



michigan municipal league

## Law Enforcement Action Forum Newsletter



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### The MCOLES Firearms Standard – A Baseline for Firearms Training



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Given the predictable work environments in which officers commonly find themselves, law enforcement training needs to be interesting, relevant to regular work assignments and practical. This applies to all law enforcement training. In this issue of the LEAF Newsletter, the focus will be on applying those attributes to firearms training and the MCOLES Active Duty Firearms Standard. Audrey Forbush will discuss why the extra effort is necessary and techniques that can be incorporated with the shooting portion of the Standard to make it realistic to the officer's work environments.

#### A Brief History: It Started with HR 218

After President Bush signed HR 218, *the Law Enforcement Officers' Safety Act of 2004* (LEOSA), the Michigan Commission on Law Enforcement Standards (MCOLES) started to receive pressure to bring the State of Michigan into compliance with the Act. To do that, MCOLES needed to adopt a LEOSA required in-service firearms training standard that eliminated a barrier for retired officers to be able to carry a gun nationally. Before long MCOLES sounded the alarm that if it did not respond to the need for a compliant Michigan standard, a political solution would be

sought through the legislature. No one wanted to risk politicians deciding what kind of firearms or force training police officers needed. Because of the saber rattling, MCOLES formed what eventually became known as the *Active Duty Firearms Training Standard Project Committee* and LEAF was asked to participate.

Since this was to be the first in-service training standard that MCOLES would develop, the Commission tried to identify all the contingencies in formulating it, so they could reduce the likelihood of its leading to unintended consequences. They called upon representatives from the various sectors that the standard might affect. The subject matter experts evaluated the predictability of armed encounters as well as the mechanical and tactical skills that officers need to best survive a shooting incident. The labor representatives voiced their concern that the Standard be valid and reasonable.

From a risk management point of view, LEAF had a variety of issues that they wanted the MCOLES Committee to consider. Representatives from both of Michigan's major insurance pools were on the Committee, and they worked closely to ensure that the Standard did not just become a check off on

somebody's training calendar. The Risk Managers believed that police officers historically do a good job of hitting what they shoot at. Their priority for the Standard was for officers to understand the law and be able to clearly report, in plain language, the observed behaviors that led to the choices they made in using force.

MCOLES Staff had to absorb it all and make it into a Standard.

### **The Core Issue**

Two courts cases - *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham V. Connor*, 490 U.S. 386 (1989) – have shaped how the courts and the law enforcement community view use of force situations, especially those that involve firearms. The concept of reasonableness arising from the court decisions in these cases continues to be the standard of evaluation for the use of force today. To meet the threshold officers have to learn how to identify what they saw or perceived that caused them to choose their course of action.

MCOLES Staff worked hard to identify all the components necessary in firearms training. They determined that people carrying guns create high-risk situations and that officers have to have a full understanding of the law that affects their conduct during them.

This is even more essential today because the paradigm of how officers deal with armed individuals is undergoing change. With the relatively new and rapidly evolving Concealed Pistol License Act, the Law Enforcement Safety Act and the phenomenon of Open Carry, officers have to know how to enforce the law as well as what governs when, how and where civilians and the officer's themselves can carry a gun. (See: *Open Carry, A Potential Nightmare!* (LEAF Newsletter, April 2009)

### **Watch MCOLES Presentation**

In developing the standard, MCOLES developed specific goals for training and assessment. LEAF

encourages all those responsible for training to the MCOLES Active Duty Firearms Standard to view the FLETC video in which Danny Rosa, MCOLES Standards and Curriculum Development Specialist, gives a very good analysis of MCOLES' goals in this area. Rosa emphasizes the importance of using the Facilitator's Guide to develop training scenarios and to guide the training in the use of the tabletop exercises. The exercises are designed for Facilitators to help students use their knowledge of the law, department policy, and tactical thinking to problem solve when facing potential deadly force encounters. This process will help students become better decision makers. He points out that this is important because decision-making is tougher when life threatening stress is involved. One of the tactics discussed is to obtain and maintain a position of advantage; another is to organize the tactics used by officers through communication with each other. Both of these tactics will lead to better decisions being made under stressful situations, which may be the difference between surviving, or not.

When discussing the actual course of fire, Rosa said the subject matter experts did research that lead to the close quarter combat techniques, with a bit of marksmanship added. A significant amount of police shootings are at close quarters. Rosa said the purpose of the course of fire is to assess an officer's ability to perform the mechanical skills required.

Although the idea of the course of fire is not primarily to train officers but to give trainers the opportunity to identify any difficulties an officer may have in performing certain critical tasks, such identification creates a training opportunity by focusing on those areas where officers are deficient and providing training to correct the deficiencies. Rosa also discusses the need to be flexible about time limits when it comes to reacting to problems, such as stoppages, that may develop with the weapon. If the officer is not proficient in clearing a gun malfunction such as a stoppage, then a training opportunity is identified. If it is a complicated stoppage, then treat it as if it were an actual street incident and do what is necessary to

clear the weapon, even if it means retreating to a point of safety or transitioning to a second weapon. Rosa indicates that the time limit is not relevant to the learning opportunity.

To view Rosa's presentation, go to:  
<http://hosted4.mediasite.com/mediasite/Viewer/?poid=da856b793b7f4381aa304f078ae09460> or contact MCOLES and ask for a copy of the program.

### **LEAF Legal Advisor Again Points to Canton to Define Training**

When it comes to any discussion of the legal issues relevant to officer training, Audrey Forbush of Plunkett, Clooney and LEAF's Legal Advisor points out that the granddaddy of all cases is *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). In this case, Mrs. Harris did not receive the medical treatment she needed while in custody and sued the city. After hearing the case, the U. S. Supreme Court established that the city will have liability only when the failure to train amounts to deliberate indifference on behalf of the city toward its inhabitants.

The *Canton* court framed the critical question before it as "Under what circumstances can inadequate training be found to be a policy 'that is actionable' under § 1983?" *Canton, supra*, at 1202. In determining whether a "city policy" not to train is associated, the court expressed the culpability standard of deliberate indifference. The Court stated:

**[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy of training so likely to result in the violation of constitution rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible,**

### **and for which the city may be held liable if it actually causes injury.**

In short, Forbush observes that liability attaches only if the failure to train is a "deliberate choice to follow a course of action," and this failure to train led to, or caused, the injury alleged. Evidence of a single violation of federal rights, along with a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, is sufficient to trigger municipal liability. See *Board of County Com'rs v. Brown*, --- U.S. ---, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); *Canton*, 489 U.S. at 390 n. 10, 109 S.Ct. at 1205.

Forbush points to "famous footnote 10" as an example of the Court's decision that is directly on point to this topic. At page 1206, the Court noted examples of when liability would arise under a policy of deliberate indifference. "One such example would be if the city armed its officers with firearms in order to permit them to arrest fleeing felons, and then failed to train them on the use of deadly force. This could be said to be "so obvious" that the failure to train could be characterized as "deliberate indifference" to the constitutional rights of a municipality's inhabitants."

In *Gregory v City of Louisville*, 444 F.3rd 725 (6th Circuit, 2006) the 6<sup>th</sup> Circuit looked even closer at the cause of liability. In this case a former inmate brought a civil rights claim under §1983. The inmate alleged that members of an investigatory team involved in his criminal conviction did not disclose and, in fact, withheld evidence causing him to serve seven years in custody. This case points to *Canton's* deliberate indifference standard in assessing liability. The Sixth Circuit ruled in *Gregory* that the failure to train officers in their duty to reveal all of the evidence they possess as required by *Brady v. Maryland*, 373 U.S. 83 S.Ct. (1963), even that which is favorable to the criminal defendant, has the **highly predictable consequence** of being a moving force in a constitutional violation. The obligation to turn over exculpatory materials is a significant constitutional component of police duties with obvious

implications for individuals facing criminal charges. This Court held that evidence pointing to a city's failure to provide *any* training on key duties with direct impact on the constitutional rights of citizens is sufficient to survive summary judgment with a *Monell* failure to train claim.

In light of *Canton* and with the Courts looking at the highly predictable consequences of the actions of employees, Forbush opines that if a municipal entity has police officers, the officers must receive training on any task or responsibility that the department expects them to fulfill regularly. Even though deliberate indifference is a high wall to breach, the Supreme Court's focus on deadly force training in *Canton* makes complying with the MCOLES Standard, and possibly training in other firearm areas not addressed by the Standard, important. The objective is to avoid the perception that it can reasonably be said that a department's failure to comply with the Standard or train in obvious recurring tasks demonstrates the department is deliberately indifferent to the need to train.

With the state of the law and given that MCOLES is on record that the mechanical skill section of the Standard is for assessment of the officer's proficiency, departments are still responsible to train their officers to handle recurring situations. In Michigan, those situations could be a variety of things. It can include working environment, time, weather and equipment limitations. Departments also provide a variety of implements that officers must choose from given the situation that confronts them. This adds another layer of complication for preparing officers to choose the right implement at the right time.

LEAF felt the following list should be included to guide departments in how they can build upon the lessons learned using the MCOLES Standard and skill assessment to develop customized training focused upon the recurring situations found in their policing environment.

## Firearms Training Recommendations

It should be noted that the word *qualification* is not used in conjunction with any of the training recommendations. LEAF does not want to have officers think that one training session is more important than another one is. Each time an officer attends any training, the instructor should have a lesson plan that outlines the topics the training will cover and the objectives that students are expected to meet. To pass the training, students must demonstrate through written, oral, physical or mechanical means that they meet the objectives of the training. The lesson plan and the success or failure of the students should be documented and kept in an administrative file as outlined by the department.

The concept then should focus on meeting department objectives on a pass/fail basis as opposed to a traditional qualification designation. The goal is proficiency and demonstration of techniques required by the department, not how well an officer puts holes in paper.

Historically, MML Law Enforcement Risk Control Consultants have recommended that departments need to have firearms training programs and recommend that officers attend firearms range training four times annually. However, given the current economic conditions, departments can still meet the recommendations by rolling together the skill areas when training on the range at a minimum of twice a year.

While the following list may sound cumbersome, many of these exercises can be included together and scheduled so they are all adequately covered and assessed during the recommended training sessions. As an example, rapid entry training can occur during the dark time of winter months when officers are in winter coats, sweaters, vests, boots and long johns. Schools start early and it is cold and dark in Michigan more than it is light and warm!

**Training needs, in addition to, or incorporated with, the MCOLES Standard:**

- F** Training should cover the department's use of force policy, including the expectations of the Chief, Director or Sheriff and an explanation of the discretion that the department allows its officers
- F** Training should cover proper weapon safety and security while at home and work.
- F** Training should include exercises that are relevant to the environment that the officers are in and include critical incidents in or around a patrol vehicle, a home environment with furniture including the paraphernalia and utensils often found and use of cover found naturally in the work environment.
- F** Demonstration of proficiency by officers at least twice annually with each authorized firearm. These include all primary duty firearms, all off-duty and backup firearms and any shotguns, rifles or any other authorized firearm.
- F** Annual firearms training in reduced light, out of doors, and in cold weather while wearing the proper seasonal gear.

- F** Decision-making and target identification drills are recommended at least once annually, although twice annually is preferable. Include simulated stress scenarios with requirements for taking cover. (Note: simulation training can be provided, and officer actions assessed, by means other than live-fire range exercises. For example, FATS, marking cartridges, soft air projectiles, or even red handled inert training guns.)
- F** Throughout all training exercises, officers should be required to use the holsters and other equipment that they would normally use or wear while on and off duty; these include concealed carry holsters and reloading equipment, body armor and uniforms.

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LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.*

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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