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To: Joint Committee on Kansas Security
From: Natalie Teemer-Washington, Research Analyst
Re: Laws Related to Use of Deadly Force

DEADLY FORCE

This memorandum provides an overview of the federal regulations and Kansas statutes related to the use of deadly force.

Several federal regulations pertain to the use of deadly force. This memorandum uses, as an example, the federal regulation pertaining to the Department of Energy Protective Force Officer's use of deadly force; it was chosen as an example because of its clarity and its applicability to situations of concern to Committee members.

What is Deadly Force?

Federal Department of Energy definition (10 CFR 1047.7):

- Force that a reasonable person would consider likely to cause death or serious bodily harm.

Kansas definition (KSA 21-5221):

- Application of physical force likely to cause death or great bodily harm.

Who is Justified to Use Deadly Force?

Federal Department of Energy Regulations

- Protective Force Officers – under certain circumstances
 - Under 10 CFR 1047.3, "protective force officer" means any person authorized by Department of Energy to carry firearms under section 161.k. of the Atomic Energy Act of 1954.

- The Atomic Energy Act of 1954 (42 USCA § 2201.k) permits the Department of Energy to authorize members, officers, employees, and employees of contractors and subcontractors, as it deems necessary in the interest of the common defense and security, to carry firearms while in the discharge of their official duties.

In Kansas

- Law enforcement officers – under certain circumstances
- Private persons – under certain circumstances

Under What Circumstances is the Use of Deadly Force Justified?

Federal Regulations for Protective Force Officers:

Under 10 CFR 1047.7, protective force officers may use deadly force in conditions of extreme necessity, when lesser means have failed or cannot reasonably be employed. Deadly force is justified under one or more of the following conditions when deadly force reasonably appears necessary:

- To protect officer who reasonably believes himself or herself to be in imminent danger of death or serious bodily harm;
- To prevent serious offenses against another person in situations presenting an imminent danger of death or serious bodily harm. (Example: sabotage of an occupied facility by explosives);
- To prevent theft, sabotage, or unauthorized control of a nuclear weapon or nuclear explosive device;
- To prevent theft, sabotage, and or unauthorized control of special nuclear material from a fixed site or from a shipments where Category II or greater quantities are known or reasonably believed to be present; or
- To apprehend or prevent escape of a person reasonably believed to:
 - Have committed an offense described above;
 - Be escaping by use of weapon or explosive; or
 - Who otherwise indicates that he or she posed a significant threat of serious bodily harm to the protective force officer or others unless apprehended without delay.

If use of firearm becomes necessary, the following precautions must be taken:

- A warning must be given, if feasible. For example, an order to halt must be given, if feasible, before shots are fired; and
- Warning shots shall not be fired.

Kansas Law Enforcement Officers Making an Arrest:

- Only when the law enforcement officer reasonably believes deadly force is necessary under KSA 2014 Supp. 21-5227:
 - To prevent death or great bodily harm to the officer or another person; or
 - To prevent resistance or escape from arrest; and
 - The officer has probable cause to believe the person arrested:
 - Has committed or is attempting to commit a felony involving death or great bodily harm; or
 - Is attempting to escape by use of a deadly weapon; or
 - Otherwise indicated that such person will endanger human life or inflict great bodily harm unless arrested without delay.

Private Persons in Kansas:

If a person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm, the person is justified to use deadly force and does not have a duty to retreat in the following situations:

- In defense of self or other person (KSA 2014 Supp. 21-5222); or
- In defense of home, workplace, or occupied vehicle to prevent or terminate unlawful entry into or attack upon any dwelling, place of work, or occupied vehicle (KSA 2014 Supp. 21-5223).

Kansas Presumption of Reasonable Belief:

Under KSA 2014 Supp. 21-5224(a), there is a presumption of the reasonable belief deadly force is necessary in these circumstances:

- The person against whom the force is used is unlawfully or forcefully entering or has unlawfully or forcefully entered, and is present in the dwelling, workplace, or occupied vehicle of the person using force; or
- The person against whom force is used has removed or is trying to remove another person against such person's will from the dwelling, workplace, or occupied vehicle; and

- The person using force knows or has reason to believe this is happening.

However, under KSA 2014 Supp. 21-5224(b), the presumption does **not** apply in these circumstances:

- The person against whom force is used has the right to be in or is a lawful resident of the dwelling, workplace, or vehicle;
- The person being removed is a child, grandchild, or otherwise in the lawful custody of the person against whom force is used;
- The person using force is committing a crime, trying to escape from the location where a crime has been committed or using the dwelling, place of work, or vehicle to further the commission of a crime; or
- The person against whom force is used is a law enforcement officer in the performance of the officer's lawful duties, and the person using force knows or has reason to know the officer is a law enforcement officer.

Aggressors and Use of Deadly Force in Kansas:

Use of deadly force by an aggressor is generally not justified in Kansas absent certain circumstances. Under KSA 2014 Supp. 21-5226, the use of deadly force justification is **not** available to a person who:

- Is attempting to commit, committing, or escaping from the commission of a forcible felony;
- Initially provokes the use of any force against such person or another, with intent to use such force as an excuse to inflict bodily harm upon the assailant; or
- Otherwise initially provokes the use of any force against such person or another, unless:
 - Such person has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force; or
 - In good faith, such person withdraws from physical contact with the assailant and indicates clearly to the assailant that such person desires to withdraw and terminate the use of such force, but the assailant continues or resumes the use of such force.

What Guidance for Use of Deadly Force Is Provided by the Federal Department of Energy and the Department of Homeland Security?

The Department of Energy's Protection Programs Operations (PPO) Order establishes requirements for the management and operation for the protective forces providing physical security to personnel and property of the Department of Energy. The PPO order also provides guidance for deadly force use, training, and signage. A copy of the PPO is available at the link below.

<https://www.directives.doe.gov/directives-documents/400-series/0473.3-BOrder>

Also, the Department of Homeland Security established its Policy for the Use of Deadly Force in 2004. This policy applies to law enforcement officers and agents of the Department of Homeland Security. A copy of the policy is available at the link below.

<http://www.dhs.gov/publication/use-force-policy>

How Does Case Law Interpret Use of Deadly Force in Kansas?

Kansas

Case law in Kansas suggests ways to determine whether or not the use of deadly force is justified.

- A two-part test is applied for determining whether the use of deadly force is justified:
 - The first part of the test is subjective, and requires a showing that the defendant sincerely and honestly believed the use of deadly force in defense of self was necessary; and
 - The second part of the test is objective, and requires a showing that a reasonable person in the defendant's circumstances would have perceived the use of deadly force in defense of self was necessary. *State v. Salary*, 2015, 343 P.3d 1165, 301 Kan. 586.
- Statutory justification for use of deadly force in defense of a person is to be determined by the trier of fact using an objective standard, *i.e.*, from the viewpoint of a reasonable man in the accused's position. *State v. Simon*, 1982, 231 Kan. 572, 646 P.2d 1119.

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Kansas Security

Review Various Security Issues

KSA 46-3301 directs the Joint Committee to "study, monitor, review, and make recommendations for the following: (1) matters relating to the security of state officers or employees; (2) security of buildings and property under the ownership or control of the state of Kansas; (3) matters relating to the security of a public body or agency, public building or facility; (4) matters relating to the security of the infrastructure of Kansas, including any information system; and (5) measures for the improvement of security for the state of Kansas." The following topics were noted as being among those on which the Committee should hear testimony and formulate recommendations:

- The security of utilities in Kansas, specifically the electric grid, and what is done to ensure that security;
- The progress and potential security risks related to the National Bio and Agro Defense Facility (NBAF);
- The rules for the use of deadly force at facilities including the NBAF and the nuclear facilities in Kansas;
- Safety planning and practices at K-12 schools and post-secondary institutions and the role of the Department of Education and other state agencies in increasing that safety planning;
- The extent to which certain persons may be claiming public and private benefits related to military service when not entitled to those benefits and how that could be reduced; and
- The governance of public emergency communications systems (as requested by the Adjutant General).