

Department of Legislative Services
 Maryland General Assembly
 2021 Session

FISCAL AND POLICY NOTE
 Third Reader - Revised

Senate Bill 626

(Senator Carter)

Judicial Proceedings

Judiciary

Maryland Police Accountability Act of 2021 - Law Enforcement Officers - Use of Force, Reporting, and Whistleblower Protections

This bill (1) establishes various requirements and prohibitions regarding the use of force by law enforcement officers and criminal penalties for violations; (2) establishes specified whistleblower protections with review by the Attorney General; (3) requires the Maryland Police Training and Standards Commission (MPTSC) to require specified training; (4) authorizes MPTSC to suspend or revoke the certification of a police officer under specified circumstances relating to the use of force; and (5) requires each local law enforcement agency to establish, maintain, and implement specified policies and guidance for law enforcement agencies and include funds in its annual budget for specified training and assessments. The bill also establishes various reporting requirements for local law enforcement agencies and MPTSC and establishes procedures for noncompliance.

Fiscal Summary

State Effect: General fund expenditures increase by at least \$155,300 in FY 2022; future years reflect annualization and ongoing costs. Potential minimal increase in general fund revenues due to the bill’s criminal penalty provisions.

(in dollars)	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026
Revenues	\$0	\$0	\$0	\$0	\$0
GF Expenditure	155,300	184,300	190,000	196,700	203,700
Net Effect	(\$155,300)	(\$184,300)	(\$190,000)	(\$196,700)	(\$203,700)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: Local expenditures may increase, as discussed below. Potential minimal increase in local revenues and expenditures due to the bill’s criminal penalty provisions. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: None.

Analysis

Bill Summary:

Use of Force, Duty to Intervene, and Duty to Provide Medical Treatment

A law enforcement officer may not intentionally use “excessive force.” The bill defines “excessive force” as force that an objectively reasonable law enforcement officer would conclude exceeds what is necessary to gain compliance, control a situation, or protect a law enforcement officer or others from harm, under the totality of the circumstances.

A law enforcement officer must make a reasonable attempt to intervene to terminate or prevent the use of excessive force if the officer knows or reasonably should know that another law enforcement officer is using or has expressed an intent to use excessive force that is likely to result in death or serious bodily injury. A law enforcement officer may not knowingly violate this requirement.

A law enforcement officer may not intentionally refuse to promptly provide, or make reasonable efforts to obtain, appropriate medical treatment for a person who sustains a serious bodily injury as a result of a law enforcement officer’s use of force.

A law enforcement officer who violates any of the above provisions is guilty of a misdemeanor and on conviction is subject to a maximum penalty of 10 years imprisonment.

Duty to Make a Report

A law enforcement officer must immediately make a report to any supervisory member of a law enforcement agency, a State’s Attorney, the Attorney General, or the State Prosecutor if the law enforcement officer has actual knowledge that another law enforcement officer has engaged in (1) homicide, as specified; (2) the use of excessive force resulting in bodily injury; (3) specified sexual crimes; (4) specified theft and related crimes; (5) perjury, as specified; (6) specified fraud and related crimes; or (7) tampering with or fabricating physical evidence, as specified. A law enforcement officer who violates any of these provisions is guilty of a misdemeanor and on conviction is subject to a maximum penalty of three years imprisonment and/or a \$10,000 fine.

Maryland Police Training and Standards Commission

MPTSC has the power and duty to require (1) for entrance-level police training and, as determined by the commission, for in-service level training conducted by the State and each county and municipal police training school, that the curriculum and minimum courses of study include, as specified, training regarding individuals who are in crisis and

(2) for entrance-level police training and at least every two years for in-service level police training conducted by the State and each county and municipal police training school, that the curriculum and minimum courses of study include training on the bill's requirement to intervene to terminate or prevent the use of excessive force.

MPTSC is authorized to suspend or revoke the certification of a police officer if the police officer (1) fails to use "de-escalation," as defined, as an alternative to using physical force, under circumstances in which de-escalation did not increase the risk of physical injury posed to the law enforcement officer or (2) misuses "less-lethal force," as defined, against a member of the public.

Local Law Enforcement Agency Requirements

By July 1, 2022, in consultation with MPTSC, each local law enforcement agency must establish, maintain, and implement policies and guidance for law enforcement agencies on prohibited actions relating to the improper use of force, specified principles regarding the use of force, protecting officers from retaliation or discipline relating to the duty to intervene and report the improper use of force by another officer, documenting uses of force and conducting use-of-force investigations, and promptly providing, or making a reasonable effort to obtain, appropriate medical treatment for a person injured as the result of a law enforcement officer's use of force.

By July 1, 2022, each local law enforcement agency must include funds in its annual budget for (1) training and assessment of training, as specified, and (2) assessing supervisors in the reinforcement of training objectives in real-world scenarios. By December 31, 2021, and every six months thereafter, each local law enforcement agency must report to the Governor's Office of Crime Prevention, Youth, and Victim Services (GOCPYVS) specified data regarding the use of force that resulted in complaints, hospitalizations, or death, as specified. GOCPYVS must analyze and summarize the reports submitted and, by September 1 each year (1) submit a report of the analysis and summaries to the Governor, each law enforcement agency, and the General Assembly and (2) publish the report on its website. GOCPYVS must develop a standard form for reporting the required data.

Other Reporting Requirements and Procedures for Noncompliance

If a law enforcement agency fails to comply with the reporting provisions, GOCPYVS is required to report the noncompliance to MPTSC. MPTSC is required to contact the law enforcement agency and request that the agency comply with the reporting provisions.

In addition, by December 31, 2021, and each December 31 thereafter, MPTSC must review a representative sample of the policies enacted by local law enforcement agencies relating to use of force and the internal files of law enforcement agencies to determine compliance

with specified requirements of the bill. If a local law enforcement agency is not in compliance, MPTSC must contact the agency to request compliance, as specified. If the local law enforcement agency does not comply within 90 days, (1) MPTSC must notify the Executive Director of GOCPYVS and the Comptroller and (2) the local law enforcement agency may not receive funds administered through the State Aid for Police Protection (SAPP) Fund.

Whistleblower Protections

The bill prohibits a supervisor, an appointing authority, or the head of a law enforcement agency from threatening or taking a “retaliatory action” against a law enforcement officer who discloses specified information or, following such a disclosure, seeks a remedy under the bill’s provisions or any other law or policy governing the law enforcement agency. These protections apply to a disclosure of information that a law enforcement officer reasonably believes demonstrates (1) an abuse of authority, gross mismanagement, or gross waste of money; (2) a substantial and specific danger to public health or safety; or (3) a violation of law. A disclosure by a law enforcement officer that is otherwise prohibited by law, is confidential by law, or that a law enforcement officer knew or reasonably should have known would impede or was likely to impede an investigation is protected only if the disclosure is made exclusively to the Attorney General, in writing, and contains specified information.

A “retaliatory action” includes any recommended, threatened, or actual adverse employment action, including:

- termination, demotion, suspension, or reprimand;
- involuntary transfer, reassignment, or detail to an assignment that a reasonable law enforcement officer would find less favorable;
- failure to promote, hire, or take other favorable personnel action;
- engaging in any conduct that would dissuade a reasonable law enforcement officer from engaging in activities protected under the bill; and
- any other retaliation against a law enforcement officer because the law enforcement officer makes a disclosure protected under the bill’s whistleblower protections.

A law enforcement officer aggrieved by a violation of the bill’s prohibitions regarding retaliatory actions may bring a civil action against the law enforcement agency for equitable relief or damages. In a civil action brought under the bill, if the law enforcement officer demonstrates – by a preponderance of the evidence – that the disclosure of information was a contributing factor in the alleged retaliatory action, the law enforcement agency has the burden of proving – by clear and convincing evidence – that the personnel action would have occurred for legitimate reasons, even if the officer had not made the

disclosure. In the civil action, the officer may seek, instead of reinstatement and back pay, statutory damages of at least \$5,000 for each instance of retaliatory action. The trier of fact, in awarding statutory damages, must consider the severity of the prohibited retaliatory action and the purposes of the bill's whistleblower protections.

The bill details options for the court when a determination is made that an officer is entitled to equitable relief or damages in a civil action, including the award of compensation for all lost remuneration and reasonable attorney's fees and costs. In addition, the court must issue an injunction against the law enforcement agency for any continuing violations of the bill's provisions. If the court determines that a civil action was brought by a law enforcement officer in bad faith or without substantial justification, the court may award reasonable attorney's fees and other litigation expenses to the law enforcement agency.

The bill does not preclude an action for defamation or invasion of privacy. The bill's provisions may not be construed to diminish the rights, privileges, or remedies of a law enforcement officer provided under any federal, State, or local law or under a collective bargaining agreement.

The Attorney General must (1) designate an assistant Attorney General to receive, from law enforcement officers, any information that is otherwise protected by law from disclosure; (2) investigate each allegation of illegality or impropriety; and (3) take appropriate legal action.

The bill applies prospectively and may not be applied or interpreted to have any effect on or application to any cause of action arising before its October 1, 2021 effective date.

Current Law:

Use of Force

Each law enforcement agency must require a police officer who is involved in a use of force incident in the line of duty to file an incident report regarding the use of force by the end of the officer's shift unless the officer is disabled.

Common law allowed police officers to use any force necessary to effectuate a felony arrest; however, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the U.S. Supreme Court held that, under the Fourth Amendment, when a law enforcement officer is pursuing a fleeing suspect, the officer may not use deadly force to prevent escape unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." In *Graham v. Connor*, 490 U.S. 386 (1989), the Supreme Court expanded its definition to include the "objective reasonableness" standard. The court held that the Fourth Amendment "reasonableness" inquiry is whether the

officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." In *Randall v. Peaco*, 175 Md. App. 320 (2007), the Maryland Court of Special Appeals applied principles of the *Graham v. Connor* case and stated that the test for determining the objective reasonableness of an officer's conduct for purposes of deciding a claim of excessive force brought under the State constitution is the test the Supreme Court announced in *Graham v. Connor*.

Police Officer Training

Chapter 519 of 2016 reconstituted the former Police Training Commission as MPTSC, an independent commission within the Department of Public Safety and Correctional Services. MPTSC operates approved police training schools and prescribes standards for and certifies schools that offer police and security training. In consultation and cooperation with various entities, it also sets minimum qualifications for instructors and certifies qualified instructors for approved training schools.

MPTSC certifies persons as police officers who have met commission standards, including submission to a criminal history records check and a specified psychological consultation. An individual who is not satisfactorily trained in the 12-month probationary period may not be employed as a police officer, and a police officer may not serve after certification has been revoked, suspended, or allowed to lapse.

MPTSC requirements include, among other things, the adoption and recommendation of best practices and standards for use of force and that the curriculum and minimum courses of study include special training, attention to, and study of the application of antidiscrimination and use of force de-escalation training at entrance-level police training and at least every two years for in-service level police training conducted by the State and each county and municipal police training school.

Governor's Office of Crime Prevention, Youth, and Victim Services

The State provides regular and supplemental grants to local government police operations through various programs and funds administered by GOCPYVS. GOCPYVS plans, promotes, and funds efforts with government entities, private organizations, and the community to advance public policy, enhance public safety, reduce crime and juvenile delinquency, and serve victims. Examples of grants administered by GOCPYVS include the Maryland Violence Intervention and Prevention Program Fund, the Community Program Fund, and the SAPP Fund.

Maryland Whistleblower Law

The Maryland Whistleblower Law includes protections for Executive Branch employees, including law enforcement officers employed by the State, that are substantively similar to those required by the bill. It protects State Executive Branch employees who disclose information believed to evidence abuse of authority, gross mismanagement or waste of money, a substantial and specific danger to public health or safety, and/or a violation of the law.

The Whistleblower Law prohibits reprisal against an employee who, after making a disclosure, seeks a remedy provided by any law or policy. A complaint under this statute must be brought within six months after the complainant first knew of, or reasonably should have known of, the violation of the whistleblower protection. The Secretary of Budget and Management, or a designee thereof, is required to conduct an investigation and determine whether a violation occurred within 60 days. After reviewing a final decision under the Whistleblower Law, the court may award costs of litigation and reasonable attorney’s fees to a prevailing complainant.

State Expenditures:

Office of the Attorney General

The protections provided under the bill’s whistleblower provisions generally already exist in current law for State law enforcement agencies; however, the bill extends the protections to all local law enforcement agencies in the State. Thus, the bill likely results in an increase in whistleblower claims and cases referred to the Office of the Attorney General (OAG).

The bill requires OAG to designate one attorney to receive, investigate, and adjudicate those claims. Therefore, general fund expenditures increase by at least \$155,269 in fiscal 2022, which accounts for the bill’s October 1, 2021 effective date. This estimate reflects the cost of hiring one assistant Attorney General and one investigator to investigate and adjudicate new whistleblower cases involving local law enforcement officers and agencies. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	2.0
Salaries and Fringe Benefits	\$144,106
Operating Expenses	<u>11,163</u>
Total FY 2022 OAG Expenditures	\$155,269

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses.

Maryland Police Training and Standards Commission

MPTSC advises that the commission needs a full-time employee at an estimated cost of \$61,324 in fiscal 2022, increasing to \$79,144 by fiscal 2026 in order to (1) consult with local law enforcement agencies to establish required policies; (2) contact law enforcement agencies that fail to submit required reports; and (3) conduct the required review of a sampling of policies and provide notifications under the bill. MPTSC also advises that authorization under the bill for the commission to suspend or revoke the certification of a police officer under specified circumstances necessitates a full-time assistant Attorney General and a paralegal at an estimated cost of \$155,269 in fiscal 2022, increasing to \$203,676 by fiscal 2026. The Department of Legislative Services (DLS) disagrees and advises that the requirements can likely be handled with existing resources, as most of the requirements are done in consultation with others, do not require thorough analysis, or likely apply in limited circumstances. If existing resources prove inadequate in future years, MPTSC can request additional personnel through the annual budget process.

State Law Enforcement Agencies

State expenditures (multiple fund types) may increase minimally for some State agencies with law enforcement units to update and provide additional training to law enforcement officers due to the bill's changes relating to the use of force.

The Maryland Department of Transportation (MDOT) advises that additional training costs for Maryland Transit Administration Police could exceed \$300,000 annually beginning in fiscal 2022. MDOT further advises that the Maryland Transportation Authority may also incur costs. DLS is unable to independently verify these potential costs at this time.

Other Effects

General fund expenditures may increase minimally due to the bill's criminal penalty provisions. In addition, since the bill creates new criminal offenses and penalties, the Maryland State Commission on Criminal Sentencing Policy (MSCCSP) must adopt regulations pertaining to the new offenses. This is within the routine activities completed by MSCCSP and can be handled with existing resources. Any increase in the Judiciary's caseload is also expected to be handled with existing budgeted resources.

GOCPYVS and the Comptroller's Office did not respond to requests for information regarding the fiscal effect of the bill; however, it is assumed that both agencies can meet the bill's requirements with existing resources. Further, it is assumed that the bill does not affect the overall finances of the SAPP Fund.

Local Fiscal Effect: Beginning in fiscal 2023, local government expenditures may increase, likely minimally, for local law enforcement agencies to include in their annual budgets funds for training and assessment of training and assessing supervisors in the reinforcement of training objectives in real-world scenarios. In addition, local law enforcement agencies may require additional staff to compile the required data under the bill. To the extent that local law enforcement agencies are parties in whistleblower complaints, local expenditures for legal fees may increase to respond to those complaints.

The bill's provisions regarding the establishment of policies and the SAPP Fund are not anticipated to materially affect local finances.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 139 (Delegate D.M. Davis, *et al.*) - Judiciary.

Information Source(s): Maryland Commission on Civil Rights; Howard and Montgomery counties; City of Laurel; Office of the Attorney General; Maryland State Treasurer's Office; Maryland State Commission on Criminal Sentencing Policy; Judiciary (Administrative Office of the Courts); Office of the Public Defender; Baltimore City Community College; Department of General Services; Department of Natural Resources; Department of Public Safety and Correctional Services; Department of State Police; Maryland Department of Transportation; Morgan State University; Department of Legislative Services

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Analysis by: Shirleen M. E. Pilgrim

Direct Inquiries to:
(410) 946-5510
(301) 970-5510