



LEGAL BULLETIN #2003-05 OFFICE OF LEGAL AFFAIRS

USE OF FORCE; OC SPRAY



Legal Flag: 1) Under certain circumstances, the use of Oleoresin Capsicum (OC) spray may constitute excessive force.

2) It is important for officers to be familiar with, and follow, G.O. 92-03-07C and G.O. 02-08-02 regarding the use of OC spray.

Police officers are continually called upon to make decisions regarding the appropriate amount of force to use, and perhaps continue to use, in making an arrest.

The purpose of this bulletin is to examine a recent California case in which the officers used OC spray on passive resisters and the Ninth Circuit Court of Appeals found the officers had engaged in an excessive use of force.¹ Additionally, the court ruled that because the officers should have known that the use of force was unreasonable under the circumstances, the officers were not entitled to qualified immunity.

During three nonviolent protests against the logging of ancient redwood trees in the Headwaters Forest, the protesters linked themselves together with self-releasing, lock-down devices known as "black bears." From 1990 to 1997, Humboldt County Sheriff's deputies had forcibly, but safely, removed hundreds of "black bears" from protesters' arms by cutting the cylinders with a hand-held electric grinder.

In 1997, the deputies decided to use OC spray on the protesters to force them to release themselves from the "black bears." In

some instances, the officers applied the OC spray in the corners of the protesters' eyes with a Q-tip and in others the officers sprayed the OC spray directly in the protesters' faces from a few inches away. The protesters' eyes were not flushed with water. In several instances when the protesters requested water for their eyes, it was refused.

The issues were 1) whether the use of OC spray constituted an excessive use of force and, 2) if it was an excessive use of force, whether the officers would still be entitled to qualified immunity.

In reaching the conclusion that the use of the OC spray was excessive, the court relied upon Alexander v. City and County of San Francisco,² in which that court interpreted Graham v. O'Connor,³ by stating that "the force which was applied must be balanced against the *need* for that force: it is the need for force which is at the heart of the Graham factors." The Headwaters court found that the protesters were sitting peacefully, were easily moved by police and did not threaten or harm the officers. Once the court had reached the conclusion that the protesters represented

¹ *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Circuit 2002)

² *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994)

³ *Graham v. O'Connor*, 490 U.S. 386 (1989)

“passive” resistance, as opposed to “active” resistance, the use of OC spray in this situation became an excessive use of force and, therefore, unreasonable under the circumstances.

An earlier Ninth Circuit case held that while the use of OC spray may be reasonable, as a general policy, in bringing a subject under control, when the person is already under control or rendered helpless “any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.”⁴

The result of the Headwaters court’s findings had dire consequences for the officers who had used the OC spray. Where the regional and state practice and protocol, as in California, clearly suggested that using OC spray against nonviolent protestors was sufficiently clear at the time of the events, the officers could not claim qualified immunity on the ground that they made a reasonable mistake of law. In other words, the officers could be held personally liable for any damages that arose out of the incident.

To date, the use of OC spray on passive resisters has not been challenged in the Seventh Circuit as an excessive use of force. However, the lessons behind this California case are instructive.

G. O. 92-03-07C and G.O. 02-08-02 have established guidelines for the use of OC Spray on both active and passive resisters. It is important that officers familiarize themselves with this directive. Non-adherence to the directive may expose officers to personal liability should they be faced with a lawsuit. In particular, the Order provides that OC spray may be used on passive resisters **only after obtaining authorization from an on-scene supervisor of the rank of sergeant or above when extracting the**

resister from a motor vehicle. Authorization from an on-scene supervisor of the rank of lieutenant or above is required before the use of OC spray upon passive resisters in an unresponsive crowd or group. In addition, among other decontamination procedures, the Order provides for the subject’s eyes to be flushed with cool water and, if possible, the subject’s relocation to an area of uncontaminated air.

Where the passive resister, or protestor, presents no objectively reasonable threat of harm to the officer or other citizens in the area, and other options exist which can be used without causing injury and can be employed within a reasonable period of time, the officer should attempt to utilize those options before resorting to OC spray.

CONCLUSION

1. Under certain circumstances, the use of OC spray may constitute an excessive use of force.
2. It is important for officers to familiarize themselves with, and follow, G.O. 92-03-07C and G.O. 02-08-02 regarding the use of OC spray.
3. When officers fail to follow the Department guidelines or established practice, they may expose themselves to personal liability.

This Bulletin was prepared by Sandy Brode, an attorney with the Office of Legal Affairs.
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⁴ *LaLonde v. County of Riverside*, 204 F.3d 947 (9th Cir. 2000)