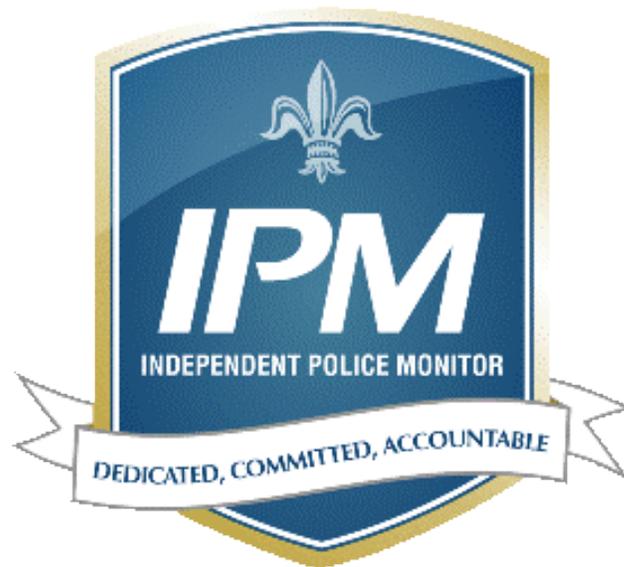


Office of the Independent Police Monitor

City of New Orleans

OIPM Observations on NOPD's Use of
Conducted Electrical Weapons (aka Tasers)



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Independent Police Monitor

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(OIPM) REVIEW OF NOPD'S USE OF FORCE OUTLINE

INDEPENDENT POLICE MONITOR MISSION AND RESPONSIBILITIES

The Office of the Independent Police Monitor (OIPM) is an independent, civilian police oversight agency created by the voters in a 2008 charter referendum and which opened its doors for the first time in August of 2009. Its mission is to improve police service to the community, civilian trust in the NOPD, and officer safety and working conditions. The OIPM has six broad responsibilities:

- 1) To ensure that all complaints regarding police misconduct are classified and investigated or mediated at the appropriate level and that those investigations are fairly, timely and thoroughly handled; to ensure that discipline is fair, timely, appropriate, and upheld upon appellate scrutiny; to make information about this review process available to the public.
- 2) To monitor NOPD investigations into use of force to identify violations of civil rights; concerns of officer tactics and safety; risks to life, liberty, and property; and adherence to law and policy.
- 3) To review and analyze aggregate data from complaints, investigations, community concerns, and public policy in crafting recommendations aimed toward improving the quality of services by the NOPD.
- 4) To reach out to inform the community about the OIPM, listen and respond to broader community concerns, and prepare the community for engagement in NOPD policy and practice.
- 5) To mend police/community relationships by fostering effective police/community partnerships.
- 6) To collect police commendations, review and monitor police training and supervision issues, and support a healthy and safe working environment for NOPD employees.

The OIPM accomplishes its mission by focusing on three main activities: complaint and disciplinary system monitoring and review, use of force monitoring and review, and subject-specific analyses or audits.

A NOTE FROM THE INDEPENDENT POLICE MONITOR

Pursuant to New Orleans City Code Section 2-1121 (16) (the Police Monitor's Ordinance), the OIPM publishes reports "detailing its monitoring and review activities," "problems it has identified," and recommendations made to the NOPD.

This report summarizes a part of the OIPM's review of major use of force investigations that were closed by the NOPD in 2016. The report also highlights a number of 2015, 2016, and 2017 incidents related to NOPD's use of Conducted Electrical Weapons ("CEWs"), colloquially called "Tasers."

OIPM OBSERVATIONS ON NOPD'S USE OF CONDUCTED ELECTRICAL WEAPONS (AKA TASERS)

INTRODUCTION

In the 2012 Consent Decree, NOPD agreed to "develop and implement a Use of Force Review Board [UFRB] to review all serious uses of force and other Force Investigation Team (FIT) investigations."¹ NOPD convened its first UFRB in 2014.² However, NOPD had to reform its UFRB policies/procedures to establish the current version of the UFRB at the end of 2015, and OIPM integrated itself into the UFRB process. Prior to each UFRB hearing, OIPM personnel review the file of a critical incident and meet or correspond with Public Integrity Bureau (PIB) FIT members to discuss identified areas of concern. OIPM personnel then frequently raise these concerns directly to NOPD leadership at the UFRB hearings.

OIPM's review of UFRB critical incident investigations led it to question the outcome of some cases related to NOPD officers' use of Conducted Electrical Weapons ("CEWs"), colloquially called "Tasers" in 2015, 2016, and 2017.³ For example:

- An officer used a CEW on a fleeing suspected person at close range. One of the CEW's prongs penetrated his skull and lodged a centimeter into his brain, where it then delivered tens of thousands of volts of electricity. He

¹ *U.S. v. City of New Orleans*, E.D. La. 12-cv-1924, R. Doc. 2-1 at 32.

² See, OIPM Administrative Review Report of the Wendell Allen Shooting Death, August 4, 2015.

³ The Use of Force cases reviewed in preparing this report include: FTN 2015-0083; FTN 2016-052; FTN 2016-236; FTN 2016-0269; FTN 2016-0400; FTN 2017-001; and Item # A-01441-17.

immediately began to experience seizures. NOPD concluded that there was “no reason to believe the CEW caused his seizures.”

- A handcuffed suspected person said, “I have a heart problem,” prior to a NOPD officer using a CEW on him - despite the Consent Decree and NOPD Operation Manual’s tight restrictions on the use of CEWs on handcuffed subjects.
- An NOPD officer used a CEW on a suspected person, who then said, “I can’t breathe.” The officer’s response: “I don’t care.”

As a result of these incidents, the OIPM calls upon NOPD to review its use of CEWs and to update its tactics, training, and use of force review processes, as needed.

BACKGROUND ON CEW RESEARCH AND NATIONAL ISSUES

The CEW was introduced as a low-risk device that could be used as a substitute for lethal force and could save lives. While the Department of Justice has concluded that there is considerable evidence that deployment of CEWs is associated with reductions in officer and offender injuries, adverse effects related to the use of CEWs have also been documented, including injuries from the probes and injuries from falls.⁴

According to Amnesty International, from June 2001 to August 31, 2008, 351 people in the United States died after being subjected to CEW activations by police. “In most cases, coroners have attributed the deaths to other causes, such as drug intoxication or ‘excited delirium,’” Amnesty International said. “However, in at least 50 cases, coroners are reported to have listed the Taser as a cause or contributory factor in the death.”⁵ Other studies have concluded that CEW use “is safe in the vast majority of cases,” but that “CEW applications longer than 15 seconds may have effects on the human body that could contribute to serious injury or death.”⁶

This year, *Reuters* expanded on past research. They “documented 1,005 incidents in the United States in which people died after police stunned them with Tasers, nearly all since the early 2000s – the most thorough accounting to date of fatal encounters involving the paralyzing stun guns.” *Reuters* found that in 153 of 712 autopsy reports

⁴ “Electronic Control Weapon Guidelines”, Community Oriented Policing Services, U.S. Department of Justice, 2011, at 28 – 31.

⁵ USDOJ, citing Amnesty International, ‘Less Than Lethal?’ The Use of Stun Weapons in US Law Enforcement, London, England: Amnesty International Publications, 2008.

⁶ “Electronic Control Weapon Guidelines”, Community Oriented Policing Services, U.S. Department of Justice, 2011, at 28 – 31.

they reviewed, “the Taser was cited as a cause or contributing factor in the death, typically as one of several elements triggering the fatality.”⁷

Given the numerous injuries and deaths that have been caused by and/or linked to CEWs, Axon⁸ updated its training guidelines for CEW use to incorporate many new safety precautions.⁹ The new training guidelines of January 1, 2016 specifically warn against using CEWs on people who are perceived to or actually suffer from a mental illness or on those who have elevated risks, such as pregnant women, persons of small stature or with lower body-mass index, the infirm, and the elderly.¹⁰ Because TASER has not tested CEWs on such vulnerable populations, the company cautions: “CEW use of [sic] these individuals could increase the risk of death or serious injury.”¹¹ TASER further cautions against directing CEWs at an individual’s “head, throat, breast, chest or area of the heart, genitals, or pre-existing known injury areas without legal justification.”¹² In total, TASER’s 2016 training update included 20 pages of warnings about CEW use.¹³

NOPD’s Consent Decree and Operations Manual already incorporate many of the best practices identified for CEW use. (See, for example, the Ops Manual’s bar on the use of multiple CEWs at once on one subject, or the Consent Decree’s requirement for training on positional asphyxia following CEW use.)¹⁴ In some areas, best practices have not been incorporated. For example, the U.S. Department of Justice recommends having every subject of a CEW be examined by medical professionals; NOPD requires pre-

⁷ Eisler et al., *A 911 plea for help, a Taser shot and the toll of stun guns*, Reuters, Aug. 23, 2017.

⁸ Axon, formerly TASER International.

⁹ Axon, “V20 TASER CEW End-User Certification and Annual Re-Certification Requirements,” January 1, 2016 (“2016 Taser Training Update”) at p. 7.

¹⁰ *Id.* These particular safety guidelines also existed in 2011. See Police Executive Research Forum (PERF), “2011 Electronic Control Weapon Guidelines,” Apr. 8, 2011, available at <https://assets.documentcloud.org/documents/2504551/electronic-control-weapon-guidelines-2011.pdf> (last visited February 24, 2017).

¹¹ 2016 Taser Training Update at p. 7.

¹² *Id.* at p. 10.

¹³ *Id.*

¹⁴ Compare Ops Manual Chapter 1.7.1 § 45; Consent Decree at § 65(b), with “Electronic Control Weapon Guidelines”, Community Oriented Policing Services, U.S. Department of Justice, 2011. NOPD Ops. Manual Ch. 1.3.1.2 defines positional asphyxia as “When a subject’s body position interferes with breathing, either when the chest is restricted from expanding properly or when the position of the subject’s head obstructs the airway. Death may occur from positional asphyxia.”

booking medical examination for injuries associated with CEW use.¹⁵ However, NOPD does not require that personnel should be aware that there is a higher risk of sudden death in subjects who are under the influence of drugs and/or exhibiting symptoms associated with excited delirium, although it does require officers to consider all facts or circumstances known to the officer at the time in assessing whether to use a CEW.¹⁶

OIPM’S CONCERNS REGARDING PATTERNS OF CEW USE

A. NOPD’s Use of CEWs Against Handcuffed Subjects

The Consent Decree requires that “CEWs shall not be used on handcuffed subjects, unless doing so is necessary to prevent them from causing serious physical injury to themselves or others, and if lesser attempts of control have been ineffective.”¹⁷ Similarly, the NOPD Operations Manual states that force (including CEW use) is not authorized against a person in handcuffs “except to prevent imminent bodily harm to the officer, or another person, or to physically move the subject who has become passively resistant.”¹⁸ Imminent means “near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous.”¹⁹

Table 1: The Standards for Use of CEW on a Handcuffed Person and the Standard for Deadly Force.

<p style="text-align: center;">Standard for CEW Use Against Subject in Handcuffs (Unless Passively Resistant) Ops Manual Ch. 1.3 § 30, 1.71 § 49(f); Consent Decree § 62.</p>	<p>Only authorized if:</p> <ul style="list-style-type: none"> • Necessary to prevent serious physical injury.
<p style="text-align: center;">Standard for Deadly Force Ops Manual Ch. 1.3 §§ 13, 21.</p>	<p>Only authorized if:</p> <ul style="list-style-type: none"> • There is an imminent danger of death or serious physical injury to the officer or another person; or • To prevent the escape of a fleeing subject if there is probable cause to believe:

¹⁵ Compare Ops Manual Chapter 1.7.1 § 77, with “Electronic Control Weapon Guidelines”, Community Oriented Policing Services, U.S. Department of Justice, 2011, at 21.

¹⁶ *Id.*

¹⁷ Consent Decree at ¶ 62.

¹⁸ Ops Manual Ch. 1.3 § 21; 1.71.1 § 3.

¹⁹ *U.S. v. Hardeman*, No. 10-51104 (5th Cir. 2011) (per curiam).

	<ul style="list-style-type: none"> ○ The subject has committed a felony involving the infliction or threatened infliction of serious bodily injury or death; and ○ The escape of the subject would pose an imminent danger of death or serious bodily injury to the officer or to another person.
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The Consent Decree and Operations Manual set a very high standard for the use of CEWs on handcuffed suspected persons. The use of CEWs on handcuffed subjects and the use of deadly force have a similar requirement: they can only be used to avoid “serious physical injury” or worse.²⁰ The use of the deadly force standard, however, provides more guidance for when officers can use deadly force than does the use of CEW standard.

It is unclear in each incident of CEW use on a handcuffed subject as to whether the officer clearly stated a case for preventing serious injuries. Such incidents include the following:

- In an incident on February 19, 2015,²¹ Officer Latoya Hamilton used a CEW in drive stun mode²² (which is separately banned by the Consent Decree)²³ against a handcuffed suspected person. The suspected person attempted to leave custody and was being handled by five NOPD officers. Officer Hamilton reported that she was kicked in the knee and stomach. Officer Hamilton removed the cartridge from her CEW and used it in drive stun mode on the suspected person. She reported using her CEW on him three times. Despite the Consent Decree and Ops Manual’s restrictions, PIB did not provide any analysis in its written report regarding the use of a CEW against a handcuffed subject. PIB and the UFRB subsequently found that Officer Hamilton did not violate the rule on “Unauthorized Force.”²⁴

²⁰ See Ops Manual Ch. 1.3 § 13, 21.

²¹ FTN 2015-083, PIB Case # 2015-0295-R, NOPD Item No. B-23647-15.

²² “Drive stun mode” is “where the Taser is held against the subject's body and the trigger pulled with no probes being fired, causing pain but not an incapacitating effect.” Dominic Cascani, *Point-blank police Taser use questioned by IPCC*, BBC News (July 22, 2014).

²³ Policy 309, paragraph 309.5.1.

²⁴ Ops Manual, Rule 2, Paragraph 6.

- In an incident on May 13, 2016,²⁵ Officer Stephen Guidry and two other officers were pursuing on foot a fleeing, handcuffed suspected person wanted for domestic aggravated assault with a firearm. As the suspected person was hopping over a fence, Officer Guidry used his CEW in an attempt to stop him. Officer Guidry and PIB justified the CEW use based on Officer Guidry's fear that the suspected person "would avoid capture and possibly confront the victim." However, a fear of possible confrontation is not "imminent bodily harm." Nor were there any facts to suggest that. In fact, at the Use of Force Review Board hearing, PIB conceded that the CEW use was "probably a violation of policy." Nevertheless, the UFRB members voted that the use of force was justified.
- In an incident on August 5, 2016,²⁶ Officer Daniel Oquendo used a CEW on a suspected person in handcuffs in the holding cell of the 8th District Station. The suspected person had slipped out of his handcuffs and was warned that he would be subject to CEW use if he did not comply. The suspected person said that he had heart problems, and put the handcuffs back on. Officer Oquendo used the CEW on the suspected person, hitting him in the chest. In his Use of Force statement, Officer Oquendo stated that he "heard a ratcheting sound" upon entering the cell and thought that maybe the suspected person was going to use the handcuff as a weapon. PIB found no Use of Force violation.

B. CEW Use Against Fleeing Suspected Persons

CEWs may be used "in situations in which a subject exhibits aggressive resistance and in situations in which the subject presents an imminent threat" but "fleeing should not be the sole justification" for CEW use.²⁷ Fleeing does not constitute active resistance,²⁸ and it is worth noting that even foot pursuit by an officer is only authorized in "rare" circumstances.²⁹ Nevertheless, OIPM has observed several incidents where NOPD officers appeared to use CEWs for little reason other than to prevent a suspected person from fleeing.

²⁵ FTN 2016-0269.

²⁶ FTN 2016-400.

²⁷ Ops Manual Ch. 1.3 § 21.

²⁸ Ops Manual 1.3.1.1.

²⁹ Ops Manual Ch. 41.4 § 1,

One incident in particular bears close examination. On January 27, 2016,³⁰ Officers Troy Williams and Ladarius Johnson responded to a report of two black men selling narcotics on a certain street block. They immediately targeted two black men they saw there. Officer Johnson detained and searched one man; Officer Williams approached the other and yelled, "I'm gonna tase you brah, I'm gonna tase you. Come over here." The suspected person responded, "For what?" Officer Williams then grabbed the suspected person's arm but the suspected person broke free and started to run away. Officer Williams immediately discharged his CEW, striking the suspected person at close range in the face.³¹ One prong of the CEW penetrated the suspected person's skull and lodged a centimeter into the suspected person's brain. The CEW delivered tens of thousands of volts of electricity, and the suspected person began to have seizures. Officer Williams later stated that he felt that the suspected person may have been armed, as Officer Williams could not see one of the suspected person's hands. PIB concluded that Officer Williams's CEW deployment did not violate any laws or NOPD policies.

At the Use of Force Review Board hearing, PIB stated that there was "**no reason to believe the CEW prong in the brain caused the suspect's seizures.**" PIB's investigator said that this was based on their review of medical information. OIPM asked to be provided with this medical information; PIB provided only a single email from Dr. Ho of Axon. Dr. Ho confirmed that the CEW "could have been a cause of inducing a seizure," but that it was "very difficult to say with any conclusive certainty" which of several factors caused the seizure. The UFRB ultimately ruled the use of force to be unjustified on a 2 to 1 vote, although one of the votes for "unjustified" thought it was a "close call." Most of the non-voting NOPD officers who spoke at the UFRB meeting argued that it was justified.

Similarly, in the above described May 13, 2016, incident,³² Officer Guidry used his CEW on a fleeing, handcuffed suspected person wanted for domestic aggravated assault with a firearm. Officer Guidry and PIB justified the CEW use based upon Officer Guidry's fear that the suspected person "would avoid capture and possibly confront the victim." However, a fear of possible confrontation - without any facts to suggest the confrontation was likely - is not an "imminent threat." The fact that the subject took flight and a CEW discharge was used to prevent that flight is the only available fact.

³⁰ FTN 2016-0052.

³¹ See Consent Decree § 61: "CEWs may not be applied to a subject's head, neck, or genitalia, except where lethal force would be permitted, or where the officer has reasonable cause to believe there is an imminent risk of serious physical injury."

³² FTN 2016-0269.

Most recently, in a January 2, 2017 incident,³³ Sgt. Toka Lane used a CEW on a suspected person from behind as he walked away – even though he had been the person to call the police. Though the officers involved argued that the suspected person could have been returning to the house to get a gun, an officer’s justification for force should not be based on a hypothetical rationale to constitute an “an imminent threat.”

C. CEW Use Against Suspected Persons After They Say They Have Medical Problems

The Consent Decree requires that “CEWs shall not be used against visibly pregnant women, elderly persons, young children, or visibly frail persons, except where lethal force would be permitted, or where the officer has reasonable cause to believe there is an imminent risk of serious physical injury. Officers shall determine the reasonableness of CEW use based upon all circumstances, including the subject’s age, size, physical condition, and the feasibility of lesser force options. Officers shall be trained in the increased risks that CEWs may present to the above-listed vulnerable populations.”³⁴ The Ops Manual contains similar language.³⁵

Despite both the Consent Decree and Ops Manual’s warnings about the use of CEWs on physically vulnerable persons, OIPM has reviewed the use of CEWs against what are arguably vulnerable persons. In one incident, an officer used a CEW on a suspected person that was handcuffed and in a holding cell after the suspected person warned that he had heart problems.³⁶ In another incident, an officer discharged a CEW into a suspected person’s back as he walked away, even after the suspected person warned that he had “seizures and a heart problem.”³⁷

In another case, NOPD officers used CEWs on a suspected person for more than 20 seconds, with more than one CEW simultaneously. Afterwards, as the suspected person in handcuffs laid on the street, he said, “Dude, I can’t breathe.” An officer responded, “I don’t care, stay down.” Later, the suspected person said again, “I can’t breathe,” and an officer instructed the suspected person to “quit talking.”³⁸ This is very troubling. After the July 17, 2014 death of Eric Garner in New York, it is a basic expectation that police take claims of possible asphyxia seriously. In fact, such seriousness is required by the Consent Decree, which requires officer training on their responsibilities following CEW use, including “the risk of positional asphyxia, and training officers to use a restraint

³³ NOPD Item No. A 01441-17.

³⁴ Consent Decree § 60.

³⁵ Ops Manual 1.7.1 § 49.

³⁶ FTN 2016-0400.

³⁷ NOPD Item No. A 01441-17.

³⁸ FTN 2016-0236.

technique that does not impair the subject's respiration following an CEW application."³⁹

Relatedly, in the course of discussing FTN 2016-52 with OIPM, PIB investigators stated that CEWs have "never directly resulted in death" – anywhere. This is incorrect, and the Consent Decree explicitly indicates that certain uses of CEWs are associated with "the risk of death."⁴⁰ But this statement may reflect a common belief among NOPD officers that CEWs are relatively harmless, which, in turn, may contribute to the use of CEWs against suspected persons with declared medical problems.

D. Failure to Provide Warning and Time to Comply Before CEW Use

The NOPD Operations Manual Ch. 1.7.1 § 29 provides that, "Unless prohibited by circumstances or officer safety concerns, a VERBAL WARNING of the intended use of a CEW should precede each CEW application." Additionally, it states that, "Where feasible the officer will defer CEW application for a reasonable time to allow the subject to comply with the warning." (*Id.* at § 30; see also Consent Decree at § 55.) In OIPM's review, however, officers have been less than consistent with providing warnings and time to comply. At times, officers report having given a warning, while further review of body-worn video or other footage does not substantiate such a claim.

For example, in the written report following CEW incident FTN 2016-0236, an NOPD officer wrote that he "advised [the suspected person] he would be tased," yet that warning cannot be heard in any of the body-worn camera or other footage, was not mentioned in his statement to PIB, and was not mentioned in the PIB summary of the officer's BWC footage.

In addition, even when the officers do provide warnings, sometimes the warnings themselves are problematic. In FTN 2015-083, the PIB report states that "Officer

³⁹ Consent Decree § 65.

⁴⁰ Consent Decree § 65(c). *See also, e.g., Cora Mitchell v. City of Warren*, 09-cv-11480 (E.D. Mi. Feb. 9, 2012) (undisputed that sixteen-year-old suspect fell to the floor and died after deployment of taser); Eisler et al., *A 911 plea for help, a Taser shot and the toll of stun guns*, Reuters, Aug. 23, 2017 (In 153 of 712 reviewed autopsies of post-TASER deaths, "the Taser was cited as a cause or contributing factor in the death"); *Police Use of Force, Tasers and Other Less-Lethal Weapons*, National Institute of Justice 2011 ("More than 200 Americans have died after being shocked by Tasers. Some were normal, healthy adults; others were chemically dependent or had heart disease or mental illness."); Strote J., & Hutson, H.R. (2006). *Taser use in restraint-related deaths*. *Prehospital Emergency Care*, 10, 447-450.) ("Medical examiners reported [CEWs] were a possible cause of death in six cases (16.2%) and were a contributory cause in four (10.8%).").

Hamilton warned [the suspected person] to stop or he could be exposed to a CEW.” Officer Hamilton’s actual words were less clear. On video, Officer Hamilton is recorded saying, “I’m telling you, you about to get it. You about to eat this. You about to eat this.”⁴¹ She then used her CEW on the subject even after he indicated he would comply.

E. PIB and the UFRB’s CEW Findings in 2016 Contradict OIPM’s Conclusions.

OIPM is concerned that PIB and the UFRB have concluded that the majority of the critical incidents involving CEWs in 2016 are legally justified and justified according to NOPD’s policies and the Consent Decree as discussed above. OIPM has questioned these determinations in several incidents. Research has shown that CEWs present a danger and should be used in strict accordance with the law. Every deployment of a CEW by an NOPD officer constitutes a use of force,⁴² and every additional trigger-pull of the CEW is another use of force. NOPD policy and the Consent Decree require NOPD officers who deploy CEWs on civilians to document and justify every CEW deployment because, as Axon training materials state, “law enforcement use of a CEW may cause or contribute to death or serious injury.”⁴³

RECOMMENDATIONS

The issues and patterns identified above directly impact people who have been subject to CEW use, affect the New Orleans community’s relationship with NOPD, and expose the City of New Orleans to potential financial liability. The OIPM recommends that NOPD take the following steps to address the issues regarding CEW use:

- NOPD PIB and OIPM meet by March 30, 2018 to discuss a more robust review process for CEW deployment and use. Following that meeting, NOPD and OIPM will work together to develop the review protocol. The development of the review protocol will include a date for completion of the process and a date for implementation.

⁴¹ Contrast this with NOPD Rule 3:1, which requires that: “Employees shall conduct themselves in a professional manner with the utmost concern for the dignity of the individual with whom they are interacting. Employees shall not unnecessarily inconvenience or demean any individual or otherwise act in a manner which brings discredit to the employee or the Police Department.”

⁴²Ops Manual.

⁴³ 2016 Taser Training Update at p. 8.

- In addition to the first recommendation, OIPM would like to be invited to engage in a discussion at a UFRB hearing regarding the standards for CEW use and case review with the broader leadership of NOPD. We request this discussion on or before the March 2018 UFRB hearing. A discussion regarding the legal and policy standards for CEW use would benefit both the OIPM and NOPD.
- Assess and document findings regarding whether NOPD officers are receiving sufficient training and guidance concerning the legal and policy constraints on the use of CEWs and the risks associated with CEW use. Share the assessment methodology and findings with OIPM.
- Have the NOPD Operations Team assess and document their finding whether the CEW tactics that officers are instructed in are appropriate given the pattern of issues identified above. Share the assessment methodology and findings with OIPM.