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**MEMORANDUM**

**TO:** All County Prosecutors  
  
All Law Enforcement Chief Executives  
  
All County Sheriffs  
  
Colonel Joseph R. Fuentes  
Superintendent, New Jersey State Police  
  
Stephen J. Taylor  
Director, Division of Criminal Justice

**FROM:** Jeffrey S. Chiesa, Attorney General

**DATE:** May 3, 2012

**SUBJECT:** Clarification of the Revised Supplemental Policy on Conducted Energy Devices

Final preparations are being made across the State to provide conducted energy devices (CEDs) to police officers who have been selected by their departments to carry and use these less-lethal weapons. These devices can, in appropriate circumstances, help to diffuse a volatile situation, and may make it unnecessary for an officer during a confrontation to resort to the use of deadly force. Indeed, in some circumstances, the mere display of a CED may obviate the need to employ *any* type of actual force. It is therefore important that these devices be made available for deployment as expeditiously as possible.

During the course of recent CED training programs, several questions have been raised concerning the Attorney General's Revised Supplemental Policy on Conducted Energy Devices



("Supplemental Policy"). It is appropriate to address and definitively resolve those questions before CEDs are deployed so that police officers can know when, and in what circumstances, they are permitted to use these weapons to enhance public and officer safety. The purpose of this memorandum is to explain, clarify, and, as needed, amend the Supplemental Policy.

Two of the questions that have arisen relate to the "spark display" function of a CED. Specifically, clarification is needed on when an officer is permitted to conduct a spark display and whether such a display of a CED's ability to discharge electricity can only be done in circumstances where the officer would be authorized to actually fire or discharge the weapon. That issue is addressed in Section I of this memorandum. Section II of this memorandum addresses the related question of what reports, if any, must be filed by an officer to document the exercise of this form of so-called "constructive authority." Section III of this memorandum addresses a separate question as to when, and in what circumstances, a person against whom a CED has been discharged must be transported to a hospital. Section III also addresses whether, and in what circumstances, a properly trained law enforcement officer is authorized to detach CED darts/electrodes from the person against whom the device had been used.

#### I. Authority to Conduct a Spark Display

Conducted energy devices are capable of producing a large, continuous spark that can be seen and heard by the person against whom the device may be targeted. The spark display function is used to convince a person that the device being exhibited by the officer is indeed a CED and not a firearm, and that the device is charged and ready to be fired at the person if needed. The Supplemental Policy defines a spark display to mean "a non-contact demonstration of a conducted energy device's ability to discharge electricity that is done as an exercise of constructive authority to convince an individual to submit to custody." Supplemental Policy, Section III at p.4.

The critical term "constructive authority" is defined and explained in the Attorney General's Use of Force Policy that had originally been issued in April 1985 and that was last revised in June 2000. (The Attorney General's 2000 Use of Force Policy is hereinafter referred to as the "General Policy" or "General Use of Force Policy.") The Definitions section of the General Policy explains that "constructive authority does not involve actual physical contact with the subject, but involves the use of the law enforcement officer's authority to exert control over a subject." The General Policy provides several examples of constructive authority, including "verbal commands, gestures, warnings, and unholstering a weapon."

The question that has been raised during the course of CED training programs is when, and in what circumstances, is an officer authorized to conduct the spark display, and specifically, whether any such display is permitted only in those situations where the officer would be authorized to actually fire and discharge a CED. In addressing this question, it is first critical to note that the

Definitions section of the Supplemental Policy, Section III, clearly distinguishes a spark display from the act of firing or discharging the device. The actual firing or discharge of a CED constitutes a level of actual force that is now referred to as “enhanced mechanical force.”<sup>1</sup> A spark display, in contrast, does not involve the use of actual force, but rather constitutes mere constructive authority under the continuum of force options outlined in the General Use of Force Policy. In other words, constructive authority is not deemed to be the actual use of force, but rather is only a threat to use future force if the subject refuses to comply with the officer’s commands. Clearly, and as a matter of common sense, the standard and prerequisites for employing actual force, and in particular enhanced mechanical force, are significantly different from the standard and prerequisites for employing mere constructive authority.

With that general principle in mind, and for the following reasons, a spark display should not be deemed to constitute the “use” of a CED for purposes of the specific standard explained in Section V (1) of the Supplemental Policy (Authority to Use Conducted Energy Devices). Clearly, the term “use” for purposes of that Section of the Supplemental Policy refers to the actual firing and discharge of a CED. Accordingly, an officer should not be precluded from conducting a spark display simply because the confrontation with a civilian has not yet escalated to the point where the officer would be authorized to actually fire or discharge the device. Rather, an officer should be permitted to conduct a spark display in appropriate situations where the exercise of this form of constructive authority might convince the person to submit to custody or authority, and might therefore obviate the need to use *any* form of *actual* force (physical, mechanical, enhanced mechanical, or deadly).

This commonsense interpretation of Section V of the Supplemental Policy is consistent with, indeed required by, that portion of the Supplemental Policy that specifically addresses when, and in what circumstances, an officer may unholster and display a CED. Section VIII (3) of the Supplemental Policy specifically provides that:

An officer shall not unholster a conducted energy device during an actual operation unless the officer reasonably believes that it may be necessary for the officer to use the conducted energy device. An officer shall not exhibit a conducted energy device to a person or conduct a spark display during an actual operation unless the officer

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The term “enhanced mechanical force” is not part of the continuum of force options described in the General Use of Force Policy. Rather, this concept was first developed and incorporated into the Attorney General’s Supplemental Policy on Less-Lethal Ammunition, which was issued in 2008. See Report on Less-Lethal Ammunition (February 13, 2008), which had been submitted by the Attorney General’s Advisory Group to Study Less Lethal Force (explaining that enhanced mechanical force is “an intermediate force option between mechanical force and deadly force, requiring a greater level of justification than that pertaining to physical or mechanical force, but a lower level of justification than that required for the use of deadly force.”). See also Supplemental Policy on Conducted Energy Devices, Section II (1) at p. 2 (embracing the “enhanced mechanical” level of force classification and applying it to CEDs).

reasonably believes that display of the device and/or a demonstration of its ability to discharge electricity as an exercise of constructive authority would help to establish or maintain control in a potentially dangerous situation in an effort to discourage resistance and ensure officer safety. An officer may also unholster and/or exhibit a conducted energy device or conduct a spark display if another officer on the scene has unholstered and/or exhibited a firearm in accordance with the Attorney General's Use of Force Policy." [Supplemental policy at 9 (emphasis added to show that the focus is on future use-of-force contingencies, rather than on an already-existing justification to fire or discharge the device)].

It is especially important to note that the Supplemental Policy thus makes clear that an officer is authorized to exhibit a CED – and to conduct a spark display – when an officer would be allowed to unholster his or her firearm, thus incorporating by reference the longstanding policy governing the display of a firearm. Indeed, the above-quoted portion of the Supplemental Policy explaining when a CED may be displayed is taken essentially verbatim from the provision of the General Use of Force Policy that explains when an officer may exhibit a firearm. See General Use of Force Policy, Section on "Authorization and Limitations," D (1) (e). Relatedly, the General Policy explains that, "pointing a firearm at a subject is an element of constructive authority to be used only in appropriate situations." Id., Definitions section, par. A(3).

Both the General Use of Force Policy and Supplemental CED Policy contemplate situations where some form of actual force (as distinct from constructive authority) may need to be used if, as it turns out, the exercise of constructive authority does not succeed in inducing the subject to comply with police commands or submit to police custody. In other words, the authority to display a firearm, or a CED, anticipates future events and risks to public or officer safety that have not yet ripened, and that may never come to fruition if, as is hoped, the exercise of constructive authority in the form of the threat to use future force is sufficient to convince the subject to submit.

It is also critical to note that section VIII (4) of the Supplemental Policy explains that, "an officer may, through verbal commands, threaten to use the conducted energy device, so long as the officer's purpose is limited to creating an apprehension that the device will be used if necessary." This provision of the Supplemental CED Policy is based upon the provision of the General Use of Force Policy relating to an officer's threat to use deadly force. That provision of the General Policy specifically provides that, "a threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the officer's purpose is limited to creating an apprehension that deadly force will be used if necessary, does not constitute deadly force. General Use of Force Policy, Deadly Force, Section E(3)(emphasis added).

It is thus clear that the Supplemental Policy fully embraces the well-established principle that

in appropriate circumstances, a police officer may threaten to use a particular level or type of force, even though the officer at the moment of the warning is not authorized to actually employ the threatened level or type of force. Indeed, it would make no sense to permit an officer to display and create apprehension of the future use of a firearm loaded with lethal ammunition, but prohibit the officer in those circumstances from similarly displaying a less-lethal weapon.

**For the foregoing reasons, the Supplemental CED Policy shall be interpreted to permit an officer during an encounter to unholster and display a CED -- and as part of that exhibition, to activate the device's spark display function -- where: 1) the purpose of such display is to create an apprehension that the device will be fired/discharged if necessary so as to induce compliance with police commands; 2) the person to whom the CED is exhibited is refusing to comply with police commands; and 3) the use of some form of actual force against the person (whether physical, mechanical, enhanced mechanical, or deadly) may potentially be needed if the exercise of constructive authority is not successful in inducing the person to comply with the officer's commands.**

If the foregoing three conditions are satisfied, a spark display may be used to gain the attention and compliance of a person who does not yet pose a risk of causing death or serious bodily injury to the officer, him/herself, or others, notwithstanding the strict and unwavering rule that a CED may only be actually fired or discharged against a physically combative person and not someone who is only passively resisting police authority. It must be emphasized, however, that the authority to conduct a spark display as an exercise of constructive authority does not in any way alter the requirements that must be satisfied before the device can actually be fired. These weapons may not be fired or discharged against a person who is only passively resisting police commands. Accordingly, in the event that the person refuses to comply with police commands after witnessing a spark display, the officer would not be authorized to fire or discharge the CED unless all of the criteria and prerequisites set forth in the Supplemental Policy are satisfied. The refusal to submit to constructive authority, in other words, does not by itself justify firing or discharging a CED, and nothing in this memorandum should be construed in any way to relax or lessen the standard for actually firing or discharging a CED.

Finally, it bears noting that nothing in this memorandum should be construed to limit the authority of an officer to exhibit a CED in circumstances where the officer would be immediately authorized to fire or discharge the weapon. Rather, the purpose of this portion of this clarifying memorandum is to explain the circumstances when exhibiting a CED and activating its spark display function is authorized notwithstanding that the present circumstances do not justify actually firing or discharging the device.

## II. Reporting of Spark Display Events

Section X(1) of the Supplemental Policy provides that when a law enforcement officer either fires/discharges a CED or conducts a spark display, the officer must complete a "use of force report as required by the Attorney General's Use of Force Policy," and must also complete a "Conducted Energy Device Report." These specialized reports are in addition to any other reports "made necessary by the nature of the underlying incident." For purposes of this report-writing provision, the Supplemental Policy does not distinguish between the firing/discharge of a CED and a spark display.

After consulting with police chiefs and other law enforcement professionals, it reasonably appears that no purpose will be served by requiring an officer to prepare either a Use of Force Report or a Conducted Energy Device Report when an officer conducts a spark display but does not thereafter fire or discharge the device, or otherwise employ actual force against the subject. It is important to note in this regard that the General Use of Force Policy does not require a law enforcement officer to complete a Use of Force Report when an officer merely exercises constructive authority and does not actually employ force. Rather, the General Policy expressly provides that such reports must be filed only when an officer employs physical, mechanical, or deadly force. See Section III (A). Thus, the part of the Supplemental Policy that provides that an officer who conducts a spark display must in all instances complete a Use of Force Report "as required by the Attorney General's [General] Use of Force Policy" is internally inconsistent, since such reports are not required by the General Policy. It is also important to note that the Supplemental CED Policy requires the careful review of CED reports by the county prosecutor and the Division of Criminal Justice, and requires followup investigations by the deploying officer's department, but only when a CED is actually fired or discharged. See Supplemental Policy, Section X(2). These special investigation and oversight provisions do not apply in circumstances where an officer merely conducts a spark display.

Accordingly, in order to make the Supplemental Policy consistent both internally and with the reporting requirements of the General Use of Force Policy, Section X(1) of the Supplemental Policy is hereby amended to provide that an officer need not complete a Use of Force Report or a Conducted Energy Device Report based solely upon having conducted a spark display and where the officer did not actually fire or discharge the CED. If the officer is otherwise required to complete a Use of Force Report (*i.e.*, if physical, mechanical, or deadly force was actually employed), then such reports should, of course, in the interest of completeness, document the use of a spark display as constructive authority that was unsuccessful in preventing the need to employ actual force. Likewise, if a CED was fired or discharged during the encounter, thus necessitating the filing of both a Use of Force Report and a Conducted Energy Device Report, those reports should, of course, document the use of a spark display as constructive authority prior to the actual firing or discharge of the weapon. Finally, it should be noted that nothing in this memorandum should be construed in any way to relieve an officer's duty to complete any other kind of report made necessary by the

nature of the underlying incident (*e.g.*, an arrest, incident, investigation, or continuation report).

### III. Clarification Regarding the Handling of Injured Suspects

A question has been raised regarding when and in what circumstances a law enforcement officer is required to transport a person to a medical facility following the firing or discharge of a CED. Section IX of the supplemental policy succinctly provides in its entirety that:

Subjects against whom a conducted energy device has been directed shall be transported to a medical facility for examination if they suffer bodily injury or request medical attention.

The specific question that has been raised is what constitutes bodily injury for purposes of the mandatory transport-to-a-medical-facility provision, and whether such injury is automatically and invariably suffered whenever a person is struck by the dart/electrode of a CED and/or is subjected to a CED discharge.

The term “bodily injury” is not defined in either the Supplemental Policy or the General Use of Force Policy. The New Jersey Code of Criminal Justice broadly defines “bodily injury” to mean “physical pain, illness or any impairment of physical condition.” N.J.S.A. 2C:11-1(a). If the penal code’s definition of bodily injury were to be applied to the Supplemental Policy provision on medical transport, then as a practical matter, in every instance following the firing or discharge of a CED, police would be required to transport the person against whom the CED was used, since the device, given its design and purpose, causes “impairment of physical condition” (*e.g.*, neuromuscular disruption resulting in temporary physical incapacitation) if not physical pain during the relatively brief period while the device is being discharged.

The Supplemental Policy, however, does not require officers in all instances where the device is deployed to transport the subject to a medical facility for examination. Indeed, if any such automatic, bright-line medical-transport rule were intended, the Supplemental Policy undoubtedly would have expressly so provided. By the same token, the Supplemental Policy should not be read to mean that the impact or implanting of a CED dart/electrode onto the subject’s person automatically and invariably constitutes physical injury within the meaning of the mandatory transport-for-medical-examination provision. Rather, a more practical and common sense interpretation of the Supplemental Policy would require a case-by-case determination considering, among other relevant factors, the nature and sensitivity of the area of the body where the darts/electrodes have struck, and the medical risks posed by the act of removing one or both darts/electrodes from the subject.

Accordingly, the text of Section IX of the Supplemental Policy concerning the handling of

injured suspects is hereby DELETED AND REPLACED with the following highlighted material:

**Subjects against whom a conducted energy device has been directed shall be transported to a medical facility for examination if any of the following circumstances exist:**

- 1. The subject requests medical attention;**
- 2. The subject had been rendered unconscious or unresponsive;**
- 3. The subject after being subjected to a discharge does not appear to have recovered normally, as described in CED training;**
- 4. The subject has exhibited signs of excited delirium, as described in CED training, prior to, during, or after the discharge of the CED;**
- 5. The subject has suffered bodily injury requiring medical attention as a result of a fall, or otherwise reasonably appears to be in need of medical attention;**
- 6. The subject was exposed to three or more discharges from a CED during the encounter;**
- 7. The subject has been exposed to a continuous discharge lasting 15 seconds or more;**
- 8. No one present at the scene is qualified or authorized to remove the CED darts/electrodes from the subject's person;**
- 9. An officer trained and authorized to remove darts/electrodes experiences difficulty in removing a dart/electrode; or**
- 10. Any part of a CED dart/electrode has broken off and remains imbedded.**

**An officer is authorized to remove a CED dart/electrode from a subject only if the officer has received training on dart/electrode removal, provided, however, that an officer is not authorized to remove a CED dart/electrode from any part of the person's head or neck, or where the dart/electrode is located in the area of the subject's genitalia, or female breast. In the absence of exigent circumstances requiring immediate action, a CED dart/electrode may only be removed from these areas of the subject's body by an emergency management technician (EMT) or by other qualified medical personnel.**