are required to immediately report all CUOF incidents to a supervisor.²⁸ At that time, one or more supervisors will respond to the scene and take immediate action to secure the scene, protect any evidence, and to ascertain which officers used force or were substantially involved in tactical decision-making. As part of that process, the supervisor in charge of the scene will take a public safety statement from each of the involved officers and, if necessary, other officers present at the scene.²⁹ Each officer is asked a series of basic questions designed to provide information about potential safety concerns, such as the number and

²⁶ Under certain circumstances, such an incident may later be reclassified as a "Death Investigation" by the Commission, which is then removed from the CUOF adjudication process.

²⁷ Because the majority of CUOF incidents involve the use of firearms, and because those investigations are normally the most complex, the OIG's description of the CUOF process is based primarily on the investigation of OIS incidents. Investigations of other types of incidents -- such as unintentional discharges and animal shootings -- may be more limited.

²⁸ In most incidents, the notification will occur while the involved officers are at the scene, although there may be some instances, such as an ICD, where the incident is designated as a CUOF after the officers' initial involvement. In such cases, there may not be an on-scene investigation.

²⁹ Under certain circumstances, the obligation to provide a public safety statement supersedes an officer's right to remain silent.

direction of any shots fired and the location and existence of any outstanding suspects or evidence. These questions also provide preliminary information for the purposes of the on-scene investigation.

The supervisor in charge will then ensure that the involved and witnessing officers, called percipient witnesses, are individually separated according to Department protocols. Those protocols, which are designed to prevent officers at the scene from discussing the incident, require that the officers be individually monitored by a supervisor until they are interviewed by investigators. Officers are admonished that they may not talk about the incident with one another prior to their interview nor should supervisors discuss tactics or other decisions with the officers. In situations where resource constraints prevent the individual monitoring of every officer, groups of percipient witnesses may be monitored by one supervisor, but they are nonetheless prohibited from conferring about the incident.

Finally, the supervisor in charge or watch commander is responsible for ensuring that all appropriate preliminary notifications are made, including to the Real-Time Analysis and Critical Response Division (RACR), the Department's 24-hour command post, which is responsible for completing notifications to the investigative team; the Chief of Police; the OIG; the District Attorney's Office – if required; and others.

2. Investigation

Responsibility for the investigation of a CUOF incident falls to the Department's Force Investigation Division (FID), made up of several teams of detectives and technical staff specializing in the investigation of serious uses of force. A team of FID personnel responds to each CUOF incident and is responsible for managing and overseeing the on-scene investigation -- including the photographing and collection of physical evidence and documentation of the physical environment -- as well as conducting subsequent interviews of officers and any other investigation.³⁰

Along with the processing of evidence and canvassing of the area for witnesses, a major component of the on-scene investigation is the process of walking each involved officer and percipient witness through the scene of the incident. During that process, FID personnel ask officers to provide information about their movements and positioning throughout the incident, as well as those of the suspect. Officers are also photographed in the clothing and equipment they were wearing at the time of the incident and any firearms or other weapons used are collected and processed.

Following the walk-throughs, FID conducts in-depth, tape-recorded, individual interviews of all officers who were "substantially involved" in the incident -- Department employees who used force or "who had a significant tactical or decision making role in the incident" -- and percipient

³⁰ Evidence collection and analysis, including firearms analysis, is conducted by the Department's Scientific Investigation Division (SID).

witnesses.³¹ Barring concerns about an officer's condition due to injury, trauma, or fatigue, these interviews are conducted on the same day as the incident, until which time they are continuously monitored by a supervisor.³² Officers are, however, afforded representation throughout the walk-through and interview process.

The Department assigns responsibility for both the administrative investigation and, if necessary, the criminal investigation of a CUOF incident, to FID, which assigns two teams to develop both investigations concurrently. The criminal investigation is focused solely on the question of the officers' criminal culpability, while the administrative investigation focuses on the officers' actions, including the use of force, as they pertain to relevant Department policy. It is the general practice of LAPD officers -- including those who witness an incident -- not to provide a voluntary interview. As such, nearly all FID interviews of Department officers are "compelled," meaning the officers are ordered to submit to questioning as a condition of their employment with the City. Because officers maintain their Fifth Amendment right against self-incrimination, however, no information obtained as a result of their compelled interview may be used against them in a criminal case.

To ensure that a "wall" is maintained between such information and the criminal investigation, FID assigns separate teams to conduct the investigations.³³ The "administrative" team is responsible for conducting compelled interviews of involved officers, while the "criminal" team conducts interviews of percipient Department witnesses and other persons who witnessed the incident. The administrative investigation may use any information gathered during the criminal investigation, but information or evidence gleaned from compelled interviews with the involved officers may not be shared with the criminal team.

During the interview, FID asks involved officers about their planning, decision-making, actions, and observations throughout the incident in an attempt to determine what information was available to the officers, what tactics were used, and officers' reasoning for their actions. All interviews are subsequently transcribed to facilitate the review process.

In general, officers are not shown video footage of the incident, such a surveillance video that captures a use of force, prior to their initial interview. The only exception to this practice is footage taken from the Department's Digital In-Car Video System (DICVS), which, when activated, records audio and video from a patrol car's front-facing and back-seat cameras. Department policy requires that officers be shown any footage of the incident captured by their own DICVS prior to their initial interview. In instances where officers need to be questioned

³¹ "Adjudication of Categorical Use of Force Incidents," Use of Force Directive, Office of the Chief of Police, July 2008.

³² There are some instances in which the CUOF classification is made some time after the event -- for example, when a person is admitted to a medical facility several hours after the initial use of force. In such cases, it may not be possible to conduct all of the interviews immediately. In such cases, they will be scheduled as soon as possible.

³³ The criminal investigation of the suspect, if necessary, is, in most cases, conducted by a separate FID team, the Criminal Apprehension Team.

about additional video, or where supplementary information is required, FID will schedule subsequent interviews, which are conducted in the same manner as the initial interviews.

Along with conducting interviews, FID is also responsible for completing the rest of the investigation, including collecting and reviewing autopsy or medical reports, ballistic and other evidentiary analysis, and any other information that is relevant to the case. All of these data are ultimately compiled into the investigative record and incorporated into a final investigative report to be submitted to the OIG and the Use of Force Review Board (UOFRB).

The OIG's Role

The OIG is promptly notified of any CUOF that occurs. A representative of the OIG responds to the scene of the incident and monitors the on-scene investigation on behalf of the Inspector General and the Commission. The OIG's oversight role relative to the investigation is continual, and, following the on-scene response, the OIG regularly interacts with FID to monitor the conduct of ongoing investigations through to their completion.

3. 72-Hour Briefing

Approximately 72 hours following an OIS, a preliminary briefing to the Chief of Police will be scheduled.³⁴ During this meeting, FID will make a presentation of the preliminary findings of its investigation, to be followed by a review of the officers' backgrounds and an update from each officer's commanding officer. Whenever an officer is involved in an OIS incident, they are sent to Behavioral Science Services for a psychological assessment and also undergo generalized refresher training in a number of standard areas. The commanding officer is responsible for providing an initial assessment of the officer's status, including any need for additional training or intervention. Based on this assessment and any additional discussion, the Chief then determines whether each officer should be returned to the field or whether other steps should be taken.

The OIG attends each 72-hour briefing and provides input on these issues as required.

A. Adjudication of CUOF Incidents

1. Adjudication Process

Following the completion of the CUOF investigation and the compiling of the investigative report, each incident undergoes a rigorous review process, culminating in the final adjudication by the Commission.

The first step is a review of the incident by the UOFRB. The board, chaired by the Director of the Office of Administrative Services, reviews the performance of each substantially involved

³⁴ A briefing may also be held in other types of incidents as necessary.

officer for tactics, drawing and exhibition of a firearm, and the use of force.³⁵ As part of this process, the UOFRB receives a presentation on the incident from an FID investigator, followed by an assessment and recommendations from the involved officer's commanding officer. Although they do not participate in the process, the involved officers may observe this portion of the proceedings, as well as a brief review of their employment histories, including any previous CUOF incidents and/or sustained personnel complaints. The UOFRB then develops recommended findings to be presented to the Chief of Police in each of the relevant areas including, when necessary, the minority opinion for any board members whose analysis or recommendation differs from that of the majority. Representatives from the OIG attend each UOFRB meeting to exercise an oversight role and provide input to the discussion as appropriate.

The recommendations of the UOFRB, including any minority opinions, are presented to the Chief of Police for his review. The Chief of Police determines whether to accept those recommendations or to make different findings. A correspondence to the Commission, detailing the Chief's analysis and conclusions, is prepared by UOFRD and signed by the Chief. This report, along with the FID investigation of the incident, is ultimately submitted to the Commission for its review. The OIG also receives those documents and, following a review of all investigative materials, prepares its own analysis of the incident and its investigation. The OIG's report provides an annotated summary of the incident, an assessment of the quality of the investigation and of the Chief's analysis, and any supplemental analysis it deems appropriate. Finally, the report sets forth an independent set of recommended findings for the Commission's consideration. While the OIG concurs with the Chief's findings in many cases, the OIG's recommendations may differ from the Department's.

The final step of an incident's review is the adjudication by the Commission of the case, which occurs in closed session. Prior to the meeting, Commission members will have received and had the opportunity to review the investigative file and the reports provided by the Chief and the OIG. They then receive a presentation from FID on the incident itself, which includes a summary of the events, relevant video or audio footage, and a description of any relevant evidence. The Commissioners also receive a brief overview of each involved officer's work history. Following deliberations, during which they may ask questions of the Department and the OIG, the Commission ultimately votes either to adopt the Chief's analysis and recommendations or, in some cases, to amend one or more aspects of those findings. In those cases where the decision is made to amend the Chief's findings, the OIG will, on the Commission's behalf, prepare a report that memorializes the basis for the Commission's amendment.

³⁵ Along with the Chairperson, the UOFRB is composed of an Office Representative, the Deputy Chief over Personnel and Training Bureau, the Deputy Chief of the involved Bureau(s), and a Peer Member for each rank of involved officer.

2. *Adjudication Categories*

Based on procedures put into place following the 1979 shooting of Eulia Love, described in the previous section, each Department employee involved in a CUOF is adjudicated in each of the following categories, as applicable: tactics, drawing and exhibition of a firearm, and use of force. Those procedures were further codified and clarified in a Use of Force Directive approved by the Commission in 2008.³⁶

The Department uses “preponderance of the evidence” as its administrative standard of proof, meaning that the adjudicator must determine whether it is “more likely than not” that an officer’s conduct complied with the applicable standard. As described in the following sections, the general practice of the Department is to evaluate each of the three classifications in isolation from the others, which may lead to outcomes that are inconsistent with *Hayes*. While there is no explicit prohibition against the consideration of deficiencies in preshooting conduct -- whether in the form of tactics, the decision to draw and exhibit a firearm, or other relevant decisions -- during the ultimate evaluation of the use of force, there is likewise no explicit mechanism for doing so.

a. Tactics

The evaluation of the tactics used by an officer or a group of officers encompasses any of the strategies or methods used prior to, during, and following a use of force. As such, issues evaluated under this heading may include diverse topics such as planning and supervision, communication among officers, approach and positioning, availability and deployment of equipment and weapons, interactions with suspects, and post-incident procedures. The analysis may also identify issues relating to officers’ performance during the actual use of force, such as concerns about fire control, shooting backdrop, or the potential for crossfire. All aspects of involved officers’ tactical performance are assessed for compliance with relevant Department tactical training.

The purpose of the tactical analysis in a CUOF is twofold. First, it identifies those officers who were substantially involved in tactical decision-making. Under Department policy, each such officer will be sent to a tactical debrief, defined as a “collective review of an incident to identify those areas where actions and decisions were effective and those areas where actions and decisions could have been improved.”³⁷ The analysis identifies areas in which the officers’ tactical decision-making warrants review -- called debriefing points -- that will be included along with the general debrief. Second, it analyzes whether there are areas in which any tactical deficiencies rose to the level where they “unjustifiably and substantially deviated from approved Department tactical training.” Such a determination will result in administrative disapproval of the officers’ tactics.

³⁶ “Adjudication of Categorical Use of Force Incidents,” Use of Force Directive, Office of the Chief of Police, July 2008.

³⁷ *Id.*, pg. 2.

Ultimately, each substantially involved officer will receive a finding of either “Tactical Debrief” or “Administrative Disapproval.” For those officers who receive the latter finding, the Chief will determine whether that finding should result in a Notice to Correct Deficiencies, extensive retraining, or the initiation of a personnel complaint for possible disciplinary action.

This category encompasses many of the decisions that make up an officer’s “preshooting conduct” as referenced in *Hayes*, but these are, in most cases, evaluated separately from the use of force itself. Although the tactical decisions in the majority of cases are ultimately unrelated to the circumstances surrounding a use of force, there may be rare instances in which identified tactical deficiencies are found to lead to an “in policy” shooting that would otherwise not have occurred.

The OIG also notes that this classification does not encompass evaluation of preshooting decisions that do not fall into the category of tactics, including, for instance, decisions regarding the legality of detentions or searches. This type of conduct is evaluated as part of the process but is discussed as an “Additional” consideration and does not receive an adjudication by the Commission. Instead, any legal or other policy/administrative issues are handled outside of the CUOF adjudication process.

b. Drawing and Exhibition of a Firearm

Any substantially involved officer who unholsters his or her firearm during a CUOF incident will receive a finding in this classification, regardless of whether or not they discharged the weapon. According to Department policy, “[a]n officer's decision to draw or exhibit a firearm should be based on the tactical situation and the officer’s reasonable belief there is a substantial risk that the situation may escalate to the point where deadly force may be justified.”³⁸ As such, the evaluation of this decision seeks to determine whether, based on the preponderance of the evidence and the tactical situation, the officer may hold a reasonable belief that the threshold for the drawing and exhibition of the firearm has been met.

Each officer’s decision to draw his or her weapon will result in a finding of “In Policy” or “Out of Policy.” As with tactics, the finding in this category is generally developed in isolation from any subsequent use of the firearm. As a result, it could be possible to have a situation where the officer’s decision to draw his or her weapon is found to be out of policy, but the ultimate use of deadly force -- even if precipitated by the drawing of the officer’s firearm -- would be found in policy.

c. The Use of Force

The question of whether a use of force -- particularly the use of deadly force -- was compliant with the Department’s policy is a key question in the evaluation of a CUOF incident. Depending

³⁸ LAPD Manual 1/556.80, “Drawing or Exhibiting Firearms.”

on the type of force used, each person using or directing the use of force will receive one or more Use of Force findings, which are divided into the following groups:

- Lethal: the use of deadly force, including the discharge of a firearm, strikes to the head with an impact weapon, or other force that “creates a substantial risk of causing death or serious bodily injury.”³⁹
- Less-Lethal: the use of a less-lethal weapon, such as a TASER or beanbag shotgun.
- Non-Lethal: the use of other force, such as bodyweight, takedowns, or strikes.⁴⁰

All uses of force, regardless of level, are evaluated according to the Department’s use of force policy, which states that Department employees “may use only that force which is ‘objectively reasonable’ to: defend themselves; defend others; effect an arrest or detention; prevent escape; or overcome resistance.”⁴¹

Along with listing the general circumstances under which force may be used, the policy also provides the specific parameters for the use of firearms or other deadly force. According to the policy, “officers are authorized to use deadly force to:

- Protect themselves or others from what is reasonably believed to be an imminent threat of death or serious bodily injury; or,
- Prevent a crime where the subject’s actions place person(s) in imminent jeopardy of death or serious bodily injury; or
- Prevent the escape of a violent fleeing felon when there is probable cause to believe that the escape will pose a significant threat of death or serious bodily injury to the officer or others if apprehension is delayed. [...]”⁴²

The Department further constrains the use of deadly force by restricting the circumstances under which officers may fire at or from a moving vehicle. Under that policy, officers “shall not” discharge a firearm at a “moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle.”⁴³ In general, officers are instructed to move out of the path of an oncoming vehicle rather than fire at it, and are directed likewise not to fire from a moving vehicle except in certain circumstances. The policy does allow, however, for exceptions to this prohibition, such as instances in which there was “no reasonable or apparent means of escape.”

³⁹ “Use of Force Policy – Revised.” Directive No. 1, Use of Force – Tactics Directive, July 2009, pg. 2.

⁴⁰ Although the use of less-lethal weapons or non-lethal force does not generally rise to the level of a CUOF incident, these categories may be included in instances where such force is used in an incident where the subject dies or is hospitalized. Additionally, any force used during an OIS or other deadly force incident will be evaluated through the CUOF process, even if it did not lead to death or hospitalization.

⁴¹ *Id.*

⁴² “Use of Force Policy – Revised.” Directive No. 1, Use of Force – Tactics Directive, July 2009, pg. 3.

⁴³ *Ibid.*

Objective Reasonableness

In determining whether a use of force was in policy, adjudicators will determine whether, based on a preponderance of the available evidence, each officer's use of force was "objectively reasonable" in light of the Department's use of force policies. Derived from the Fourth Amendment legal standard, as established by *Graham v. Connor*, 490 U.S. 386 (1989), this reflects the concept that "the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."⁴⁴ The Department further defines the reasonable officer as a "Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances."⁴⁵

In keeping with *Graham*, the current policy includes a non-exhaustive list of factors that may be used to determine reasonableness, such as the seriousness of the crime or suspected offense; the level of threat or resistance presented by the subject; whether the subject was posing an imminent threat to officers or a danger to the community; and officer versus subject factors such as age, size, relative strength, and other characteristics.⁴⁶ According to *Graham*, the test of reasonableness "is not capable of precise definition or mechanical application;" instead, "the question is 'whether the totality of the circumstances justifie[s]' " the use of force.

As currently written, none of the factors listed in the Department's use of force policy explicitly address the relevance of tactical conduct and other decisions preceding the use of force. Although the policy does not limit the factors to be calculated in the totality of the circumstances, and the policy on shooting at moving vehicles does take into account tactical decision-making, the *Graham* test has generally been interpreted to focus primarily on the circumstances present at the moment that force is used.

The Commission is not restricted from considering preshooting conduct in its evaluation of the reasonableness of a use of force, and the OIG has noted instances in the past where the Commission has considered incidents in their totality. Nonetheless, without clarification, the language of the current policy -- combined with the adjudicative separation of findings for tactics and the use of force -- creates the impression that an adjudicator should focus simply on the circumstances present in the exact moment that deadly force was used. Without clarification, the existing policy would appear to suggest that adjudicators should ignore all preshooting decision-making when deciding when a use of lethal force is in policy, no matter how otherwise relevant those actions were. Such an approach is inconsistent with the Love-era Commission's apparent

⁴⁴ "Use of Force Policy -- Revised." Directive No. 1, Use of Force -- Tactics Directive, July 2001, pg. 1.

⁴⁵ *Id.*, pg. 2.

⁴⁶ For a full list of factors, please see the current use of force policy, included as an appendix to this report.

intent in developing the new adjudication policy and is likely at odds with *Hayes*, which found “no sound reason to divide plaintiff’s cause of action into a series of decisional moments [...] when each is part of a continuum of circumstances surrounding a single use of force by [officers].”⁴⁷

V. OIG RECOMMENDATION

Based on its review of the decision in *Hayes*, the OIG has concluded that, under California negligence law, an officer’s decisions leading up to a use of deadly force are “relevant considerations” in determining whether the force was negligent, and that such conduct may show, as part of the totality of the circumstances, that the use of force was reasonable or unreasonable. As such, State law is more expansive than the Fourth Amendment “objective reasonableness” standard set forth in *Graham*, which, in most cases, looks more narrowly at the circumstances facing an officer at the moment that force was used.

The OIG has determined that the current CUOF adjudication process, which typically functions to produce separate evaluations for tactics, drawing, and the use of force, is well-designed and leads to a comprehensive evaluation of each incident that properly compares each decision made by officers against its applicable standard. The design of the process does not, however, limit the Commission’s authority to consider tactics and other preshooting conduct in their assessment of the reasonableness of a use of force, when appropriate. The OIG has noted instances when the Commission has exercised that authority, although the cases in which an out-of policy finding has been made due to preshooting conduct have been extremely rare. In the OIG’s experience, such a finding has only occurred in cases where the conduct was so substantially deficient that it unreasonably created the need to use deadly force.

While the Department’s current use of force policy includes a non-exhaustive list of factors that may be used to determine reasonableness, the section does not explicitly address the relevance of tactical conduct and decisions preceding the use of deadly force. Accordingly, in light of the *Hayes* opinion, the use of force policy currently employed by the Department can be interpreted as being less restrictive than the minimum standard set by current State law. The OIG recommends that this matter be corrected by clarifying the policy to include that adjudicators may consider “the tactical conduct and decisions leading up to the use of deadly force.”⁴⁸ This language precisely mirrors the language of the Court’s opinion and its addition to the Department’s use of force policy would serve to unambiguously align that policy with State law.

⁴⁷ *Hayes v. County of San Diego*, No. S193997 (Cal. Aug. 19, 2013).

⁴⁸ Please see LAPD Manual, Volume 1, Section 556.10, a copy of which is attached in the Appendix of this report. As stated above, the policy lists the non-exclusive factors to be considered when evaluating a use of force. In addition to these, the OIG recommends that a reference to preshooting conduct be added to the section on the use of deadly force. Specifically, the OIG recommends that the following sentence be inserted after the list of bulleted conditions under which the use of deadly force is authorized, found on page 25, paragraph 1 of this document: “The reasonableness of an officer’s use of deadly force includes consideration of the officer’s tactical conduct and decisions leading up to the use of deadly force.” This language has been developed in consultation with the Department and the City Attorney’s Office, and has been agreed to by all of the parties.

This approach would also serve to align adjudicative practice with the original intent of the Commission in adopting the current three-classification system, enabling officer conduct during an incident to be considered in its totality. Such a change in practice would not require any amendment to existing adjudication policy, and could be immediately implemented.

Appendix
Los Angeles Police Department Manual, Volume 1
Current Use of Force Policy

556.10 POLICY ON THE USE OF FORCE.

PREAMBLE TO USE OF FORCE. The use of force by members of law enforcement is a matter of critical concern both to the public and the law enforcement community. It is recognized that some individuals will not comply with the law or submit to control unless compelled to do so by the use of force; therefore, law enforcement officers are sometimes called upon to use force in the performance of their duties. It is also recognized that members of law enforcement derive their authority from the public and therefore must be ever mindful that they are not only the guardians, but also the servants of the public.

The Department's guiding value when using force shall be reverence for human life. When warranted, Department personnel may objectively use reasonable force to carry out their duties. Officers who use unreasonable force degrade the confidence of the community we serve, expose the Department and fellow officers to legal and physical hazards, and violate the rights of individuals upon whom unreasonable force is used. Conversely, officers who fail to use force when warranted may endanger themselves, the community and fellow officers.

DEFINITIONS.

Objectively Reasonable. The legal standard used to determine the lawfulness of a use of force is the Fourth Amendment to the United States Constitution. See *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* states in part, "The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain and rapidly evolving - about the amount of force that is necessary in a particular situation. The test of reasonableness is not capable of precise definition or mechanical application." The force must be reasonable under the circumstances known to the officer at the time the force was used. Therefore, the Department examines all uses of force from an objective standard rather than a subjective standard.

Factors Used To Determine Reasonableness. The Department examines reasonableness using *Graham* and from the articulated facts from the perspective of a Los Angeles Police Officer with similar training and experience placed in generally the same set of circumstances. In determining the appropriate level of force, officers shall evaluate each situation in light of facts and circumstances of each particular case. Those factors may include but are not limited to:

- The seriousness of the crime or suspected offense;
- The level of threat or resistance presented by the subject;
- Whether the subject was posing an immediate threat to officers or a danger to the community;

- The potential for injury to citizens, officers, or subjects;
- The risk or apparent attempt by the subject to escape;
- The conduct of the subject being confronted (as reasonably perceived by the officer at the time);
- The time available to an officer to make a decision;
- The availability of other resources;
- The training and experience of the officer;
- The proximity or access of weapons to the subject;
- Officer versus subject factors such as age, size, relative strength, skill level, injury/exhaustion, and number of officers versus subjects; and,
- The environmental factors and/or other exigent circumstances.

Deadly Force. Deadly Force is defined as that force which creates a substantial risk of causing death or serious bodily injury.

Imminent. Black's Law Dictionary defines imminent as, "Near at hand; impending; on the point of happening."

Serious Bodily Injury. California Penal Code Section 243(f)(4) defines Serious Bodily Injury as including but not limited to:

- Loss of consciousness;
- Concussion;
- Bone fracture;
- Protracted loss or impairment of function of any bodily member or organ;
- A wound requiring extensive suturing; and,
- Serious disfigurement.

Warning Shots. The intentional discharge of a firearm off target not intended to hit a person, to warn others that deadly force is imminent.

POLICY.

Use of Force – General. It is the policy of this Department that personnel may use only that force which is "objectively reasonable" to:

- Defend themselves;
- Defend others;
- Effect an arrest or detention;
- Prevent escape; or,
- Overcome resistance.

Deadly Force. Law enforcement officers are authorized to use deadly force to:

- Protect themselves or others from what is reasonably believed to be an **imminent** threat of death or serious bodily injury; or,
- Prevent a crime where the suspect's actions place person(s) in **imminent** jeopardy of death or serious bodily injury; or,
- Prevent the escape of a violent fleeing felon when there is probable cause to believe the escape will pose a significant threat of death or serious bodily injury to the officer or others if apprehension is delayed. In this circumstance, officers shall, to the extent practical, avoid using deadly force that might subject innocent bystanders or hostages to possible death or injury.

Warning Shots. Warning shots shall only be used in exceptional circumstances where it might reasonably be expected to avoid the need to use deadly force. Generally, warning shots shall be directed in a manner that minimizes the risk of injury to innocent persons, ricochet dangers, and property damage.

Shooting At or From Moving Vehicles. Firearms shall not be discharged at a moving vehicle unless a person in the vehicle is immediately threatening the officer or another person with deadly force by means other than the vehicle. The moving vehicle itself shall not presumptively constitute a threat that justifies an officer's use of deadly force. An officer threatened by an oncoming vehicle shall move out of its path instead of discharging a firearm at it or any of its occupants. Firearms shall not be discharged from a moving vehicle, except in exigent circumstances and in the immediate defense of life.

Note: It is understood that the policy in regards to discharging a firearm at or from a moving vehicle may not cover every situation that may arise. In all situations, Department members are expected to act with intelligence and exercise sound judgment, attending to the spirit of this policy. Any deviations from the provisions of this policy shall be examined rigorously on a case by case basis. The involved officer must be able to articulate clearly the reasons for the use of deadly force. Factors that may be considered include whether the officer's life or the lives of others were in immediate peril and there was no reasonable or apparent means of escape.