Wisconsin Legislative Council
INFORMATION MEMORANDUM

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LAW ENFORCEMENT USE OF FORCE

Recent events involving alleged incidents of excessive force by law enforcement have generated legislative interest in state and local policing and the ways in which law enforcement use of force is governed in Wisconsin. This information memorandum describes the sources of authority governing law enforcement use of force, as well as the potential consequences for an officer in employee discipline, civil, and criminal contexts, depending on the circumstances surrounding, and the nature of, the officer's use of force.

BACKGROUND

In Wisconsin, law enforcement is typically a service provided by local governments, though certain state law enforcement agencies are created under state law, such as the State Patrol, Capitol Police, and University of Wisconsin System. Police departments in cities, villages, and towns are generally led by a chief of police, while county law enforcement is under the authority of elected sheriffs. In most cases, a police department is overseen by a police and fire commission, and a sheriff's department is overseen by a county civil service commission. These commissions are essentially civil service bodies with reviewing authority over the hiring, promoting, and discipline of law enforcement officers.[1] [ss. 59.26 (8), 59.52 (8), 62.13, and 62.50, Stats.]

SOURCES OF AUTHORITY GOVERNING USE OF FORCE

Several sources of authority set the parameters for appropriate use of force by a law enforcement officer. First, use of force by law enforcement is governed broadly by certain constitutional principles rooted in the Fourth Amendment of the U.S. Constitution, which generally protects a person's right to be free from unreasonable searches and seizures. In addition, each law enforcement officer is subject to a use-of-force policy adopted by the officer's employing law enforcement agency. An officer is also trained on certain defensive and arrest tactics as determined by the Law Enforcement Standards Board (LESB), a governmental board responsible for establishing educational and training standards for and certifying law enforcement officers in this state. Each of these sources of authority is described below.

Constitutional Standards Governing Use of Force

Case law has set the constitutional bounds of an officer's use of force, the principles of which both guide certain analyses for officer liability and inform the content of use-of-force policies and training standards. Specifically, over the last several decades, the U. S. Supreme Court has clarified the applicable legal principles regulating the use of force by police officers, with the

[1] Commissions that have been granted certain optional powers may have additional supervisory authority over a law enforcement agency. [s. 62.13 (6), Stats.]

seminal cases being *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989).

In short, all claims that officers have used excessive force in the course of an arrest, investigatory stop, or other seizure require analysis under the Fourth Amendment's reasonableness standard. To determine what is reasonable, a court must balance the nature and quality of the intrusion on the individual's interests against the importance of the governmental interests alleged to justify the intrusion. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, in light of the fact that officers are often forced to make split-second judgments about the amount of force that is necessary. Moreover, the "reasonableness" inquiry is objective, i.e., "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." [*Graham*, 490 U.S. at 396-97.] These general principles have been relied upon by federal and state courts across the country in use-of-force cases.[2]

Law Enforcement Agency Use-of-Force Policies

Under state law, each person in charge of a law enforcement agency, including both local and state agencies, must prepare in writing and make available for public scrutiny a policy or standard regulating the use of force by law enforcement officers in the performance of their duties. In other words, current law requires that each law enforcement agency adopt a written use-of-force policy, but does not specify the particular content that the policy must contain.[3] [ss. 66.0511 and 165.83 (1) (b), Stats.]

Training by the Law Enforcement Standards Board

Very generally, a law enforcement officer is hired by a law enforcement agency, and then certified to serve as a law enforcement officer by the LESB, a 15-member board attached to and administratively supported by the Wisconsin Department of Justice (DOJ). The LESB's objectives are to assist law enforcement by establishing minimum standards of recruitment and recruit training and by encouraging and supporting other programs designed to improve law enforcement administration and performance. [ss. 15.255, 165.85, and 165.86, Stats.; s. LESB 1.02, Wis. Adm. Code.]

Current law grants the LESB various powers and duties related to those objectives, such as the authority to: (1) certify or decertify law enforcement officers; (2) establish minimum educational and training standards, including curriculum requirements; (3) conduct research designed to improve law enforcement administration and performance; and (4) make recommendations concerning any matter within its purview. An officer meets the LESB's certification requirements if the officer: (1) meets the LESB's minimum employment standards; (2) is

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[2] The U.S. Supreme Court has reiterated the *Graham* and *Garner* standards in a few more recent cases. For example, in *Scott v. Harris*, 550 U.S. 372 (2007), a case involving an officer's attempt to terminate a dangerous high-speed car chase. In *Scott*, the court cited *Garner*'s application of the Fourth Amendment's "reasonableness" test and the balancing test. [*Id.* at 382-83.] The Court concluded that the car chase posed a substantial and immediate risk of serious physical injury to others, and the officer's attempt to terminate the chase by forcing the driver off the road was reasonable. [*Id.* at 386; *see also Plumhoff v. Rickard*, 572 U.S. 765 (2014).]

[3] Current law also requires that each person in charge of a law enforcement agency prepare in writing and make available for public scrutiny a specific procedure for processing and resolving a complaint by any person regarding the conduct of a law enforcement officer employed by the agency. Any writing prepared pursuant to this requirement must include a conspicuous notification of the criminal prohibition against and penalty for making false complaints of police misconduct. [ss. 66.0511 (3) and 946.66, Stats.]

employed as an officer with an agency; and (3) successfully completes the required preparatory training for each applicable certification within 12 months of hire.[4]

The LESB is statutorily required to conduct training on specified subjects, such as first aid, patrolling, techniques of arrest, and firearms, among several others. Pursuant to its statutory charge, the LESB provides a preparatory training course titled "defensive and arrest tactics." Specifically, the LESB's *Defensive and Arrest Tactics; a Training Guide for Law Enforcement Officers*, effective January 1, 2008, sets forth the use-of-force standards on which officers are trained.

POTENTIAL CONSEQUENCES FOR AN OFFICER'S USE OF FORCE

Disciplinary Action

A law enforcement officer may be subject to certain disciplinary procedures, which currently exist as a matter of state law, based on the officer's use of force. In the context of local law enforcement, disciplinary action taken against a law enforcement officer may only be authorized by the relevant reviewing authority, such as a police and fire commission or county civil service commission.[5] The process is typically initiated by disciplinary charges being filed against a law enforcement officer by a chief, sheriff, police and fire commission, civil service commission, or other aggrieved person. Once this occurs, a public hearing before the appropriate reviewing authority is scheduled. [ss. 59.26 (8), 59.52 (8), 62.13 (5), and 62.50, Stats.]

Both state and local governmental employees have certain procedural protections when an officer is disciplined or removed. For example, a reviewing authority may not suspend, demote, or discharge a law enforcement officer unless it determines there is "just cause" to sustain the charges.[6] For a local law enforcement officer, in reviewing whether there is "just cause" to discipline or remove an officer, the authority must analyze seven factors, to the extent applicable. These include:

- Whether the employee could reasonably be expected to have knowledge of the probable consequences of the alleged conduct.
- Whether the rule that was allegedly violated is reasonable.
- Whether reasonable efforts were made to discover whether the employee violated a rule or order, whether there was substantial evidence of the violation, and whether the efforts to discover the evidence were fair and objective.

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[4] For more information regarding these requirements, and the LESB generally, see Wisconsin Law Enforcement Standards Board, *Policy & Procedures Manual* (June 7, 2017).

[5] A hearing is not held by a reviewing authority for every disciplinary action taken by a chief or sheriff. For example, a law enforcement officer and chief or sheriff may agree to a penalty, such as a suspension, that does not require approval by a reviewing authority.

[6] Disciplinary policies are traditionally subject to collective bargaining, and a collective bargaining agreement may include aspects such as the particular requirements for providing notice of certain steps in the investigation, the conditions under which a union representative may be present or take other action regarding an investigation, and the conditions that may be applied to a suspension. However, the reviewing authority retains, as a management right, the right to suspend, demote, discharge, or take other appropriate disciplinary action against an employee for just cause.

- Whether the chief or sheriff is applying a rule or order fairly and without discrimination against the law enforcement officer.
- Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and the employee's record of service.

[ss. 59.26 (8) (b) 5m., 59.52 (8) (b), 61.65 (1) (am), 62.13 (5) (em), and 62.50 (17) (b), Stats.]

For a state law enforcement officer, in reviewing whether there is "just cause" to discipline or remove an officer, a progressive discipline process must be applied for work performance or personal conduct that is inadequate, unsuitable, or inferior. However, an agency may accelerate discipline for conduct or performance that is severe in its inadequacy, unsuitability, or inferiority, and certain conduct by an employee constitutes just cause for discipline or removal, without being subject to progressive disciplinary actions. The conduct that constitutes just cause includes harassment, intoxication, falsification of records, and theft, among others. [s. 230.34, Stats.; and ch. 410, Wisconsin Human Resources Handbook.]

Decertification

Certain events may result in a law enforcement officer being decertified by the LESB. Current law grants the LESB authority to decertify a law enforcement officer, meaning that the officer is no longer qualified to be a law enforcement officer in Wisconsin. Statutory grounds for decertification by the LESB include termination of employment; violation or failure to comply with an LESB rule, policy, or order relating to curriculum or training; conviction of a felony; or conviction of a misdemeanor crime of domestic violence. Pursuant to the LESB's policy and procedures manual, a decertified officer is ineligible to retain employment, and is ineligible for re-employment and recertification for a minimum of six months from the date of decertification. [s. 165.85 (3) (cm), Stats.]

Civil Liability

A law enforcement officer may be subject to civil liability based on his or her use of force. Under **state law**, a person may file a civil lawsuit against a public officer in state court. Such lawsuits typically allege negligent or tortious conduct. However, in Wisconsin, such lawsuits may be subject to the requirements and restrictions set forth in s. 893.80, Stats., known as the **governmental immunity** statute.[7] Generally, the statute grants immunity to governmental entities for intentional acts, but such immunity is not granted directly to a governmental entity's officers or employees. However, units of government, their officers, and their employees are immune from liability for damages resulting from discretionary acts. Wisconsin case law has established narrow exceptions to governmental immunity that, if applicable, allow units of government or their officers or employees to be held liable for an action or inaction undertaken in the scope of employment. The exceptions to immunity are: (1) the performance of ministerial duties imposed by law; (2) known and compelling dangers that give rise to ministerial duties on the part of public officers or employees; (3) acts involving medical discretion; and (4) acts that are malicious, willful, and intentional. [*Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶24.]

In addition to state law claims, a plaintiff may seek relief pursuant to 42 U.S.C. s. 1983, a **federal law** under which an individual may file a civil lawsuit against any person who, acting under color of state law in the official's individual capacity, deprived the individual of rights created by the U.S. Constitution and laws. The use of excessive force by police officers in

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[7] For more information on immunity under state law, see Legislative Council, *Local Governmental Immunity in Wisconsin*, Information Memorandum (Aug. 2015).

effecting an arrest is a well-recognized ground for liability under federal law. [*Clark v. Ziedonis*, 513 F.2d 79, 80 n.1 (7th Cir. 1975).]

However, **qualified immunity** may be a defense to federal claims under s. 1983. Generally, qualified immunity shields governmental officials from liability under s. 1983 claims when the official carries out a discretionary function, unless the conduct violates "clearly established" constitutional law. [*Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009).] Note, that under state law, no such exception to immunity applies, while in federal litigation, whether an officer's alleged conduct violates clearly established constitutional law is the critical issue.[8]

Criminal Liability

A law enforcement officer's use of force may result in criminal charges, depending on the circumstances. Most crimes are prosecuted under **state criminal law**, in that each state legislature determines the conduct that constitutes a crime in the state and assigns a penalty for each crime. Generally, a prosecutor determines whether to charge an officer with a crime by analyzing whether the officer's actions constitute a crime. However, in some instances, an officer's use of force which would otherwise be a crime may be permissible if his or her conduct constitutes self-defense or the reasonable accomplishment of a lawful arrest. [See, ss. 939.45 (4) and 939.48, Stats.] In a criminal action where one of these defenses is raised, the prosecution has the burden of proving, beyond a reasonable doubt, both the elements of the crime charged and that the defendant's actions were not privileged.

A **federal criminal law** statute, 18 U.S.C. s. 242, enforces U.S. constitutional limits on conduct by police officers. Under this law, the government has the burden of proving the following elements: (1) that the defendant deprived a victim of a right protected by the Constitution or laws of the United States; (2) that the defendant acted willfully; and (3) that the defendant was acting under color of law. The "willfulness" element requires proof of "specific intent." Specific intent is "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." [*Screws v. United States*, 325 U.S. 91, 104 (1945).]

This information memorandum was prepared by Amber Otis, Staff Attorney, on June 26, 2020.

[8] This information memorandum focuses on an individual officer's potential civil liability. However, local governmental entities are considered "persons" and may violate s. 1983 through: (a) an express policy that, when enforced, causes a constitutional deprivation; (b) a widespread practice so permanent and well-settled that it constitutes a "custom or usage" with the force of law; or (c) a final decision of a policymaking authority. [*Monell v. N.Y. Dep't of Soc. Serv.*, 436 U.S. 658 (1978); *Calhoun v. Ramsey*, 408 F.3d 375 (7th Cir. 2005).] Federal law also prohibits government authorities or their agents from engaging in a "pattern or practice of conduct by law enforcement officers…that deprives persons of rights…secured or protected by the Constitution or laws of the United States." [42 U.S.C. s. 14141.] Under this statute, the U.S. Attorney General is authorized to sue for equitable or declaratory relief if there is "reasonable cause to believe" that such a pattern of constitutional violations has occurred.