Managing Aerosol Issues

by

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The use of aerosol weapons by law enforcement agencies has skyrocketed during recent years. As more and more agencies have adopted spray devices, concerns have arisen regarding aerosol program implementation and management. Three issues which consistently raise significant concerns are aerosol training, placement of aerosols on a Force continuum, and in-custody death.

TRAINING WITH AEROSOLS

Aerosol weapons (referred to most commonly as aerosol subject restraints, or ASR's) are one viable method for controlling resistive behavior. In this regard, they are no different than any other control option. Verbal direction, defensive tactics, batons, and firearms are other methods of exerting control. We train with each of these control mechanisms in order to enhance officer safety and to reduce the threat of litigation. ASR's should be managed in the same way.

One issue that is regularly raised is that of exposure to ASR's during training. Some officers have resisted this, using the time-worn excuse that if they aren't shot with a handgun during firearms training, they shouldn't have to be exposed to aerosol's during ASR training, while others have legitimate concerns regarding potential medical complications. In order that training can be as effective as possible, these concerns should be addressed by administrators and trainers.

It is universally accepted that the more realistic training is—the more it approximates actual street conditions—then the more relevant, defensible, and useful it is. However, we can only make training so realistic, without forfeiting safety. During the past few years trainers have gone to great lengths to make training more realistic and job related, and this has shown up in our firearms, defensive tactics, and driver training. Training would be most realistic if we could shoot each other, or ram into each other's vehicles, during classes, without actually injuring each other, but we obviously cannot. We can, however, spray each other in dynamic simulation with almost no potential for injury.

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Injuries are always a concern with use of force training, and can frequently be attributed to the training environment, as opposed to the actual training instruments themselves. Just as there is a possibility of an injury during Defensive Tactics training or on the firearms range, there is a possibility of injury during dynamic simulation training with aerosols. For this reason, its important to properly design and implement your use of force training program.

Traditional methods of control such as firearms and impact weapons, have a long history of use. Officers are acculturated (although television has created a "myth" which leads many officers to believe their weapons are more effective than they are) to expect certain results when using these weapons. This is not the case when using aerosols. Firearms make holes in people, and represent the supreme measure of control. Impact weapons—most notably batons or sticks—are used to deliver a physical blow, much like a punch or kick. Aerosols, however, merely spray a liquid, which may or may not have an effect on the target. Additionally, under certain conditions, aerosols are likely to effect others in the area, including the officer.

Officers must develop sound expectations regarding the outcome of an ASR use, both as to the likely reaction of the subject they are trying to control, and to the likely result of being sprayed themselves. The survivability of an ASR related encounter may depend, in large part, on an officer's having been sprayed in training. There have been several cases around the country where officers have attributed their survival to having been sprayed during ASR training, and at least one case where the lack of proper training probably led to an officer's death at the hands of a violent assailant.

There are many reasons to expose officers to aerosols during training, running the gamut from enhanced officer safety and decreased tendency for horseplay to litigation defensibility. While some departments allow officers to carry ASR's without being exposed, and others require a minimal exposure (most typically walking through an "airborne fog" or wiping a small amount of agent on the cheek with a finger), the vast majority of trainers nationally have recommended training exposures, as have manufacturers. Many recommend a dynamic full spray "hit" as opposed to a "wipe" or "airborne fog" exposure, in keeping with our need to conduct the most realistic training possible. A dynamic "hit" is generally defined as a one to two second burst sprayed directly into the face of a student who is simulating a struggle or resisting a simulated arrest.

Some state OSHA organizations have stated that, while exposure should be voluntary, it is acceptable to require an exposure prior to allowing an officer to carry an ASR on the street. Many nationally recognized trainers recommend this approach, and encourage a full, dynamic training exposure. Because this type of training involves a potential risk exposure, sound loss control practice dictates that this be conducted only with appropriate safety and medical controls in place, such as securing adequate decontamination supplies and equipment, developing an effective exposure and decontamination process, and having an EMT or Paramedic on site.

THE APPROPRIATE CONTROL LEVEL

One troubling question regarding aerosols is where they fit on any particular force continuum. The key to the use of any control mechanism is objective reasonableness, as required by the Fourth Amendment to the United States Constitution, and as adjudicated in *Tennessee v. Garner*, 105 S.Ct. 1694 (1985), and *Graham v. Connor*, 109 S.Ct. 1865 (1989). We frequently attempt to place specific weapons, such as ASR's, on a continuum of force. Consider, however, the difficulties this creates.

We develop and utilize continuums primarily as training aids. From the beginning of an officer's career, we illustrate the relationship between resistance and control in this way. Yet, whenever we use our training aid, we are forced to explain "exceptions" to the continuum. The best example of this is the baton. Most continuums consider baton use "intermediate force", yet we must explain that a baton strike to the head is actually "deadly force". This is confusing, and complicates the use of our training aid.

Most other weapons suffer this same fate. Firearms represent deadly force, yet exert a lesser controlling effect when present and in a holster, or when merely held in the hand at the officer's side. Restraint devices such as handcuffs represent, in many systems, empty hand control. Yet they can be used as an impact weapon, and are therefore intermediate force. Other examples are obvious.

Because of this "flexibility of effect", it is inappropriate to place specific weapons, including ASR's, at any given location on a continuum of force. Once a particular weapon is locked into a specific location on whatever continuum of force/control that a given department uses, any use of that weapon elsewhere on the continuum necessitates explanation, and usually results in confusion. Most often the explanations are required in court, and the confusion usually resides in the minds of officers, supervisors, and attorneys—and juries.

Weapons are instruments of control, and most can be used to manifest various levels or types of control, depending on an officer's reasonable assessment of the <u>need</u> for control. This assessment must be reasonably based on the officer's evaluation of each given situation, rather than some artificial construct outlined in a force/control continuum. The standard must be "objective reasonableness", as clearly established by constitutional case law.

ASR's, as well as other weapons, should not be specifically placed on a continuum, but should be considered a reasonable response to the articulable need to control a threatening or resistive subject.

MONITORING THE AFTERMATH

There is much anecdotal, often erroneous information regarding the connection between ASR's and Sudden In-Custody Death Syndrome (SICDS). An examination of various SICDS incidents from around the country (approximately 58, according to one report) indicates that this connection is essentially non-existent.

There have indeed been SICDS cases, although many of these cases have occurred over the years prior to the widespread use of ASR's by police. Some have occurred during the past several years, in cases where ASR's have been used during the arrest process. But, this appears to be the only connection.

In only one case—the death of Angelo Robinson, in Concord, North Carolina—has competent medical authority linked a death to the use of "pepper spray". The Medical Examiner in this case stated that the death of Mr. Robinson was due to, "...bronchospasm, precipitated by pepper spray..." However, this was after stating that there was no physically

identifiable cause of death, and after referring to the temporal relationship between the use of the spray and the death. Other medical experts have reviewed these findings, and indicated that the ruling could just as appropriately have gone the other way.

In other SICDS cases where an aerosol was used during the arrest process, no connection has been substantiated. Most often, death is attributed to positional asphyxia, cocaine psychosis, excited delirium, or simple exhaustion of the cardio-vascular system. Space precludes an in-depth examination and discussion of each of these factors here. Suffice it to say that the only one of these factors that officers have any control over is positional asphyxia.

Positional asphyxia is caused by the inability to breathe, due to some interference with the mechanical functioning of the body. Prime candidates for positional asphyxia are subjects who are transported on their stomachs, hog-tied, or placed face down during a struggle with an officer's weight pushing down on their back.

It is common in SICDS cases for subjects to stop breathing during arrest or transport, and for officers to discover this some time later. One key to management of SICDS appears to be careful monitoring of any subject who is taken into custody, and upon whom force is used. A review of SICDS cases reveals that in a significant number, this was not done. Officers should be trained to carefully monitor the condition of those they arrest, particularly if force was used.

CONCLUSION AND RECOMMENDATIONS

ASR's are a viable method for controlling resistive behavior. There is far less likelihood of suspect injury with an aerosol weapon than with a baton or firearm, and far less likelihood of officer injury than with empty hand control techniques.

Aerosols allow the officer to maintain a "cushion of safety", and reduce the necessity to move in and grapple with an unruly subject. One Midwestern State reports that approximately one half of the police related worker's compensation injuries reported each year are suffered by officers during a forcible arrest situation.

Officers should be trained, and retrained, as with any other weapon system. In the interest of officer safety, initial training should be as realistic as possible, following manufacturer's recommendations. Policies should be adopted which call for objectively reasonable use of all control options, including aerosols. Policies should also require proper post exposure monitoring and first aid.

Reducing Your Aerosol Risk

- Select an ASR from a reputable manufacturer.
- Adopt a policy governing the use of aerosols. Include language on training considerations and reporting requirements following use of aerosols.
- Avoid the placement of specific weapons onto specific levels in your department's force/control continuum.
- Require training of all officers **BEFORE** allowing carry or use of any weapon/control option.
- Utilize training programs that meet your State POST Council's guidelines for use of force programs, and that are POST approved.
- Conduct the most realistic training possible.
- Develop appropriate safety and medical controls for your training program.
- Require a minimum of annual retraining with all issued/approved weapons/control options. More frequent training is recommended.
- Require careful post use-of-force monitoring of subjects, especially when aerosols are used.
- Require a written Resistance Control Report whenever force is used.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of an incident, it will not eliminate all possibility of an incident. Further, as always, the reader is encouraged to consult with an attorney for specific legal advice.