



TEXAS YOUTH COMMISSION

ED OWENS
Conservator

DIMITRIA D. POPE
Acting Executive Director

November 27, 2007

To: All TYC Staff

From: Dimitria D. Pope
Acting Executive Director

Steve Foster
General Counsel

Re: TYC Rule 97.23 (Use of Force)

On September 28, 2007, an Agreed Final Judgment and Order of Dismissal was entered in litigation pending in the 53rd Judicial District Court of Travis County, Texas, in the case styled *M.P., by and through his next friend, A.T., et al., v. Texas Youth Commission, et al.*, Cause No. D-1-GN-07-002998. Pursuant to that judgment, the Texas Youth Commission ("TYC") agreed to suspend the enforcement of the terms of Executive Directive #2 FY07 (which dealt with the use of OC pepper spray) and to instead enforce the provisions of the agency's current use of force rule codified at 37 Texas Administrative Code § 97.23 ("Rule 97.23") that was in place prior to the issuance of Executive Directive #2 FY07. TYC also agreed that any proposed change to Rule 97.23 would be promulgated pursuant to the provisions of the Texas Administrative Procedures Act.

As you may be aware, the agency is in the process of adopting a new use of force policy, which has been posted in the Texas Register and is now in the public comment period. Prior to the adoption of any proposed changes, however, it is important that we continue to adhere to our obligation to enforce the existing provisions of Rule 97.23 as they are presently written. To aid in doing so, please take notice of the contents of this memorandum. In addition, provide a copy of this memorandum to all TYC staff who are authorized and trained to use OC spray within the next 24 hours, and obtain their signatures on a form acknowledging receipt of the document.

I. Persons Authorized to Carry OC Spray Under Rule 97.23(p)(2)(C):

In TYC's high restriction institutions, only the facility administrator, assistant superintendent, ADO, duty supervisor, director of security, and security personnel whose regular assignment is outside the security unit are authorized to routinely carry OC spray on their person. *See* 37 TAC 97.23(p)(2)(C).

JCO staff who are trained in the use of OC pepper spray but who are not acting in the capacity of an ADO or duty supervisor may use, but may not carry, OC pepper spray.

JCO staff who are actually functioning as an ADO or duty supervisor may carry OC spray during the shift when they are actually functioning as an ADO or duty supervisor and for a reasonable time before and after that shift, not to exceed one hour.

Circumstances that are deemed not “routine” and which would therefore permit additional individuals not listed in Rule 97.23(p)(2)(C) to carry OC spray must be approved in writing by the facility administrator, with a copy forwarded to the agency’s Executive Director.

II. Permitted Use of OC Spray Under 37 TAC 97.23 (p)(1)(A)(i-vii):

Rule 97.23 provides that OC spray is the only agency-approved chemical agent. It is authorized for use only when other less restrictive interventions have failed or are determined to be impracticable, and it is necessary to:

- (i) quell a riot or major campus disruption;
- (ii) resolve a hostage situation;
- (iii) remove youth from behind a barricade;
- (iv) secure an object that is being used as a weapon and that is capable of causing serious bodily injury;
- (v) protect oneself from imminent harm when manual restraint would be impracticable;
- (vi) protect youth, staff or others from imminent harm when manual restraint would be impracticable;
- (vii) prevention of escape and fleeing apprehension when manual restraint is impracticable.

See 37 TAC 97.23 (p)(1)(A)(i-vii).

A. Imminent Harm

Rule 97.23 defines “imminent harm” as follows:

Imminent Harm or Imminent Threat – a reasonable belief that harm to persons or property is about to occur, and the need for action is immediate.

Rule 97.23 defines “reasonable belief” as follows:

Reasonable Belief – for purposes of this policy, means facts and circumstances, known to staff at the time of the incident, that would cause a reasonable, trained staff to conclude that an imminent threat exists.

See 37 TAC 97.23(g)(3) & (6).

B. Manual Restraint Impracticable

When applying subsections (v), (vi), and (vii) of Rule 97.23 (p)(1)(A), the rule requires that in order for staff to use OC pepper spray to protect youth, staff or others from imminent harm or to prevent an escape, it must be determined by staff that manual restraint would not be practicable under the circumstances.

Rule 97.23 defines “practicable” as follows:

Practicable – means something is capable of being done with the means at hand and presenting circumstances.

See 37 TAC 97.23(g)(5).

These provisions set out a two-part test to determine whether or not the use of OC spray is appropriate. It is not simply a question of whether there is a need to protect youth, staff or others from imminent harm (or to prevent escape or fleeing from apprehension). It is also a question of whether manual restraint is not a practicable method for dealing with the situation, under all the circumstances presented. If both parts of this test are met, the use of OC spray is appropriate. If both parts of the test are not met, OC spray is not authorized.

In deciding whether or not to use OC spray under these circumstances, as in all cases of use of force, staff should weigh the youth’s opportunity, ability and risk to do harm to self, others or property, as opposed to the youth’s behavior reflecting only emotional venting or verbal aggression with no physical movement toward a target. *See* 37 TAC 97.23(j).

III. Restrictions On the Use of OC Spray Under 37 TAC 97.23(p)(1)(B) :

The general circumstances under which OC spray may be used are discussed in the previous section. In addition, Rule 97.23 provides further restrictions on the use of OC spray in three specific circumstances, and provides a different test for its use in those cases.

Unless it is necessary to prevent loss of life or serious bodily injury, OC spray is not authorized for use when:

- (i) the youth has been identified as having respiratory problems or other health conditions which would make use of OC spray dangerous; or
- (ii) the youth is assigned to a mental health treatment program or identified by a mental health professional as having a psychiatric condition or mental health diagnosis that would contraindicate the use of OC spray until the MHP has been given the opportunity to establish control; or
- (iii) the youth is confined in a room in a security unit or an isolation room.

See TAC 97.23 (p)(1)(B).

Rule 97.23 does not contain a definition of “serious bodily injury.” For purposes of the construction of these terms as used in the above-quoted portion of Rule 97.23, the agency will adopt the definition of “serious bodily injury” used in the Texas Penal Code.

Section 1.07(A)(46) of the Texas Penal Code defines “serious bodily injury” as follows:

bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

A. Youth with Respiratory Problems/Other Health Conditions

All youth in TYC who have respiratory problems like asthma or other health conditions that would make use of OC spray dangerous should be identified by a physician and placed on a no-OC spray list. All staff who are authorized to use and/or carry OC spray should be informed of the youth on the no-spray list.

If a youth is on the no-spray list because of a respiratory or health problem contraindicating the use of OC spray, it cannot be used except to prevent loss of life or serious bodily injury.

B. Youth in Mental Health Treatment & Youth with Mental Illness

As a general rule, OC spray should not be used in the Corsicana Residential Treatment Center, except as necessary to prevent loss of life or serious bodily injury.

In all other facilities, any youth identified by a mental health professional as having a psychiatric condition or mental health diagnosis that would contraindicate the use of OC spray until the MHP has been given the opportunity to establish control may not be administered OC spray prior to a MHP being afforded the opportunity to establish control of the situation, except as necessary to prevent loss of life or serious bodily injury.

Youth who are considered by a mental health professional as having a psychiatric condition or mental health diagnosis that would contraindicate the use of OC spray until the MHP has been given the opportunity to establish control should be identified by the MHP and placed on a no-OC spray list. All staff who are authorized to use and/or carry OC spray should be informed of the youth on the no-spray list.

C. Youth in Security

For youth who are confined in a room in a security unit or an isolation room, OC spray is only authorized for use when it is necessary to prevent serious bodily injury or loss of life. This should be a very uncommon situation.

OC spray should not be used to control the conduct of youth confined in security or isolation who are passively resistant, simply refusing to obey verbal commands, or obstructing or placing arms or hands in the food slot, unless such conduct actually risks serious bodily injury or loss of life.

Cell extractions, on the other hand, are much more volatile situations. A youth is no longer considered “confined” once the room door is opened. Caution should be used in such situations, with a particular emphasis on avoiding unnecessary injury to staff or youth. OC spray is authorized if manual restraint has failed or is otherwise impracticable under all of the circumstances presented.

IV. Issues Regarding Form CCF 352 for Use of Force

As previously discussed in the memorandum dated September 5, 2007, all staff must continue to file a Form 352 for all use of force incidents, including the use of OC spray. Staff should be particularly mindful that these forms are carefully reviewed by TYC administration and may, with appropriate de-

identification, be released to the public. It is imperative that staff be accurate and detailed in the information provided in these forms.

As to any decision to use OC spray, it should be clearly set out in the account of the incident why force was necessary and what steps were taken to employ alternative strategies prior to using OC pepper spray.

In the limited cases outlined in this memorandum where OC spray may only be used to prevent loss of life or serious bodily injury, staff must affirmatively state in the incident report why the use of OC spray was necessary to prevent death or serious bodily injury, along with sufficient facts to support that conclusion.

V. Issues Regarding Training

To avoid any potential for confusion, while the agency is operating under the provisions of Rule 97.23 in its current form, TYC will not distribute, train, or base instruction on any visual aid or handout that attempts to illustrate or define a “use of force continuum” for TYC. Rule 97.23 is the agency’s present policy on the use of force.