AUSTIN POLICE DEPARTMENT

M E M O R A N D U M

TO: Mayor and Council Members

FROM: Brian Manley, Chief of Police

DATE: July 2, 2020

SUBJECT: Update Regarding Resolution No. 20200123-059, Enforcement of Marijuana Offenses

The purpose of this memo is to provide an update on the implementation of changes to the Austin Police Department's policies and procedures regarding the enforcement of marijuana-related possession offenses, as required by Resolution No. 20200123-059.

Background

The enforcement of misdemeanor marijuana offenses—except those with a nexus to violent crimes—has never been a priority at APD. For many years, however, the only enforcement option available to officers was via a custody arrest. The paradigm shifted in 2007 when the Texas Legislature amended the Code of Criminal Procedure (CCP) to allow officers to issue citations for several non-violent misdemeanor offenses, including possession of marijuana. Amid widespread skepticism and reluctance to endorse citation in lieu of arrest strategies throughout many agencies and jurisdictions across the state, APD readily instituted a "cite and release" program that deferred almost 13,000 arrests during the first four years of operation.

The Department took the next step forward in 2018 after City Council enacted the Freedom City resolutions, which further emphasized the importance of eschewing arrests and limiting discretion for citation-eligible offenses. The impact was unequivocal: overall arrests for citation-eligible offenses decreased from 1,557 in 2017 to 332 in 2019, a reduction of 79%. Similar improvements have been made with low-level marijuana arrests. Arrests for citation-eligible marijuana offenses (less than 2 ounces) decreased from 319 in 2017 to 54 in 2019. There were only 3 such arrests during the first quarter of 2020, all of which were made in the interest of public safety (i.e. for compelling and exigent circumstances beyond the mere possession of marijuana).

House Bill 1325

On June 10, 2019, Governor Greg Abbott signed House Bill 1325 into law. The bill authorized the production, manufacture, retail sale, and inspection of industrial hemp crops and products in Texas. The bill defined "hemp" as the plant Cannabis sativa L. and any part of that plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts,

and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

The passage of the bill seemingly stipulated that law enforcement agencies would need to conduct previously unnecessary lab tests to distinguish between hemp and marijuana. Accordingly, APD began to explore its options for conducting lab tests to meet the burden of proof for marijuana-related charges.

The new law also caused confusion amongst prosecutors and law enforcement officials regarding the intent and significance of the enacted provisions and how agencies were expected to proceed with enforcement actions (Chapter 2 of the CCP outlines the duties and responsibilities of peace of officers and prosecutors), which caused state leaders to provide clarification. On July 18, 2019, Governor Greg Abbott, Lt. Governor Dan Patrick, Speaker Dennis Bonnen, and Attorney General Ken Paxton issued a letter addressed to District and County Attorneys. The letter stated, in part:

> *"Marijuana has not been decriminalized in Texas, and these actions [dismissing cases without a lab test] demonstrate a misunderstanding of how H.B. 1325 works."*
>
> *"The power to change the law is legislative and rests with the Texas Legislature under the Texas Constitution. Since H.B. 1325 did not repeal the marijuana laws of Texas, as Judicial Branch Members, you should continue to enforce those laws by 'faithfully executing the duties of the office of the [District or County Attorney], of the State of Texas, and ... to the best of [your] ability preserve, protect, and defend the Constitution and laws of the United States and of this State.'"*
>
> *"Criminal cases may be prosecuted with lab tests or with the tried and true use of circumstantial evidence, a point some of you have already made clear in this context. Even before the passage of H.B. 1325, companies and labs were already developing THC concentration tests. As more companies enter the testing marketplace, the costs of the tests will certainly decline, and you may weigh which prosecution method is appropriate. In short, lab tests are not always needed, and they are not as costly as some initial reporting indicated."*

Nonetheless, many departments, including the Texas Department of Public Safety (DPS) and APD—which were already employing such a strategy to the furthest extent allowable under state law—instructed personnel to primarily utilize "cite and release" to enforce misdemeanor marijuana offenses until legally sufficient lab tests could be developed and implemented.

Testing Limitations and Prohibitions

On January 23, 2020, City Council passed Resolution No. 20200123-059. The resolution directed, in part:

> *It is the policy of the City that City funds and personnel will not be used to:*
>
> - *Develop THC concentration testing protocols or pursue validation for the purpose of testing any cannabis-related substance to determine whether the substance meets the legal definition of marijuana under state law.*
> - *Access, by any means, THC concentration testing of cannabis-related substances except in the investigation of high priority felony level cannabis-related trafficking offenses or a violent felony charge (not a cannabis-related charge).*

And:

> *It is the policy of the City that City resources may be used to access THC concentration testing conducted or performed by non-City laboratories only for use in the investigation of high priority felony-level cannabis-related trafficking offenses, for the purpose of determining whether a cannabis-related substance meets the legal definition of marijuana under state law.*

Shortly thereafter, DPS issued a statewide bulletin indicating its laboratory would prioritize resources on processing felony cases and not accept misdemeanor marijuana cases for analysis.

Per the resolution and in accordance with the protocols issued by DPS, APD has stopped all development of testing and is in the process of entering into contracts with vendors to conduct testing for only the cases outlined in the resolution.

Revised Enforcement Policies

City Council's resolution further prohibited APD from taking enforcement action under certain circumstances:

> *The City Council directs the City Manager to take the steps necessary and appropriate to eliminate, to the furthest extent allowable under state law and as long as there is no immediate threat to a person's safety, the use of arrest or other enforcement action for cannabis-related possession offenses, when the Chief of the Austin Police Department knows, or reasonably should know, that the prosecuting entity will automatically reject the charges or that a lab report will not be obtained to test the THC concentration of the substance.*

After reviewing the current protocols for handling marijuana cases at all of the relevant County and District Courts and Attorney Offices and/or conferring with representatives from those respective entities, APD has revised our marijuana-enforcement polices to comply with Council's resolution and align with present practices within the local judicial system.

APD will no longer cite or arrest individuals with sufficient identification for Class A or Class B misdemeanor "possession of marijuana" offenses, unless there is an immediate threat to a person's safety or doing so as part of the investigation of a high priority, felony-level narcotics case or the investigation of a violent felony.

Training and Public Notification

In order to ensure APD officers are well-trained in the changes made as a result of the resolution, the Department has held a meeting with Command Staff to discuss the revisions. The mandatory policy updates will be published for officers to review and acknowledge, along with a corresponding training bulletin.

The Department will inform the public of the changes through social media, the Department's website, and interviews with any attentive media outlets.

CC: Spencer Cronk, City Manager
Rey Arellano, Assistant City Manager

Attachment: 308.8 Misdemeanor Possession of Marijuana final

Request for Policy Revision

Requestor Name COS Troy Gay Emp # 2174

This revision applies to Choose One

If new, recommended section _____

This revision is necessary to comply with Choose One

Who does this revision affect? Choose One

This revision Choose One have an unbudgeted financial impact of _____

Brief reason for the revision:

On June 10, 2019, the Legislature passed House Bill 1325 which defined "hemp" as Cannabis sativa L with a delta 9 tetrahydrocannabinol concentration of not more than .3 % on a dry weight basis. This change meant that illegal marihuana was at a .3% THC or higher, but is otherwise indistinguishable from legal hemp. A lab test is required to prove beyond a reasonable doubt that a substance is illegal marijuana rather than hemp. At the time APD/DPS did not have any test available to provide to prosecutors when a citation or arrest was made for POM. Also, COA council passed resolution 20200123-059 that APD would not develop or utilize labs to test for Misdemeanor POM cases unless it met certain requirements which are outline in the policy below. Also, DPS lab will not be testing any Misdemeanor cases for outside agencies. The CA and DA Offices in the counties we service require lab test results if they are to move forward with any POM cases. Without the ability to test, the arrest and citations are being rejected. This policy will reflect APD's current position on the enforcement of POM while complying with State Law and COA resolution 20200123-059

Document the changes or additions to Policy below. Please include the specific policy number. ~~Red strikethroughs~~ will be used for deletions and blue underlined for text insertions. Please email completed forms to APDPolicy@austintexas.gov.

308 Misdemeanor Citations

308.9 MISDEMEANOR POSSESSION OF MARIJUANA (POM)

For Class A and B POM offenses officers should only make an arrest or issue a citation as otherwise permitted by section 308.3 and 308.4 of this general order if doing so as part of:

(a) the investigation of a high priority, felony-level narcotics case, or

(b) the investigation of a violent felony.

In all other Class A and B POM cases, and when officers have probable cause to believe the substance is marijuana, officers shall seize the marijuana, write a detailed report titled "possession of marijuana" and release the individual if POM is the sole charge. Officers shall deposit the marijuana as evidence. In the event there are offenses in addition to POM, officers should take appropriate enforcement action for those additional offenses, but should not charge for the POM offense unless it meets one or both of the factors identified in paragraphs (a) or (b) this general order.

Reviewed by Policy Vetting Committee on n/a Reviewed by City Legal ☒

Reviewed by Policy Review Committee on n/a

Reviewed by Executive Staff on 06-29-2020

☐ Pillar Policy – Additional Training Assigned to ☐ Sworn ☐ Civilian ☐ Both

☑ Approved ☐ Not Approved ☐ Approved with Notations/Revisions

Comments: Training Bulletin will be provided along with this policy update.

Command Staff Reviewed on 7-1-20

Chief's Signature

7-1-2020
Date