
Code Enforcement Officers, Self-Defense, and the Use of Force: The Issues That Can No Longer Be Ignored

I. Law Enforcement Officers and the Use of Force

Law enforcement officers in Maryland and across the Country are vested with a powerful and unique authority in the performance of their duties: Law enforcement officers have the duty to use such force as may reasonably be necessary in the enforcement of law. This includes the use of force ranging from minimal to deadly, depending on the circumstances faced by the officer. It is not, however, an authority given lightly. In Maryland, law enforcement officers must meet training requirements established by the State and must be certified by the Maryland Police Training Commission. Law enforcement officer training includes constitutional limitations on the use of force and training in the use of specific weapons, from batons, to pepper spray, to Tasers, to firearms. Law enforcement officers are trained in when they can act in self-defense and what level of force should be used in different and rapidly changing circumstances. In essence, law enforcement officers must use force only in accordance with the law and departmental procedures and cannot use more force than is reasonably necessary under the circumstances to affect an arrest or protect themselves or citizens from harm. Finally, law enforcement officers are prohibited from using force in a discriminatory manner.

The law enforcement officer's duty to use force when necessary is a blessing and a curse. When force is reasonably used by a law enforcement officer to effect his or her duties, the officer and others are protected. However, if a law enforcement officer inflicts injury by using more force than necessary to make the arrest, he or she may face administrative discipline and legal liability. When a law enforcement officer is charged with having used excessive force, the reasonableness of the force used must be judged in the light of the circumstances as they appeared to the law enforcement officer at the time he or she acted, and the measure is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary under the circumstances. The law enforcement officer has discretion, within reasonable limits, to determine the amount of force which the circumstances require, and he is not guilty of wrongdoing unless he arbitrarily abuses the power confided in him.

II. Code Enforcement Officers and Self-Defense

What does this discussion concerning law enforcement officers have to do with code enforcement officers? The answer is it highlights the obvious: Code enforcement officers are *not* law enforcement officers in the strict sense of the word, and are neither expected to nor required by law to use force, in any degree, in the performance of their official duties. But this fact doesn't answer the question of whether a code enforcement officer *may have to use force* in the performance of his or her duties. Start with the local government's position description for code enforcement officers – does it mention the use of force? Does it specifically state that using force, in at least some degree, may be part of the position's requirements? I hope not. In fact, the answer to these questions should be a

resounding “No.” If it is not, the local government could be exposing its code enforcement officers and itself to legal pitfalls that it probably has not even considered.

But we all have to acknowledge that there may be extreme circumstances in which a code enforcement officer has no choice but to use force. After all, a code enforcement officer’s job includes actions that generate hostility, confrontation, and even violence, such as serving violation notices, placing liens and levies on property, authorizing the removal of motor vehicles and/or the razing of homes. So, how could a code enforcement officer’s use of force in such situations be viewed differently than the use of force by a police officer? Again, unlike a law enforcement officer, a code enforcement officer is precluded from affirmatively using force in the performance of his or her duties. Does this mean that a code enforcement officer may never use force in the performance of official duties? No, it does not. What it *does* mean is this: A code enforcement officer, as any other citizen, has *the right to defend himself* in certain circumstances. Does it follow then that code enforcement officers should be trained in the use of force? No, and to the contrary, it means that code enforcement officers should be trained in the right of self-defense.

Self-defense is a legally recognized right that we all have. It allows us to protect ourselves and others by using reasonable force against another person who is threatening to inflict force upon our person or someone else. The legal right requires that the person acting in self-defense: (1) not be the aggressor; (2) actually believe he or she (or another person) is in immediate and imminent danger of death or serious bodily harm; (3) that the belief is reasonable in the circumstances presented; and (4) use no more force than is reasonably necessary to defend himself or herself (or others) in light of the threatened or actual force.

Even if attacks on code enforcement officers, by man or animal, are isolated, officers need to know the circumstances in which the right of self-defense comes into play. An example of why comes from an occurrence in Florida when a property owner with a meat cleaver confronted a code enforcement officer during a routine property inspection. The code enforcement officer had been responding to a neighbor’s complaint that the property owner had “too much junk in his yard.” The property owner attacked the code enforcement officer, causing injuries to his face and arms. The code enforcement officer had not, however, been trained in self-defense. In fact, no Pensacola Code Enforcement Officer had received such training. This is problematic in a job which can be far more dangerous than expected, and officers, whose mere presence can generate hostility, can face attack from both individuals and animals. Certainly, this problem is sufficiently widespread for local governments to respond. Self-defense training statewide for code enforcement officers should be the goal. This can be accomplished by directly working with local law enforcement in the community.

III. The Proactive Measures

Going forward, what principles should be kept in mind as we move towards the goal of self-defense training for code enforcement officers? Ensuring that code enforcement officers wear uniforms or other professional dress is a must, as is making sure that the code enforcement officers prominently display photo identification. Code enforcement vehicles should be prominently marked. Strobe lights are a possibility. Radio access to local police agencies is also encouraged, as it must be each code enforcement officer’s primary objective to *avoid* confrontation and to de-escalate confrontation when it occurs. This can be done by retreating, if safe to do so, and/or contacting local police. Do your code enforcement officers have radios on their persons or in their cars? If not, consider this option. Also, it is important to document all incidents that involve self-defense. This includes preserving recordings and photographs, as well as police and hospital records. As to public outreach, asking residents to contact local police if they see a code enforcement officer in trouble should be encouraged. Jim Garrett, then the City of Gainesville, Florida’s Code Enforcement

Manager, said in 2008: “Code enforcement officers protect neighborhoods, property values and the quality of life. And they do it at risk to themselves.”

IV. The Lawsuit Potential – The Code Enforcement Officer

So, what is your local government doing to benefit code enforcement officers and what is it doing to protect itself in the event of a lawsuit? If you are “arming” Code enforcement officers with mace, pepper spray, or even Tasers, you are inherently authorizing at least a limited use of force during the performance of the code enforcement officer’s duties, although restricting that use to self-defense. As to electronic control weapons, including stun guns and Tasers, the local government must first determine if such weapons can legally be carried in the jurisdiction. Is this prohibited by local law? Is the code enforcement officer who is carrying such a weapon allowed to do so under State law? Was the weapon purchased in compliance with State law? If you are “arming” code enforcement officers or knowingly allowing them to be “armed,” are you training them in the law of self-defense? Are you training them in the use of the specific devices/weapons issued to or possessed by them? If not, why not? The failure to do so could expose not only the code enforcement officer, but also the local government to suit and liability. How can this be?

By allowing code enforcement officers to employ specific devices/weapons in self-defense, local governments can be sued under State common law (for example, assault and battery) and under the State and federal constitutions for using excessive force. As to federal constitutional claims, they most likely would be analyzed under the Fourth Amendment of the United States’ Constitution, the amendment that prohibits State actors, including local government officials and officers, from making “unreasonable” seizures by using excessive force. But if a code enforcement officer is not a law enforcement officer, how can they be judged under the same constitutional standard when force is used? I reach this conclusion because even when force is used in self-defense, it can be excessive. In other words, even when one is acting in self-defense, the actor may “cross the line” and use more force than was necessary to repel a threatened or actual attack. For example, a code enforcement officer who used pepper spray might be sued by a property owner who alleges that the officer used the pepper spray even though there was no attack or threatened attack. With little guidance in this area, there is the distinct probability that a court would analyze the use of force by the code enforcement officer the same as it would a law enforcement officer. Even if the court decided not to apply the Fourth Amendment, rest assured that another amendment, specifically the Fourteenth (which, in part, prohibits conscience shocking or arbitrary government conduct), would fill the void.

V. The Lawsuit Potential – The Local Government

With that said, if a code enforcement officer can be sued for federal and/or State constitutional violations, is the local government exposed to liability as well? Without question, the answer is yes. Under a state constitutional claim, the local government employer could be liable merely because it employed the code enforcement officer at the time of the incident. In a federal constitutional claim, liability could be imposed – not because the local government is the employer – but rather because it may have failed to train the code enforcement officer in self-defense, and/or had established an official policy or informal custom of tolerating the use of force by code enforcement officers in non-self-defense situations. As to federal constitutional liability, the great concern is that such liability is unlimited – there are no liability caps. Further, notice of claim is not required in such suits and governmental immunity does not apply.

VI. The Insurance Issues

Last, and in some ways least, are the insurance issues, namely coverage, defense and indemnification. These are the niceties that generally come into play when a claim is made or a lawsuit filed. In this regard, LGIT members can be assured that, under LGIT's General Liability Program (not Police or Public Official) coverage extends to a member's officials, officers, and employees who use "reasonable force to protect persons or property...." While the phrase "self-defense" is not used, it is implicit in the coverage language.

VII. Conclusion

The existence of insurance coverage does nothing to root out the underlying issues that give rise to the lawsuit in the first place. Confronting such problems is the responsibility of each local government. Taking proactive measures now, including reviewing job descriptions for code enforcement officers, establishing written policies and procedures, providing self-defense training, including training in the use of any device/weapon issued to or knowingly carried by code enforcement officers, will certainly help overcome legal challenges when they come. That should be an objective for all of us.

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