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Law Enforcement Action Forum NEWSLETTER

OFFICERS JUST DON'T GET IT: THEY ARE TRAINED IN MORE PLACES THAN THE CLASSROOM !

By Gene King, LEAF Coordinator

The Michigan Municipal League, LEAF's sponsor, feels officer training is so important that it has promoted training in numerous ways. The MML has supported officer training by offering classes, publishing the *LEAF Newsletters*, and sponsoring LEAF at the MACP Conferences. In addition, the MML has devoted a chapter to officer training in the *LEAF Manual for Law Enforcement Risk Control* and has stressed the importance of training in the *Risk Management is Good Management Manual*, including the Police Survey Guide. All these resources are available to you at "www.mml.org".

LEAF believes that the MML's efforts to provide resources and training have increased the number of law enforcement executives who understand the importance of training. The executives know officers need training and try to provide it as budgetary constraints allow. The problem is that even though the bosses may understand how important training is, neither they nor their people understand that getting training does not mean you have to be sitting in a classroom. The truth is that administrators and officers are continually in training. For example, they constantly receive training materials and information about various topics relevant to their jobs.

TRAINING DEFINED

Years ago, LEAF developed the definition of training that follows. Audrey Forbush of Plunkett Cooney and LEAF's Legal Advisor embraces the definition. Law enforcement executives need to drill this definition onto officers' minds, so that officers understand what training is:

"Training is the opportunity to learn, develop and become further educated. This is accomplished, in part, by reviewing and discussing the rules, policies, procedures, philosophy, and practices of the department and current case law applicable to their performance as employees. The purpose is to assist employees in performing their essential job functions. As an example, employees may be provided briefings, videos, periodicals, magazines, bulletins, newsletters, books or lectures. Training may also include discussion of current events and public policy issues, incident debriefing and performing mechanical and motor skills important to the job."

Over the years, Forbush has defended many law enforcement departments and officers across the state of Michigan and she, as well as other Pool Attorneys, can tell horror stories about when a defendant officer answered "NO" when asked by Plaintiff's Counsel whether or not they have received training. In the recent past, defendant officers, when asked about training, responded that they had **not** received any since leaving the police academy -- responses that directly contradicted testimony from the Police Chief and the Department's Training Officer. Forbush said she really had to scramble to overcome the blast from the bomb the officers had just dropped. However, the department had provided good training records that listed the many different types of training the department had given to the officers over their years of employment. These included many activities in the above definition of training. When it was her turn to ask questions, Forbush had to rehabilitate the officers without calling them stupid or ruining their credibility. Fortunately for the officers, Forbush was able to keep the training issue out of the trial and ultimately was awarded a no-cause verdict from the jury. When later asked about the training records, the officers said they did not consider things such as policy review, topical newsletter articles, or legal updates to be training. They were just things the department made everyone do!



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IT SHOULD NEVER HAPPEN

These situations happen all too often but are avoidable. Forbush believes that with the commitment of top-level management and supervisors, officers can learn and understand LEAF's definition of training. Then, officers will recognize that the article their supervisor assigns them to read or the video they have to watch is training. Furthermore, Forbush stresses the importance of supervisors making these types of assignments so officers recognize that management supports the training and that each employee is accountable for completing them. Additionally, management should use obvious tracking devices – such as a sign-off sheet -- to ensure officers have completed the training. To verify completion and, more importantly, understanding of the message, supervisor's should give a short test that requires a 100% score to pass. Several Chapters of the Law Enforcement Risk Control Manual have tests in the resource sections for just this purpose.

These steps become part of the department's Quality Assurance process by establishing accountability for the officers and their supervisors to document back to the boss that the officers have completed assignments. One of the fundamentals of "Risk Management is Good Management" is accountability for performance. In RMGM, the boss identifies to their subordinates what is important and then implements a quality assurance process to ensure that the department has reached the goal. In short, everyone understands that "If it is important to the boss, it is important to me!"

LEGAL CONTEXT FOR TRAINING

When it comes to any discussion of the legal issues involving training, as Forbush points out, the granddaddy of all cases relevant to officer training is *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). In this case, Mrs. Harris did not receive the medical treatment she needed while in custody and sued the City. After hearing the case, the U. S. Supreme Court established that the City will have liability only when the failure to train amounts to deliberate indifference on behalf of the city toward its inhabitants.

The Canton court framed the critical question before it as "Under what circumstances can inadequate training be found to be a policy 'that is actionable' under § 1983?" *Canton, supra*, at 1202. In determining whether a "city policy" not to train is associated, the court expressed the culpability standard of deliberate indifference. The court stated:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy of training so likely to result in the violation of constitution rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Forbush points to "famous footnote 10" as an example of the far-reaching impact of the Court's decision. At page 1206, the court noted examples of when liability would arise under a policy of deliberate indifference. One such example would be if the city armed its officers with firearms in order to permit them to arrest fleeing felons, and then failed to train them on the use of deadly force. This could be said to be "so obvious" that the failure to train could be characterized as "deliberate indifference" to the constitutional rights of a municipality's inhabitants.

In a more recent case, *Gregory v City of Louisville*, 444 F.3^d 725 (6th Circuit, 2006) a former inmate brought a civil rights claim under §1983. The inmate alleged that members of an investigatory team involved in his criminal conviction withheld evidence causing him to serve seven years in custody. This case points to Canton's deliberate indifference standard in assessing liability. The 6th Circuit ruled in this case that failure to train officers in their duty to reveal all of the evidence they possess, even that which was favorable to the criminal defendant as required by *Brady v. Maryland*, 373 U.S. 83 S.Ct. (1963), has a **highly predictable consequence** of being a moving force in a constitutional violation.

In light of *Canton* and with the Courts looking at the highly predictable consequences of the actions of employees, Forbush opines that if a municipal entity has police officers, the officers must receive training on any task or responsibility that the department expects them to fulfill regularly. The training does not have to be formal classroom instruction, but the department has an obligation to educate its officers and to document all such activities.

MIOSHA REQUIRES TRAINING

All of Law Enforcement knows that the requirement to provide training to employees comes from many sources. Some

comes from the Courts, some from the legislative process, and others from regulatory agencies such as the Michigan Occupational Safety and Health Agency (MIOSHA). MIOSHA requires public entities that employ police officers to have particular policies and to provide training in a variety of areas. A number of law enforcement agencies ignore this requirement because MIOSHA does not often audit them. When MIOSHA inspects police, it often is while auditing the fire department in areas of confined space rescue, hazardous materials, Right to Know, or Respiratory Protection.

In June of 2002, LEAF published a newsletter titled *MIOSHA Affects Law Enforcement*. This newsletter discussed a wide range of compliance requirements, including training, as well as a number of facility exposures that could cause fines. You can find the newsletter at www.mml.org under Insurance/LEAFNewsletters and the compliance requirements in all the areas the newsletter discusses at www.michigan.gov/cis.

NEEDED TRAINING

One issue that arises more often than it should is the type of training officers receive. For example, officer may receive training in motorcycle or bicycle riding when they have received no training in use of weapons, defensive tactics, use of force, or any updates on legal issues. Executives must remember to prioritize training so that officers receive instruction in job functions they regularly perform before training on job functions they perform less frequently.

According to Forbush, training should cover the recurring situations that officers are likely to confront and training should include opportunities for discussion. Discussion allows an opportunity for trainers to outline management's expectations about the officers and their behavior. They also create a forum to define the discretionary portions of department policy using input from the officers who must apply it.

Officers should also participate in scenario-based training that stresses the appropriate use of force and choice of weapon to overcome any resistance that they may encounter. Forbush went on to say that scenarios should include escalation and de-escalation of force techniques so officers recognize when to escalate or deescalate an incident.

Based on current court decisions, law and regulations, at a minimum the following training should be provided to law enforcement officers. The LEAF Manual for Law Enforcement Risk Control and the MML Safety and Health Manual at mml.org have resources in all of these areas.

Recognizing the Mentally Ill and Substance Abusers (Yearly)

A number of incidents have occurred during which subjects died while being taken into custody. Not surprisingly, the Courts have ruled that departments must train their officers in handling the mentally ill and those with substance abuse problems. Specifically, officers must be able to recognize people with mental illness or substance abuse problems, they must know how to handle them, and they must know where to take them once they are in custody.

Handling Persons In-Custody (Yearly)

Once officers take a person into custody, they must be aware of the person's physical and psychological well-being. They must address any identifiable needs or issues. This can be as simple as providing food or ensuring that medicine is available at the right time for a diabetic. Sometimes, however, the "duty to protect" is more difficult. The person in custody might have a less recognizable medical condition or a communicable disease, or the individual may suffer from a recent or current psychological problem. Recognizing these "at-risk" individuals is an awareness issue. Officers should receive training regarding the importance of asking a few questions to obtain enough information to identify if a person is at risk. The types of questions that they should ask are:

Do you currently have a medical problem, illness or injury?

1. If yes, what?
2. Are you taking any medication?
3. Are you currently a user of narcotics or illegal drugs?
4. If yes, what drugs and when was the last time you took the drug?
5. Are you under psychiatric treatment? Any medication?

Firearms (Twice a Year Minimum, Four Times a Year Preferred)

Proper and consistent training techniques are the foundation for any firearms training program. Numerous resources are available to help law enforcement agencies design an effective firearms program. The department is responsible to ensure that

- Officers must meet qualification requirements at least twice annually with their authorized firearms. These include the primary weapon, any off-duty or back up weapons, and the department-issued shotgun or rifle. Twice a year is acceptable; four times a year is preferred.
- Officers should participate in reduced light training at least once annually.
- Officers should participate in outdoor, cold weather shooting at least once annually.
- Officers should undergo target identification drills at least annually to strengthen decision-making skills.
- Officers should be required to use holsters and other equipment during training that they would normally use on the job. Including winter outerwear and ballistic vest.

Vehicle Operations (Yearly, Physical Driving Every 3 Years)

Each year the department should train officers in its policy on vehicle operations and pursuit driving. This allows the command officers to reinforce the department's expectations of officer decision making. The training also serves to emphasize the limits on discretion in making those decisions.

Every three years, officers should receive behind-the-wheel driver's training. Driving is a high frequency job function that holds the potential for high severity of injury and loss. Officers spend most of their time behind the wheel of the most powerful weapon in the police arsenal, which definitely qualifies as a recurring situation.

Use of Force Issues (Yearly)

A yearly refresher is essential on force as defined in the law and on its appropriate application. With the introduction of so many different kinds of weapons into the police arsenal, officers have a variety of choices on what to use in any given situation. They need training on department policy, including what officers can expect in the evaluation of their actions by the department in assessing the use of force. It is important to communicate clearly to officers that there may be an incident where deadly force is the correct, immediate response.

Defensive Tactics/Weapons (Yearly)

Officers must be able to defend themselves against a spontaneous assault or overcome subject resistance. The tendency is to overreact and resort to excessive force or to under-react and suffer personal injuries. Officers therefore need training in basic defensive tactics and use of defensive weapons with yearly updates. With the proliferation of less-than-lethal weapons in law enforcement, regular training in their use and deployment is necessary. During the yearly training, the department should also update officers on any technological changes or recommendations for use of the weapon that the manufacturer has made.

Hazardous Materials (Every Two Years)

Federal Law, under SARA Title III, requires all officers to receive training every two years in the recognition of and proper response to hazardous materials and weapons of mass destruction.

Bloodborne Pathogen (Yearly)

MIOSHA's Bloodborne Infectious Disease Standard, Part 554, requires that employees wear protective equipment when it is reasonably anticipated that they may be in contact with blood, mucous membranes, non-intact skin, or contaminated items or surfaces, other potentially infectious materials. It is important for departments to have an up-to-date blood borne pathogen and infectious disease policy. MIOSHA requires yearly

training for all employees who are in jobs that may have an exposure. Employers must offer high-risk employees inoculations for HBV. Agencies should always document the policy update and training.

First Aid/CPR (As Required)

There seems to be a public perception and expectation that police officers are trained to render aid in an emergency. Because the public has this expectation, some people would contend that the police department is responsible for providing this service. Therefore, training is necessary and even more so if officers respond to medical calls and have first aid kits and AED's in the patrol vehicle. Basic level training in both first aid and CPR is sufficient.

Fire Extinguisher Use (Regularly)

MIOSHA Parts 6 & 8 require employers to maintain fire extinguishers in proper working order in the workplace and to have an emergency evacuation plan. Employees need training on the use of the extinguishers and on how to implement the evacuation plan. The training should also outline what to do with the extinguisher once someone has used it.

Michigan Right to Know (Required Once w/Posting)

MIOSHA Part 92 requires that all employers provide employees with information and training on hazardous chemicals in the workplace. Departments must keep Material Safety Data Sheets (MSDS) for any hazardous chemicals in an organized and consistent manner. Employees must know where the department maintains the MSDS sheets and whom they should contact to receive answers to questions they may have. Employees must receive training any time they need to work with or have exposure to a new chemical in the workplace.

Sexual Harassment-Hostile Work Environment-Discrimination (Yearly)

Court rulings have required that employers must be able to document regular training of their employees in the prevention of sexual harassment, hostile work environment and discrimination. The training should include a definition of each, state that the organization will not tolerate the behavior, the policy of the organization outlining who to report incidents to and how incidents will be investigated potential resolutions .

Legal Update (Yearly)

Officers need yearly training to remain current with any changes in the law that affect their performance as police officers and the application of these changes according to accepted industry standards. Departments may provide this training by having officers read assigned articles, newsletters and periodicals. However, training is most effective when a prosecuting attorney or the municipality's legal counsel who is well versed in criminal law provides the update. Areas of primary importance are Use of Force, Arrest, Search and Seizure, Evidence, Terry Stops, Domestic Violence, and Handling Substance Abusers and the Mentally Ill.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund has formulated Policy that fits most departments' operations. These Policies are found in the Manual for Law Enforcement Risk Control, which is available on the MML Web site. LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.