
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No: AB 26 **Hearing Date:** June 29, 2021
Author: Holden
Version: May 27, 2021
Urgency: No **Fiscal:** Yes
Consultant: GC

Subject: *Peace officers: use of force*

HISTORY

Source: Author

Prior Legislation: AB 1022 (Holden), 2020, held in Senate Appropriations
SB 731 (Bradford), 2020, not heard on Assembly Floor
AB 1506 (McCarty), Ch. 326, Stats. of 2020
SB 230 (Caballero), Ch. 285, Stats. of 2019
AB 392 (Weber), Ch. 170, Stats. of 2019
AB 2327 (Quirk), Ch. 966, Stats. of 2018
AB 619 (Weber), 2015, held in Assembly Appropriations

Support: ActiveSGV, a Project of Community Partners; All Saints Church, Pasadena; Black Leadership Council; CA State NAACP; California Attorneys for Criminal Justice; California Department of Insurance; California Nurses Association; California Public Defenders Association (CPDA); California Teachers Association; Consumer Attorneys of California; County of Los Angeles Board of Supervisors; Drug Policy Alliance; Ella Baker Center for Human Rights; Govern for California; Health Access California; Indivisible Claremont /Inland Valley; Los Angeles County; Los Angeles County District Attorney's Office; Los Angeles County Office of Education; NAACP Pasadena; National Action Network - Sacramento Chapter; National Association of Social Workers, California Chapter; Oakland Privacy; Planned Parenthood Advocates Pasadena and San Gabriel Valley; San Francisco Public Defender; Udw/afscme Local 3930

Opposition: California Association of Highway Patrolmen; California Correctional Peace Officers Association (CCPOA); California Narcotic Officers' Association; California Peace Officers Association; California Police Chiefs Association; California State Sheriffs' Association; Deputy Sheriffs Association of San Diego; Los Angeles County Sheriff's Department; Los Angeles Police Protective League; Los Angeles Professional Peace Officers Association; Peace Officers Research Association of California (PORAC); Riverside Sheriffs' Association; San Francisco Police Officers Association; Santa Ana Police Officers Association

Assembly Floor Vote:

49 - 18

PURPOSE

The purpose of this legislation is to specify that law enforcement agency policies must: (1) mandate the reporting potential excessive force by officers; (2) prohibit retaliation against officers that report violations; (3) requires that an officer who fails to intercede be disciplined in the same manner as the officer who used excessive force; (4) prevents an officer who has had a finding of misconduct for use of excessive force from training other officers for three-years as specified; and (5) clarifies the reporting requirements for uses of force and intervention on another officer who uses excessive force.

Existing law defines “deadly force” as any use of force that creates a substantial risk of causing death or serious bodily injury. Deadly force includes, but is not limited to, the discharge of a firearm. (Gov. Code, § 7286, *subd. (a)(1).*)

Existing law defines “feasible” means reasonably capable of being done or carried out under the circumstances to successfully achieve the arrest or lawful objective without increasing risk to the officer or another person. (Gov. Code, § 7286, *subd. (a)(2).*)

Existing law requires that each law enforcement agency shall, by no later than January 1, 2021, maintain a policy that provides a minimum standard on the use of force. Each agency’s policy shall include all of the following: (Gov. Code, § 7286, *subd. (b).*)

- A requirement that officers utilize de-escalation techniques, crisis intervention tactics, and other alternatives to force when feasible.
- A requirement that an officer may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance.
- A requirement that officers report potential excessive force to a superior officer when present and observing another officer using force that the officer believes to be beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances based upon the totality of information actually known to the officer.
- Clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person.
- A requirement that officers consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.
- Procedures for disclosing public records in accordance with Section 832.7.
- Procedures for the filing, investigation, and reporting of citizen complaints regarding use of force incidents.
- A requirement that an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.
- Comprehensive and specific guidelines regarding approved methods and devices available for the application of force.
- An explicitly stated requirement that officers carry out duties, including use of force, in a manner that is fair and unbiased.
- Comprehensive and specific guidelines for the application of deadly force.

- Comprehensive and detailed requirements for prompt internal reporting and notification regarding a use of force incident, including reporting use of force incidents to the Department of Justice in compliance with Section 12525.2.
- The role of supervisors in the review of use of force applications.
- A requirement that officers promptly provide, if properly trained, or otherwise promptly procure medical assistance for persons injured in a use of force incident, when reasonable and safe to do so.
- Training standards and requirements relating to demonstrated knowledge and understanding of the law enforcement agency's use of force policy by officers, investigators, and supervisors.
- Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical, mental, and developmental disabilities.
- Comprehensive and specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted.
- Factors for evaluating and reviewing all use of force incidents.
- Minimum training and course titles required to meet the objectives in the use of force policy.
- A requirement for the regular review and updating of the policy to reflect developing practices and procedures.

Existing law requires that each law enforcement agency shall make their use of force policy adopted pursuant to this section accessible to the public. (Gov. Code, § 7286, *subd. (c).*)

Existing law mandates that the Commission on Peace Officers Standards and Training (POST) shall implement a course or courses of instruction for the regular and periodic training of law enforcement officers in the use of force and shall also develop uniform, minimum guidelines for adoption and promulgation by California law enforcement agencies for use of force. The guidelines and course of instruction shall stress that the use of force by law enforcement personnel is of important concern to the community and law enforcement and that law enforcement should safeguard life, dignity, and liberty of all persons, without prejudice to anyone. These guidelines shall be a resource for each agency executive to use in the creation of the use of force policy that the agency is required to adopt and promulgate pursuant to Section 7286 of the Government Code, and that reflects the needs of the agency, the jurisdiction it serves, and the law. The course or courses of the regular basic course for law enforcement officers and the guidelines shall include all of the following: (Penal Code, § 13519.10)

- Legal standards for use of force.
- Duty to intercede.
- The use of objectively reasonable force.
- Supervisory responsibilities.
- Use of force review and analysis.
- Guidelines for the use of deadly force.
- State required reporting.
- De-escalation and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence.
- Implicit and explicit bias and cultural competency.

- Skills including de-escalation techniques to effectively, safely, and respectfully interact with people with disabilities or behavioral health issues.
- Use of force scenario training including simulations of low-frequency, high-risk situations and calls for service, shoot-or-don't-shoot situations, and real-time force option decision making.
- Alternatives to the use of deadly force and physical force, so that de-escalation tactics and less lethal alternatives are, where reasonably feasible, part of the decision making process leading up to the consideration of deadly force.
- Mental health and policing, including bias and stigma.
- Using public service, including the rendering of first aid, to provide a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts.

This bill defines “excessive force” as a level of force that is not objectively reasonably believed to be proportional to the seriousness of the suspected offense or the objectively reasonably perceived level of actual or threatened resistance.

This bill defines “intercede” as including the physical stopping the use of excessive force, recording the excessive force, if wearing a body-worn camera, and documenting efforts to intervene, efforts to deescalate the offending officer’s excessive use of force, and confronting the offending officer about the excessive force during the use of force, and if the officer continues reporting to dispatch or the watch commander on duty including identifying the officer as specified.

This bill defines “retaliation” as demotion, failure to promote when warranted by merit, denial of access to training and professional development opportunities, denial of access to resourced necessary for an officer to properly perform their duties, intimidation, harassment, or the threat of injury while on or off duty.

This bill specifies that officers must immediately report potential excessive force to a superior officers as specified.

This bill requires that law enforcement agency policies must include a prohibition on retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

This bill requires that law enforcement agency policies must include procedures to prohibit an officer from training other officers for a period of at least three year from the date that an abuse of force complaint against the officer is substantiated.

This bill requires that law enforcement agency policies must include a requirement that an officer that has received all required training on the requirement to intercede and fails to act as specified be disciplined in the same manner as the officer that committed the excessive force.

COMMENTS

1. Need for This Bill

According to the author:

On May 25, 2020, George Floyd was arrested for allegedly using a counterfeit bill. During the arrest, the supervising officer knelt on Floyd's neck for over eight minutes while he was handcuffed with two additional officers further restraining him. A fourth officer stood watch to ensure that the gathering crowd did not become involved.

While the public was outraged by the supervising officer's disregard for Floyd's life, what was equally troubling was that the other three officers failed to stop the supervising officer, despite Minnesota's "Duty to Intervene" law.

Currently, California law requires that an officer intercede when present and observing another officer using force that is beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances.

However, current law does not indicate universal measures used to establish that an officer has in fact interceded. This leads to ambiguity and leaves each law enforcement agency to determine whether an officer interceded. In the case of George Floyd, a lawyer for one of the accused junior officers argues that because the junior officer asked the supervising officer if they should turn Floyd on his side that it was intervention. For this reason, I am putting forward AB 26.

This bill specifies that a peace officer's "Duty to Intercede" shall include, but is not limited to, physically stopping the excessive use of force, recording the excessive force, and reporting the incident in real time to dispatch or the watch commander on duty in order to establish that the officer has attempted to intercede.

The bill prohibits an officer from training other officers for a three-year period if an abuse of force complaint is substantiated. Finally, AB 26 prohibits retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

2. Duty to Intercede

Current law specifies that every law enforcement agency have a policy that requires an officer intercede when present and observing another officer using force that is clearly beyond that which is necessary, as determined by an objectively reasonable officer under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject. That requirement was established by SB 230 (Caballero), Chapter 285, Statutes of 2019.

This bill makes clear the responsibilities of officers to intercede in incidents when they witness another officer using excessive force. Additionally, this bill creates new consequences for an officer who fails to intercede when another officer is using excessive force.

The author defines “intercede” as including the physical stopping the use of excessive force, recording the excessive force, if wearing a body-worn camera, and documenting efforts to intervene, efforts to deescalate the offending officer’s excessive use of force, and confronting the offending officer about the excessive force during the use of force, and if the officer continues reporting to dispatch or the watch commander on duty including identifying the officer as specified.

This definition gives guidance on what constitutes intervention, but does not limit the methods by which an officer may intervene. Additionally, the definition incorporates recent common methods of dealing with use of force incidents such as employment of “de-escalation” techniques. Furthermore the definition seeks to encourage documentation of the incident and the efforts to intercede.

3. Consequence for Not Interceding: Same Discipline

This bill specifies that the consequence for failing to intervene upon another officer when required to do so is that the officer who fails to intervene must be disciplined in the same manner as the officer who committed the excessive force.

The existing standard for intervention upon a fellow officer is that an officer must intervene when they see another officer that is using force clearly beyond that which is necessary, as determined by an objectively reasonable officer under the same circumstances. They may also keep in mind that the other officer may have additional information regarding the threat posed by a subject.

AB 1022 (Holden) of 2020, which was held in Senate Appropriations, used more significant consequences for failures of officers to intervene. Under AB 1022, in addition for any regular punishment that could be applied for failure to comply with agency policy, officer would face the following consequences under that bill required:

- Any peace officer who has been found by a law enforcement agency that employs them to have either used excessive force that resulted in great bodily injury or death of a member of the public or to have failed to intercede in that incident are disqualified from holding office as a peace officer or being employed as a peace officer.
- A requirement that an officer be disciplined in the same manner as the officer that committed the excessive force if they fail to intervene.
- A requirement that an officer who observes another officer using excessive force and willfully fails to intercede is an accessory in any crime committed by the other officer during the use of excessive force. That conviction could result in a misdemeanor or a felony on the officer’s record.

Unlike the prior proposal this bill has a more modest, yet still very significant, consequence for failing to intervene on another officer. While AB 1022 would have attached criminal liability of up to 3-years imprisonment, this bill does not. However, under the provisions of this bill officers are subject to the same discipline by their employer as the primary actor. This form of strict

liability for failing to intervene to prevent the actions of another officer can result in termination from employment from the agency.

4. Prohibition on Retaliation

This bill takes great effort to try and prevent an officer that must intervene under the provisions of the bill from being retaliated against by the agency that employs them, as well as fellow officers.

The bill defines “retaliation” as a “demotion, failure to promote to a higher position when warranted by merit, denial of access to training and professional development opportunities, denial of access to resourced necessary for an officer to properly perform their duties, or intimidation, harassment, or the threat of injury while on duty or off duty.”

The bill prohibits retaliation against an officer that reports a suspected violation of a law or regulation of another officer to a supervisor or other person of the law enforcement agency who has the authority to investigate the violation.

5. Argument in Support

According to the California Public Defenders Association:

CPDA supports AB 26’s intent to protect the public from the use of excessive force by law enforcement officers, and to ensure that excessive force, when used is reported so that the officer may be prosecuted, if appropriate. This bill will help root out the “bad apples” and protect officers who are serving the community and doing their jobs.

AB 26 would require law enforcement agencies to have policies mandating that officers immediately report potential excessive force and intercede when they observe another officer using excessive force. The agency’s policy must prohibit retaliation against officers who report violations of law and require that an officer who fails to intercede be disciplined in the same manner as the officer who used excessive force.

While the majority of law enforcement officers, do not use excessive force against members of the community there are a minority who do, and many of whom have maintained their jobs as law enforcement officers even after unjustly killing or injuring multiple individuals. These officers have neither been punished, nor even re-trained because of the “code of silence” which encourages officers to look the other way when other officers use excessive force.

AB 26 is important and necessary. It that will protect the community from those officers who routinely use more force than is necessary against community members by encouraging transparency and accountability. It will help ensure that law enforcement officers break the code of silence and report the use of excessive force without the fear of retribution or retaliation. A recent LA Times article brings home precisely why this bill is necessary. An officer whose prior acts of misconduct had gone unreported by his fellow officers until the deputy shot and

killed a young skateboarder. Had Deputy Vega's partner been required to report the alleged misconduct described in the article, Deputy Vega would have in all likelihood, been off the streets and 18-year-old Andres Guardado would still be alive today.

AB 26 protects both the community at large and police officers who follow the rules. It will help keep this state safe.

6. Argument in Opposition

According to the California State Sheriffs' Association:

Over the course of more than one year, stakeholders worked on significant reforms to law enforcement use of force statute and law enforcement policies. In the end, AB 392 and SB 230 were the results of this collaboration, and those bills ultimately enjoyed overwhelming bipartisan legislative support. Most of law enforcement, including CSSA, supported SB 230 and removed its opposition to AB 392 based on the final, agreed upon versions that the Governor signed into law.

AB 26 adds significant new requirements to the use of force policy provisions that formed the basis of the compromise on SB 230 and AB 392. Specifically, the bill requires that a use of force policy require officers to immediately report potential excessive force while simultaneously requiring officers to intercede in the use of force. Is an officer required to report the use of potential excessive force before attempting to stop it? Additionally, SB 230's provision regarding an officer's duty to intercede acknowledges the possibility that other officers may have additional information regarding the threat posed by a subject and relies upon the standard of objective reasonableness while AB 26 eliminates the reference to the former and redefines "excessive force." AB 26 also specifies that an officer who is present and observes another peace officer using excessive force and fails to report the excessive use of force to a superior officer, is an accessory in any crime committed by the other officer during the use of excessive force. This would be the case even if the officer were unaware of circumstances leading up to the use of force.

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