

LETTER OPINION
2000-L-74

May 5, 2000

Mr. Brian Neugebauer
Attorney At Law
PO Box 458
West Fargo, ND 58078-0458

Dear Mr. Neugebauer:

Thank you for the letter written on your behalf by Brenda Foyt presenting questions concerning law enforcement use of specialty impact munitions consisting of bean bag rounds fired from a 12 gauge shotgun.

The first inquiry was whether the 12 gauge shotgun used to propel the bean bag munitions is a firearm or dangerous weapon and the instruction and use of such munitions in relation to deadly and nondeadly force situations. There is little question that a shotgun is a "firearm." See, N.D.C.C. §§ 12.1-01-04(10) and 62.1-01-01(3). The fact that a shotgun can expel specialty impact munitions such as bean bag rounds does not change the nature of a shotgun as a "firearm." It is my understanding that similar types of specialty munitions or bean bags themselves can also be propelled by other types of weapons by the action of compressed air or compressed gas. In such a case, although that weapon may not be considered to be a "firearm," it is clearly a "dangerous weapon." N.D.C.C. §§ 12.1-01-04 and 62.1-01-01(1).

Although the materials submitted describe the specialty impact munitions as a "less-lethal option," the question of the type of instruction and the permissible use of such munitions may depend on the specific circumstances faced by an officer.

A firearm or dangerous weapon can be used in a non-lethal manner. In other words, such a weapon could be used to administer nondeadly force. Likewise, items, objects, or parts of the human body could be used to administer deadly force even though such items, objects, or human body parts are not classified as "firearms" or "dangerous weapons."

The key question is the amount of "force" used by the officer.

Mr. Brian Neugebauer
May 5, 2000
Page 2

When an officer is faced with a situation where force may be used, that officer is required to answer two questions:

1. May I use force?
2. How much force may I use?

It is fairly clear when force may be used. N.D.C.C. ch. 12.1-05 sets forth many instances, such as self-defense, defense of others, defense of property, execution of public duty, and other occurrences, where force may be used. Although N.D.C.C. ch. 12.1-05 is not an all-inclusive list of when force may be used, it is apparent that the North Dakota Legislature has delineated authority, justification, and limits when force may be used by one person against another. Therefore, the second issue, how much force may be used, seems to be the primary concern.

N.D.C.C. § 12.1-05-07(1) limits the amount of force that may be used to force that is "necessary and appropriate under the circumstances." This provision is applicable not only to private citizens but, also, to law enforcement officials. N.D.C.C. § 12.1-05-07(2) sets forth when deadly force may be justified. Deadly force is defined in N.D.C.C. § 12.1-05-12(1) as:

"Deadly force" means force which a person uses with the intent of causing, or which he knows creates a substantial risk of causing, death or serious bodily injury. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's intent is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.

The issue of the use of force and amount of force that may be used does not depend on the weapon or object used to administer that force. Rather, the manner in which that weapon or object is used is the relevant inquiry. The police baton is a "dangerous weapon" but it may be used in a non-deadly manner as well as in a deadly manner. In other words the baton could administer either nondeadly or deadly force depending on how it is used. The overriding issue is whether the officer who uses the baton was justified in using the amount of force that was administered by use of the baton.

The same question and analysis will apply to the use of the specialty impact munitions. Although representations are made that the bean bag munitions are nonlethal, document attachments submitted also indicate that the special impact munitions are "not intended to kill, but could" and a listing is given of possible trauma which could include skull fractures, rupture of blood vessels supplying the brain, tears or ruptures to heart, lung, or major blood vessels, and damage to the

Mr. Brian Neugebauer
May 5, 2000
Page 3

spine. Each of these areas of possible trauma may involve death or serious bodily injury. Therefore, it is possible that use of the specialty impact munitions in the form of a bean bag round delivered by way of a 12 gauge shotgun could be the use of "deadly force."

Whether the use of the specialty impact munitions in the form of bean bag rounds is the administration of "deadly force" will depend on the facts and circumstances faced by the individual officer. The officer must provide the same answers to the questions of when and how much force may be used when directing special impact munitions at another person as when a firearm with regular ammunition is used. In other words, the officer must make a determination, often in a very short time, on whether force may be used and, if the force is going to be used in the form of specialty impact munitions, if that force will be administered in a manner which could be construed to be deadly force.

Many of the issues relating to the use of force and the degree of force have been addressed in training programs administered by this office and by the Law Enforcement Training Academy. I would expect that should an issue arise in that training concerning use of this type of munitions, it would be recognized that bean bag rounds, like firearms or police batons, could be used to administer either deadly or nondeadly force. As a result, the training would address circumstances when such use would be justified and when it would not.

For your information, the 7th Circuit Court of Appeals had occasion to address the issue of whether bean bag rounds constituted deadly force when considering the defense of qualified immunity. In Omdahl v. Lindholm, 170 F.3d 730 (7th Cir. 1999), the court concluded that summary judgment would have been inappropriate in resolving the issue of whether bean bag rounds constitute deadly force. The court viewed this issue as a factual dispute regarding the classification of the bean bag rounds as use of deadly force. It is a matter which would have to be resolved by the fact-finder based on the reasonableness of the use of force. I have enclosed a copy of this case for your review.

Based on the limitations and requirements of North Dakota law, I suggest that the use of specialty impact munitions consisting of the bean bag rounds to be delivered from a 12 gauge shotgun be treated, in the use-of-force training, as any other weapon or object employed by law enforcement officers to administer force against another person. If the officer is justified and authorized to employ deadly force against another person when it is necessary and appropriate under the circumstances facing that officer, it may make little difference how that deadly force is administered. However, the officer must understand when force may be used and how much force is allowed under the circumstances. The direction and program of instruction to the

Mr. Brian Neugebauer
May 5, 2000
Page 4

officers concerning the use of force should not be distinguished by the type of weapon or object that is going to be used but, rather, by the proper way to use that weapon or object when faced with differing factual situations.

Sincerely,

Heidi Heitkamp
Attorney General

rpb/vkk
Enclosure