

# The Protection Ranger

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The Newsletter of the National Park Rangers Lodge, Fraternal Order of Police

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## President's Message

### Year End Summary of Lodge Activities

John T. Waterman

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Well, the end of the year is once again upon us. Based on the number of emails and phone calls the Lodge Board and I have received, it was a busy one for the Lodge. The Board and I felt it was important to send out a short newsletter to all of our members with a briefing on what we've been up to. Back in January, when I first became your president, I listed several key areas that we planned to work on. I reviewed the five previous years of newsletters and found that most of them talked, complained, or offered solutions on issues that, too often, were not resolved. One thing I learned in the last year was that the issues are more complex than I had ever imagined and each past president had moved us a step closer to solutions.

It has taken me some time to get my feet wet. Trying to find a balance between Lodge work, family responsibilities and, of course, a job makes time management a necessary skill. This position has offered me the opportunity to talk to many of our members and provide guidance and assistance. This has been the most fulfilling part of the position. Perhaps the Lodge's strongest success lies in the individual and group assistance that we offer. These have ranged from unsafe working conditions, medical issues, and employee discipline, to name a few. We helped several rangers involved in critical incidents, as well as a park where the radio system had become unsafe for the rangers whose lives depend on it. We

continue to offer a free consultation with Passman and Kaplan to all of our members that the Board is not able to directly assist. The ability to be able to call someone to ask for help or discuss issues is one of the most important services the Lodge offers.

Membership in the Park Rangers Lodge allows all of us to be part of a larger Fraternal Organization: the Grand Lodge of the Fraternal Order of Police. Earlier this year, the spouse of Ken Patrick contacted me. Brother Ken was killed in the line of duty at Point Reyes on August 5, 1973. I was advised that his murderer, Veronza Bowers, was about to be released from jail by the parole board. The Lodge had worked with Ken's spouse on this issue before and the Grand Lodge was instrumental in preventing his release. Based on the past files, I was not sure if we would be able to once again prevent Bowers from being released. I made one call to the Grand Lodge asking for assistance and in twenty minutes I was on the phone with President of the Grand Lodge, Chuck Canterbury. His support and assistance was incredible. Within an hour, I had been in touch with the two key Lodge Justice Department liaisons. Within three hours of my initial call I had talked with US Attorney Alberto Gonzales' office. As a result of the Lodge's efforts, Bowers was again denied release from prison.

At the beginning of the year, I felt it was important to continue an open dialogue with WASO that immediate past president Greg Johnston was instrumental in setting up. The folks in WASO have not hesitated to contact me to ask my opinion on key issues that affect our members. Although I don't always agree with their decisions and thought processes, I appreciate their trust in me and willingness to share their thoughts. My overall responsibility is to represent our membership and I am not afraid to express that to them. The open

dialogue and regular conference calls with the Board has assisted numerous members in cutting through the red tape to get solutions that benefit all our members.

Although many of us are often critical of WASO and much of the regional management, I have found that we do have some very good folks in key regions who are trying their best to support the field staff. As a field ranger, I often wonder if I will be given the time of day when a call is made to a Regional Chief asking for assistance on behalf of one of our members. This year I found it reassuring that not only did I get return phone calls, a strong effort was made to correct the issues that I brought to them.

I have received some criticism for not speaking out on the recent conviction of former Special Agent Pat Buccello. I finally feel it is important to make a comment. I applaud the Inspector's General's office for conducting a fair investigation and the WASO office for not interfering. The IG's office took a serious complaint from the field and, following up on it, led to a successful criminal conviction. It showed that the system can and does work.

I understand that none of us are perfect and that we all make mistakes. The totality of the actual amount of money that was misused by former Agent Buccello is small compared to the many other such cases we hear about. There are many strong feelings both for and against Agent Buccello and several of you have not hesitated to express your thoughts to me. My obligation is to the membership and when actions such as those taken by former Agent Buccello affect the lives and families of any of our members, it is my responsibility to support and assist those members.



In this case, these were members who gave the ultimate sacrifice by dying in the line of duty. I have never had the opportunity to work with any of these rangers and have only talked directly with several of their family members. We owe the utmost respect to these families. Failing to provide a final report of investigation to a surviving widow so that she may receive benefits to support her family is unacceptable. Promising to meet with that spouse, failing to show up, giving a false reason as to why, and then transferring the airplane ticket for personal use is shameful. Furthermore, failing to show up at an award ceremony honoring those who gave the ultimate sacrifice, including two National Park Rangers, and then using the funds for a personal trip is disrespectful.

Thirteen Federal Law Enforcement officers have died in the line of duty since 2005. Two of them were National Park Rangers. We should honor those who went above and beyond the call of duty:

Seasonal Park Ranger Jeffrey A. Christensen. EOW 07/29/05.

Special Agent Daniel Paul Madrid. EOW 09/24/05.

In my January President's Message, I listed several other key issues, including asking for more volunteers, 6(c), and help on issues. The Board did gain several members whose efforts have been greatly appreciated. It has been expressed to me that many of you are scared to participate due to the fear of retaliation from management within your parks. This is a very real and justified fear for some of you. To counter that, I can assure you that we have several folks that assist the Lodge Board who remain anonymous. If you contact the Board and wish that your name is not used or that we keep information you give us from being released, we will honor that. *Please contact us and let us know what issues you are facing. It is also important that if your park is trying something new that is helping you do your job better, let us know so that we can share it with all of our members.*

In January, I expressed concern over the medical standards program. It currently has an outdated Reference

Manual and lacks a program manager. Recently, the program took a turn back to how it operated in 2000. For many of you who have needed a waiver, the process has been going smoothly but, as some of you are finding out, suddenly this has changed. The number of rangers who are being told they no longer meet the standards, and are being denied a waiver, has increased dramatically. Information from your peers, supervisor, and chief is no longer being used. If you cannot get a physician to verify that you meet the standard, then you are not getting a waiver. As usual, this also has not been consistent. It would seem that the waiver process has been scrapped leaving rangers in the dark. We are an aging workforce where 63% of the rangers are over 43 years old and 53% can retire within three years.

It is amazing to me that after several large settlement cases, the NPS is still continuing to violate 5 CFR 339.204: Agencies must waive a medical standard or physical requirement established under this part when there is sufficient evidence that an applicant or employee, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the individual or others. Further, 5 CFR 339.202(a) states that health standards must be "established by written directive and uniformly applied."

I have spoken at length with the folks in risk management. They claim they are being compelled by DOI to make sure all the rangers meet the standards in order to be available to be dispatched anywhere in the country. This is kind of strange because, when rangers used this argument for 6(c) cases they were told by NPS that this was not the case. We also don't know of any cases where a transfer to another park has been refused because of the existence of a medical waiver at the previous park. Finally, we assume that some members of SET teams and others dispatched to emergencies have medical waivers for various conditions. Again, that doesn't seem to be an impediment to their success in safely carrying out difficult and dangerous missions elsewhere.

The largest issue we continue to try to achieve progress on is 6(c). As you have read in numerous newsletters and

from past presidents, this issue is big and complex. There are approximately thirty more cases for FLERT to review. I am very concerned that once FLERT is done with the backlog, they will begin to review the post-1994 position descriptions. As we have noted in past newsletters, it is alarming that more than 60% of the PDs out there were never updated and are not approved by FLERT. Although many are utilizing the FLERT-approved benchmark PD, there is concern this issue will be an avenue for FLERT to begin denying coverage. *The Lodge cannot stress enough that you should review your PD to make sure it has been given the FLERT stamp of approval.*

You may also want to check the FLERT web site and see if your PD is listed. Brother Calvin Farmer has done a tremendous job in his research and follow-through on the 6(c) issue. We have held several conference calls with key lawyers and have contacted numerous federal employee organizations. Several possible plans have been discussed to make the next move. If you wish to keep your 6 (c) that you get involved and contact Brother Calvin. All information you provide is confidential. We need your *active* participation if we are to move forward with this serious issue.

Via the Lodge web site, several members have asked what our goals are for 2008. In our next newsletter, we will outline our goals for this year. We want to emphasize that our goals are member-driven and, most importantly, it is our members who work to help achieve those goals. Generally, we have a working group of about 3 to 6 members of the Lodge Board who followup on almost all issues. So we definitely need rangers to contact the Lodge to help define our priorities. In addition, we urge you to help us achieve these goals. Be sure to check out the our website. Brother Duane Buck continues to do a great job in keeping that up to date. It continues to be an honor representing all of you. I wish all of you a safe and happy 2008.



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## Radio and Communications Issues

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Rangers from several parks have contacted us regarding problems with their radio systems. As parks switch to narrow-banding as well as try to consolidate dispatch operations, problems are showing up which are critical to ranger safety. Rangers at Whiskeytown are to be specifically commended for assertively bringing radio problems they were having in the field to the attention of their park's management. Not satisfied with the response they were getting, they continued up the chain of command as well as contacted the Lodge for assistance. The Lodge weighed in to make sure they were getting the attention this critical problem deserved. At press time, the issues were still not resolved to the complete satisfaction of the field rangers, though progress is being made. There's no question, though, that the organizational efforts of the field rangers at Whiskeytown have brought their issues to the attention of management all the way to WASO.

The Lodge wants to get a better idea of how widespread radio problems are. If you're having either technical issues with your repeater or with a newly organized dispatch operation, contact us.

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## Secretary's Notes George Durkee

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The Lodge's Business Manager and I would like to thank all our members for renewing promptly. You have no idea how much easier this makes the paperwork around here. The entire Lodge Board would especially like to thank the many retired members who continue to support rangers by maintaining their memberships. In addition, huge thanks to the many members who send us an extra contribution. These contributions go directly to helping fellow rangers with individual problems.

Over the last two years, the Grand Lodge has computerized all their

membership data and created a web site allowing members to change their address. Because rangers are constantly moving to new assignments, keeping up with change of addresses is critical to you receiving your newsletter and membership card in a timely manner. We really appreciate it when you write us to tell you you've moved! When you transfer, remember to write the Rangers Lodge directly at: [FOPLodge@sonic.net](mailto:FOPLodge@sonic.net) and we'll be sure to update your information. That will ensure all mailings from the Rangers Lodge will reach you. **If you also want to make sure Grand Lodge mailings reach you** (basically, their newsletter) you need to log onto the Grand Lodge site at: [www.fop.net](http://www.fop.net) and *also* (!) change your address there.

- If you don't already have a member's login and password, go to the New User Registration page. Enter your last name, the membership number from your membership card; **Virginia** for the State Lodge; and **060** for the Lodge number.
- Then enter a username and password for the site.
- New and already registered users can then enter the **Members Only** part of the Grand Lodge website. To change member information choose **My Tools**, then **Update My Information**. Remember to enter and save it only once.
- All records that have been changed are then viewed by the Rangers Lodge Business Manager, approved, and then made available for viewing and approval by the VA and then the Grand Lodge.

Although the Grand Lodge's system has made things significantly easier for all lodges, it's still sometimes a bit slow. When new data is entered by a member, it has to be reviewed and approved by us before it's then sent on to review by the Virginia Lodge; after approval there, it's sent to review by the Grand Lodge and, finally, made a permanent part of the database. Although it's getting better, this can all take a couple of weeks. Still, there are now many fewer glitches and mistakes along the way and the often-justified complaints from members have dropped significantly in the last year.

Membership cards were put in the mail over the first two weeks of January. If you haven't yet received

yours, please contact the Lodge. If you only joined or reactivated an expired membership in December, it's likely that one hasn't been issued by the Grand Lodge, but will be soon. Also, if you haven't paid, your card is being held by the Lodge. Please send in your dues!

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## Lessons learned in *Beaver v. Federal Way* Analyzing *Beaver v. City of Federal* *Way* By Ken Wallentine

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Note: Although this particular incident involved the use of a Taser, it is important to remember that the elements of this legal case apply to the use of any electro-muscular disruption (EMD) device.

### The incident

Beaver had been smoking crack cocaine and marijuana and drinking during a two-day binge. An officer responding to a burglary call saw Beaver running from the scene. The officer recognized him from a prior encounter and called to him by name, ordering him to stop. Beaver continued to run away and the officer shot him with a Taser. Beaver went down.

The officer ordered him to turn on his stomach and extend his arms. Instead, Beaver attempted to get up and the officer activated the Taser a second time. Again, Beaver did not comply with orders to turn onto his stomach and the officer activated the Taser a third time. A backup officer arrived at that point. She gave Beaver a conflicting order, telling him to get on his back. A citizen later testified that he clearly heard Beaver say, "I can't." The officer fired the Taser a fourth time and Beaver rolled onto his stomach, with his arms held under him. The officer applied the Taser to Beaver a fifth time at which point he



extended his arms above his head. The officer kicked Beaver's hands to the side and Beaver was handcuffed.

### **Beaver sues police**

Beaver sued, claiming that the officers used excessive force to arrest him and that the backup officer failed to protect him from unnecessary force inflicted by the repeated applications of the Taser. The court ruled that the first three Taser stuns were reasonable. They applied the use of force factors of *Graham v. Connor* and recognized that: "the officer was alone with a fleeing felony suspect, who was apparently under the influence of controlled substances, who ignored his commands to stop, and who was attempting to rise and perhaps to flee." However, the court found that the fourth and fifth applications were unreasonable because a backup officer had arrived and would have been able to help secure Beaver without repetition of the Taser stuns.

All use of force lawsuits are measured by standards established by the Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989). In the *Graham* case, the Court instructed lower courts to always ask three questions to measure the constitutionality of a particular use of force.

First, what was the severity of the crime that the officer believed the suspect to have committed or to be committing?

Second, did the suspect present an immediate threat to the safety of officers or the public?

Third, was the suspect actively resisting arrest or attempting to escape?

The Supreme Court also stated that the use of force should be measured by what the officer knew at the scene.

An officer may use only that force which is both reasonable and necessary to make an arrest or detention. Anything more is excessive force.

In addition to the three questions asked by the *Graham v. Connor* case, courts consider the need for the application of force, the relationship between the need and amount of force

used, and the extent of the injury inflicted by the officer's force. The *Graham v. Connor* factors govern both the amount of force used, as well as the force method, tool, or weapon used. [*United States v. Dykes*, 406 F.3d 717 (D.C. Cir. 2005)].

### **Court finds excessive force and failure to protect against excessive force**

The court found that the arrival of the backup officer diminished the "immediate threat" Beaver presented to the first officer. Moreover, Beaver's statement, "I can't" showed involuntary resistance and not a willful resistance to efforts to control him.

Courts have previously held that when no immediate threat is posed and a suspect's failure to comply may be involuntary, officers were not entitled to use force. [*Winterrowd v. Nelson*, 480 F.3d 1181 (9th Cir. 2007)]. The court observed that the backup officer could have attempted to handcuff Beaver while the first officer held the Taser on him, ready to fire again if the suspect resisted handcuffing efforts.

In addition to finding that the first officer used excessive force, the court also found that the backup officer violated Beaver's rights by failing to protect him against the excessive force applied by the first officer.

The court's logic implies that they expected the officers to go hands-on once there were two officers. This expectation fails to consider that a twisting and resisting suspect can just as easily injure two officers as one. Moreover, the officers must also consider whether swarming a suspect with multiple officers applying physical force isn't more likely to injure the suspect than a repeated application of the Taser.

### **Qualified immunity protects the officers from liability**

The court concluded that the officers were entitled to qualified immunity. At the time of Beaver's arrest, the law was not clearly established that officers could not use force when, as in Beaver's case, a suspect is not a threat, even if the suspect is not fully complying with the officer's commands (one must readily admit that there is a genuine debate over whether the court properly concluded that Beaver was not such a threat even

into the fourth and fifth application of the Taser).

A recent case decided by the Ninth Circuit Court of Appeals held just that. [*Harveston v. Cunningham*, 216 Fed.Appx. 682 (9th Cir. 2007)] – ruling that a police officer used excessive force when he used pepper spray against a suspect who was already handcuffed and on the ground, but who was trying to roll over and stand up contrary to the officer's orders]. In future cases, at least in the Ninth Circuit, officers in similar situations may not be protected by the qualified immunity doctrine.

This case illustrates the challenge of deciding the appropriate use of force to gain compliance with a lawful order. Though Beaver was actively resisting arrest by fleeing, and later by refusing to show his hands, the court disagreed with the officers that it was proper to apply the Taser when Beaver failed to show his hands and present them for handcuffing.

Law enforcement officers often cannot allow a stalemate to continue when a suspect refuses to comply with a necessary and lawful order, but does not actively resist by assaultive or combative behavior. Courts have supported officers' use of force to gain compliance from passively resisting suspects. A suspect who refuses to assume a position for searching and handcuffing may be physically forced to comply with either direct force, pepper spray, or an electronic tool. [*Archer v. City of Portland*, 2006 WL 1643507 (D. Or. 2006)] – shooting bean bag rounds at suspect was reasonable when assault suspect refused to show hands; [*Willkomm v. Mayer*, 2006 WL 582044 (W.D. Wisc. 2006)] – application of Taser was proper when DUI suspect refused to be handcuffed; [*Reese v. Herbert*, 2006 WL 1892026 (N.D. Ga. 2006)] – pepper spray was reasonable force when suspect refused to present arms for handcuffing; [*Passino v. State*, 260 A.D.2d 915 (N.Y. 1999)] – pepper spray reasonable when suspect stood rigid and would not be handcuffed)].

A suspect who refuses to get out of a car may similarly be forced to comply with officers' directions. [*Lawyer v. City of Council Bluffs*, 361 F.3d 1099



(8th Cir. 2004)– pepper spray in driver's face when driver refused to unlock car door was reasonable]. An arrestee who refuses to get into a patrol car may be sprayed to gain compliance. [*Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002) – “using pepper spray is reasonable where the suspect was either resisting arrest or refusing police requests, such as requests to enter a patrol car”].

The Beaver decision, while perhaps influenced by this line of cases and reasoning, addresses a situation where Beaver may have been physically incapacitated by the Taser. If so, he may not have been able to comply with demands to show his hands. The court disapproved of force to gain compliance from a person unable to comply.

#### Reporting use of EMD devices

The use of force factors established in *Graham v. Connors* should guide the reporting of every use of force incident. The report should answer these questions:

- Did I use force in a good faith effort to maintain or restore order?
- What did I believe to be the severity of the crime? Why?
- Was the suspect an immediate threat? To whom?
- What was the threatening behavior?
- Was the suspect resisting or fleeing? How?

Use of force may be reviewed on many levels. The agency should investigate to answer these questions:

- Was the force justified at actual moment of force?
- Did any action by officer or others unnecessarily precipitate use of force?
- Did the officer comply with agency policies?
- Would policy or procedure, additional training or equipment have potentially avoided necessity for force?

There may also be a department internal affairs inquiry to consider whether the officer followed policies. Almost always in cases resulting in

death or serious injury, the local prosecutor will look at whether criminal laws were violated by the use of force. The agency's risk management or insurance department may also investigate in anticipation of a lawsuit.

#### Lessons learned

*Beaver v. City of Federal Way* is part of the developing case law concerning Tasers and other electro-muscular disruption (EMD) devices. The ruling suggests great caution in using such a device to gain compliance from a suspect who is not an imminent threat to the officer's safety. Repeated applications of an EMD will not be justified when the suspect is physically incapable of complying with the officers' directions. Courts will continue to debate the application of an EMD device for passive non-compliance, such as refusing to show hands, assume a handcuffing position or allow a search.

Not only courts, but also the general public, have many questions about when it is proper to use an EMD on a non-violent, though non-compliant, suspect. As EMD device use is increasingly available as a force option, discussion over their use will also increase.

Officers can best protect themselves by knowing use of force rules and preparing thorough incident reports documenting the need for force.

*Beaver v. City of Federal Way*, 507 F.Supp.2d 1137 (W.D. Wash. 2007).

A police officer and former prosecutor, Ken Wallentine is Chief of Law Enforcement for the Utah Attorney General. He may be contacted at:

[KenWallentine@Utah.gov](mailto:KenWallentine@Utah.gov). Traffic detentions and passenger issues are discussed in his new book, *Street Legal: A Guide to Pre-trial Criminal Procedure for Police, Prosecutors, and Defenders*, published by the American Bar Association Press.

Xiphos (pronounced zee-phose) is a biweekly summary of recent court decisions about criminal procedure and other subjects important to street

#### Time to Renew?

If you have recently received a notice of renewal (*check your mailing label on the newsletter for your expiration date!*), please send your dues in soon. If you're past due, you won't receive your membership card. You may renew using the envelope provided or go to our web site and use PayPal:

[www.rangerfop.com/join.htm](http://www.rangerfop.com/join.htm)

We now offer the option of signing up for yearly automatic renewals with your credit card.

If you've moved, please send us an email at [fop lodge@sonic.net](mailto:fop lodge@sonic.net) and tell us your new address.

Member support is always available by email or phone: 800-407-8295.

Call *only* between 10AM and 7PM Eastern Time.

Many thanks for your continued support.

George Durkee  
Secretary

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### Lodge Website

The Lodge website is updated with notices and links to other sites that we think are interesting and/or helpful to resource based law enforcement officers. Visit it often between issues of the Protection Ranger to keep current on things that affect you and your job. Our address is [www.rangerfop.com](http://www.rangerfop.com)

### Application for Membership

You may also join, renew and pay your dues online with PayPal:  
[www.rangerfop.com/join.htm](http://www.rangerfop.com/join.htm)

I, the undersigned, a full-time regularly employed law enforcement officer, do hereby make application for active membership in the U.S. Park Rangers Lodge, FOP. If my membership should be revoked or discontinued for any cause other than retirement while in good standing, I do hereby agree to return to the Lodge my membership card and other material bearing the FOP emblem.

Name: \_\_\_\_\_

Signature: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_\_ Zip: \_\_\_\_\_ Phone \_\_\_\_\_

DOB: \_\_\_\_\_ E-Mail: \_\_\_\_\_

Permanent Rangers: \$60/year

Seasonals and Retired Active Members: \$40/year

Associate (non-Commissioned) Membership (Newsletter only): \$40/year

Renewals: You do not need to send in this form to renew. Enclose a copy of your Commission (new members only).

Make Check Payable to: National Park Rangers Lodge.

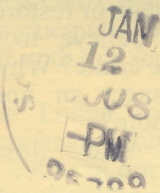
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