

FINAL REPORT OF THE COMMISSION

Name of Review Committee	USE OF FORCE REVIEW COMMITTEE
Chairperson(s) of Review Committee	DAVID A. SONENSHEIN, ESQ.
Members of Review Committee	JOSHUA S. MAINES, ESQ., and Vice-Chairperson ELIZABETH C. PITTINGER
Non-Member Advisors	Commission Chairperson SHA BROWN, and OSIG Senior Special Investigator TIFFANY WELCOME
Ex-officio Member	ANGELA FITTERER*
Date Review Started	11/09/2021
Report Number	21-0014-P
Date of Report	10/28/2022

* NOTE: Appointment of an Ex-officio (or non-voting) Member to all Review Committees is required by Article 8 (Review Process), Section 8.2 (Commission Sub-committees and Review Committees) of the Commission's Bylaws; however, the Ex-officio Member does not vote on any of the content contained in this report.

TYPE OF COMMITTEE REVIEW

Name of Covered Agency	PENNSYLVANIA BOARD OF PROBATION AND PAROLE [WITHIN THE PENNSYLVANIA DEPARTMENT OF CORRECTIONS]
Nature of Completed Internal Investigative Findings Under Review (i.e., Police-Involved Shooting, Lower-Level Use of Force, Bias-Based Policing)	LOWER-LEVEL USE OF FORCE – (TASER DEPLOYMENT)

BACKGROUND

Incident Date	September 5, 2017
Troop Jurisdiction of Incident	Troop H (PA Board of Probation and Parole – Harrisburg, PA)
Criminal Disposition	Not Applicable
Agency Administrative Disposition	Ruled Justified – Deputy Secretary (Parole Field Services, December 27, 2018)

SCOPE AND METHODOLOGY OF REVIEW

Under Executive Order 2020-04, as amended, the Pennsylvania State Law Enforcement Citizen Advisory Commission (Commission) is required to review a Covered Agency's completed internal investigation concerning lower – level uses of force during interactions with law enforcement personnel to determine the following:

1. Whether the completed internal investigation was:
 - Prompt;
 - Fair;
 - Impartial;
 - Complete; and
 - Performed in a manner consistent with applicable policies.
2. Whether the internal adjudicatory findings and discipline (if any) were reasonable under standard law enforcement protocol; and
3. Whether there is a perceived policy or training deficiency.

Under the methodology contemplated by Executive Order 2020-04, as amended, a Covered Agency is required to provide a Comprehensive Written Summary and an Oral Presentation of its completed internal investigation that shall include a description and relevant dates of all investigative activities along with a summary of all facts as determined by the investigation, and criminal and administrative adjudications.

In performing its review of the matter currently under consideration, the Commission's Use of Force Review Committee (Review Committee) used the following methodology:

1. Reviewed how the Covered Agency's completed internal investigation was conducted when compared to internal policy and relevant collective bargaining agreements to determine whether the investigation was conducted in a prompt and fair manner.
2. Reviewed internal relevant policies designed to safeguard fairness and impartiality to ensure that the Covered Agency's completed internal investigation was conducted in accordance with said policies and determine whether any conflict of interest exists based on all known information.
3. Reviewed the Covered Agency's completed internal investigation to ensure investigators collected all relevant facts reasonably obtainable and conducted all relevant interviews.
4. Reviewed the Covered Agency's adjudication report to ensure all relevant facts were considered, including all known actions by the law enforcement officer(s), to determine whether the adjudicator's decision was reasonable and based on a totality of the circumstances.
5. Compared the discipline issued (if any) with past disciplinary precedent to confirm that the discipline (if any) was reasonable and consistent with the Covered Agency's just cause standard, rules and regulations, collective bargaining agreements, and/or grievance and arbitration decisions.
6. Compared facts and circumstances described in the Covered Agency's completed internal investigation with relevant internal policies and training along with best practice guidelines (i.e., Final Report of *"The President's Task Force on 21st Century Policing"*) to determine if any policy or training deficiencies exist. Where deficiencies are identified, make recommendations for corrective action(s).

RELEVANT POLICIES AND CRITERIA EXAMINED

1. Collective Bargaining Agreement between the Commonwealth of Pennsylvania and Council 13 American Federation of State, County, and Municipal Employees AFL – CIO (July 1, 2016 through June 30, 2019);
2. United States Department of Justice’s (US DOJ) Standards for Internal Affairs (2005);
3. PBPP Policy No. 4.03.08 – Arrest Procedures Resistance and Control Continuum (effective March 1, 2016);
4. PBPP Policy No. 4.03.08 (Appendix A) – Resistance and Control Continuum (effective June 5, 2006 – Present);
5. PBPP Policy No. 4.03.08 (Appendix B) – Federal Law Enforcement Officers Safety Act of 2004 (effective July 22, 2004);
6. PBPP Policy No. 4.03.08 (Appendix C) – Response to Resistance and Control Report (effective March 1, 2016); and
7. PBPP Policy No. 12.02.07.01 – Care and Control of Commonwealth Property (effective October 29, 2020).

COMMISSION’S FINAL DETERMINATIONS, FINDINGS, AND CONCLUSIONS

Pursuant to Executive Order 2020-04, as amended, the Commission completed a comprehensive review of **Internal Case No. 21-0014-P** in accordance with Article 8 (Review Process) of the Commission’s Bylaws and adopts such Findings and Conclusions as follows:

The Commission finds that the Pennsylvania Board of Probation and Parole’s (PBPP) completed internal investigation was prompt, fair, and impartial. The Commission corroborated these determinations by examining PBPP’s investigative reports, relevant interviews, and information provided by PBPP during its Oral Presentation. The Commission also finds that PBPP’s completed internal investigation was consistent with published standards and guidelines established by the United States Department of Justice (US DOJ) concerning internal affairs investigations and PBPP’s relevant collective bargaining agreement.

PBPP also provided the Commission with documentation to form a sufficient understanding of the underlying facts concerning the incident under review and to identify any potential policy or training deficiencies as required by Executive Order 2020-04 (as amended). Based on its review, the Commission finds the following:

Finding No. 1 –

Use of Force Policy Enhancement (Flammable Materials and Taser Deployment)

During its review, the Commission thoroughly examined PBPP’s Resistance and Control Policy, which serves as PBPP’s use of force policy, as well as its Resistance and Control Continuum, the latter of which provides detailed guidance on the varying levels of force. First, the Commission recognizes PBPP’s continued efforts to improve this policy by adopting and implementing best practices along with PBPP’s pending incorporation of Recommendation No. 1, Subsection 2 of its **Final Report for Internal Case No. 21-0005-P (ratified May 13, 2022)** regarding amendment of its Resistance and Control Continuum.

Based on its review of the completed investigation of this underlying incident, the Commission finds that PBPP’s Resistance and Control Policy could be strengthened even further by: (a) detailing where TASER deployments fall within the level of control on PBPP’s Resistance and Control Continuum; and (b) including appropriate warnings concerning TASER deployments in, or around, areas where flammable liquids or similar materials are present. Currently, PBPP’s Resistance and Control Continuum lists six levels of control that an agent may utilize in response to a subject’s resistance, including:

(1) **Officer Presence** – a compliance option consisting of the employee’s announcement of his or her presence or identity as a law enforcement officer to stop a subject’s resisting behavior. Employees shall properly identify themselves if their identity is unknown to the subject;

(2) **Verbal Direction** – a low level compliance option consisting of verbal direction and/or commands given to the subject by an employee to control a subject’s movements and/or the employee’s surroundings. An employee can also use

verbal direction to persuade the subject to stop resisting behavior. Often, the mere presence of an employee or proper verbal direction will be sufficient to persuade most subjects to follow an employee's direction;

(3) **Pain Compliance** – a low level compliance option resulting in minimal injury to the resisting subject and is primarily designed to control low levels of resistance. Pain compliance techniques include escort techniques, pressure points, or the use of Oleoresin Capsicum (OC) Spray. Employees can use the pain compliance option to control passive or defensive resistance;

(4) **Physical Control** – an intermediate level compliance option using physical control techniques that have a higher probability of subject injury and are used for higher levels of defensive resistance and active aggression. These techniques are applied when lower forms of control have failed or are not viable because the subject's resistance level is perceived to be dangerous. Physical control includes strikes that may be delivered with an employee's open hand, fist, forearm, elbow, leg or foot to the subject's legs, arms, shoulders, torso, or the side of the neck. It may be necessary for the employee to strike sensitive areas, such as the face, where a potential for injury is likely;

(5) **Impact Weapon** – a high level compliance option where an impact weapon provides a method of controlling subjects when lethal force is not justified and when lower levels of force are perceived to be insufficient to control the subject. Employees shall use an impact weapon to stop the subject's actions and to temporarily disable a subject; and

(6) **Lethal Force** – which is incapacitation, any control technique that may result in death or serious bodily injury to the subject.

Regarding warnings associated with TASER deployments in, or around, areas where flammable liquids or similar materials are present, the Commission researched best practices and identified that the United States Department of Justice's Office of Justice Programs provides guidance for, and examples of, policies implemented by law enforcement agencies concerning relevant deployment safety protocols. PBPP's procedures (**Section C - Incidents Involving Control by Employees (2)**) do provide clear guidelines concerning use of OC Spray to control a subject by detailing when the application of OC Spray should be used, when use should be discontinued, the decontamination process, as well as the notification process to another law enforcement agency or custodial facility after a subject is exposed to OC Spray. However, PBPP policy does not provide any cautions for use near flammable materials, such as OC Spray in an area where a TASER was deployed.

During its Oral Presentation in accordance with Article 8 (Review Process) of the Commission's Bylaws in response to specific questions regarding this concern, PBPP replied that it is currently in the process of amending its policy to specifically include TASER deployment and that it falls within the "Pain Compliance" category before physical restraint [Physical Control] and after verbal commands [Verbal Direction]. In addition, PBPP indicated its training includes direction concerning TASER deployment around flammable materials and that TASER deployment is restricted if OC Spray was already used. Accordingly, the Commission finds that PBPP's training aligns with best practices and PBPP indicated that if this same language (as identified by the Commission) is not presently included in its written policy, PBPP will ensure it would be.

Finding No. 2 –

Post-Incident Internal Investigation Procedures (Standards for Completion of Investigations)

During its review, the Commission inquired about PBPP's general standards for completion of internal investigations. Specifically, the Commission asked for more details concerning PBPP's expectation for agents that he or she generate a written report following a use of force incident, the time frame for completion of post-incident interviews and the agency's supervisory reviews of such reports. The Commission notes that it rendered a previous recommendation concerning post-incident interviews concerning the Pennsylvania State Police in its **Final Report for Internal Case No. 21-0012-P (ratified on February 28, 2022)** which included "ensuring post-incident interviews are conducted as soon as practical following the conclusion of the 72-hour waiting period unless exigent circumstances exist," based on best practices published by the US DOJ.

Regarding the expected standard for completion of its internal investigations, the Commission notes that the US DOJ's Standards and Guidelines for Internal Affairs recommends, "completion of internal affairs investigations should occur as rapidly as is reasonably necessary to fulfill the investigative mission. In all instances, however, an internal investigation

should be completed within a reasonable time before any applicable statute of limitations or other bar to officer discipline has run out. It is preferable to conclude investigations within 180 days.”

Accordingly, the Commission finds that PBPP’s existing post-incident internal investigation procedures do consist of several layers of review and approval by its chain of command, up to and including the Deputy Secretary, its Chief Counsel and may involve its Training Division. However, it does not include explicit time frames regarding completion of post-incident interviews and/or review and approval of investigative and adjudicatory reports.

BASED ON ITS REVIEW, THE COMMISSION FINDS THAT THE COVERED AGENCY’S COMPLETED INTERNAL AGENCY INVESTIGATION WAS –

- ✓ **Prompt**
- ✓ **Fair**
- ✓ **Impartial**
- ✓ **Complete**
- ✓ **Performed in Manner Consistent with Applicable Policies**
- ✓ **Included Adjudicatory Findings and Discipline (if any) that were Reasonable and Based on Applicable Standards.**

ADDITIONAL FACTORS / NOTES

Not Applicable

FINAL RECOMMENDATION(S) FOR CORRECTIVE ACTION(S)

Recommendation No. 1 – Use of Force Policy Enhancements

The Pennsylvania State Law Enforcement Citizen Advisory Commission recommends that the Pennsylvania Board of Probation and Parole [within the Pennsylvania Department of Corrections] enhance its Resistance and Control Policy (a/k/a use of force policy) to include:

- 1) details of where TASER deployments fall within the level of control descriptions on its Resistance and Control Continuum; and
- 2) warnings or other cautions regarding TASER deployments in or around areas where flammable liquids or similar materials are present.

Recommendation No. 2 – Post-Incident Internal Investigation Procedures

The Pennsylvania State Law Enforcement Citizen Advisory Commission recommends that the Pennsylvania Board of Probation and Parole [within the Pennsylvania Department of Corrections] enhance its applicable policy to:

- 1) ensure post-incident interviews are conducted as soon as practical following the conclusion of the 72-hour waiting period unless exigent circumstances exist; and
- 2) detail completion of investigations within 180 days unless exigent circumstances exist (both recognized as best practices).

AS ADOPTED AND PRESENTED BY RESOLUTION NO. UOF-1 OF THE USE OF FORCE REVIEW COMMITTEE (DATED OCTOBER 14, 2022)

AS ORIGINALLY ADOPTED AND RATIFIED BY RESOLUTION NO. 4 OF THE PENNSYLVANIA STATE LAW ENFORCEMENT CITIZEN ADVISORY COMMISSION (DATED OCTOBER 28, 2022)

SIGNATURE OF THE PENNSYLVANIA STATE LAW ENFORCEMENT CITIZEN ADVISORY COMMISSION'S CHAIRPERSON:



Sha S. Brown

(Electronic Signature Authorized)

SIGNATURE OF THE PENNSYLVANIA STATE LAW ENFORCEMENT CITIZEN ADVISORY COMMISSION'S SECRETARY:

Jaimie L. Hicks

Jaimie L. Hicks

(Electronic Signature Authorized)

**RESPONSE BY
COVERED AGENCY
TO
FINAL REPORT OF THE
COMMISSION
INTERNAL CASE NO. 21-001 -P**



PENNSYLVANIA DEPARTMENT OF CORRECTIONS
GOVERNOR'S OFFICE OF GENERAL COUNSEL
1920 TECHNOLOGY PARKWAY
MECHANICSBURG, PENNSYLVANIA 17050
(717) 728-7763

December 14, 2022

Sha S. Brown, Chairman, PSLECAC
555 Walnut Street
8th Floor, Forum Place
Harrisburg, PA 17101

Re: Pennsylvania State Law Enforcement Citizen Advisory Commission Notification of Final Review Results and Recommendations

Dear Chairman Brown:

The Pennsylvania State Law Enforcement Citizen Advisory Commission's (Commission) completed the review of Case Numbers 21-0014-P, 21-0015-P, and 21-0016-P. The Commission provided the review of these cases to the Department of Corrections and asked to be provided with a written response to Final Reports concerning these reviews.

The Department of Corrections again thanks the Commission for its reviews and applauds the Commission's purpose and efforts in reviewing Uses of Force by Law Enforcement. The Department welcomes the reviews and appreciates any constructive criticism or insight provided by the Commission.

For the current reviews, the Commission found that the Department's internal investigations were complete and its adjudicatory findings were reasonable. In addition, the Commission recommended enhancements to the Department's Use of Force Policy and to the Post-Incident Internal Investigation Procedures.

Concerning the Use of Force Policy, the Commission recommended:

1. details of where TASER deployments fall within the level of control descriptions on its Resistance and Control Continuum; and
2. warnings or other cautions regarding TASER deployments in or around areas where flammable liquids or similar materials are present

In response to these suggestions, the Department of Corrections is implementing the Commission's recommendations. Department staff have begun to re-write our policies to incorporate these recommendations and hope to have them completed soon. The intended language directs staff to utilize a Use of Force Array instead of a Use of Force Continuum. The Array provides staff with guidance in determining what level control is proper in response to actions or behaviors of reentrants and others.

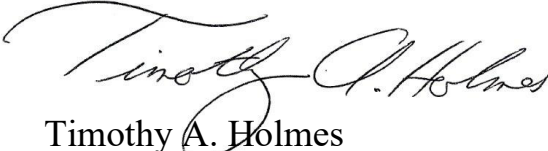
The utilization of a TASER is an option in the Array when staff are assessing the totality of the circumstances they are encountering. Notably, the policy will direct staff to not use a TASER in the presence of flammable liquids or fumes,

Concerning the Post-Incident Internal Investigation Procedures, the Commission recommended:

1. ensure post-incident interviews are conducted as soon as practical following the conclusion of the 72-hour waiting period unless exigent circumstances exist; and
2. detail completion of investigations within 180 days unless exigent circumstances exist (both recognized as best practices).

In response to these suggestions, the Department of Corrections is implementing the Commission's recommendations.

Sincerely,



Timothy A. Holmes
Chief Counsel
Office of General Counsel
Department of Corrections