

In the matter of arbitration between
CITY OF HOLLYWOOD, FLORIDA

Employer,

FMCS NO. 231007-00178
Matthew Barbieri Termination

And

FLORIDA STATE LODGE, FRATERNAL
ORDER OF POLICE, INC.,

Union.

Appearances:

For the Employer:

Michael Kantor, Esq.

Weiss Serota Helfman Cole & Bierman, P. L.

200 East Broward Boulevard, Suite 1900

Fort Lauderdale, Florida. 33301

For the Union:

Paul A. Daragjati, Esq.

Rose R. Daragjati, Esq.

4745 Sutton Park Court, Suite 503

Jacksonville, Florida. 32224

OPINION AND AWARD

This matter was tried in person before the undersigned arbitrator on August 3 and 4, 2023 at the Employer's facility in Hollywood, Florida. The Employer called three witnesses; the Union called one witness, the Grievant. All exhibits proffered by the parties were admitted into evidence¹. A transcript of the proceedings was made and the parties elected to submit post-hearing briefs in lieu of oral closing arguments. This Opinion and Award follows.

¹ The exhibits will be referred to as JE for joint exhibits, CE for City exhibits, and UE for Union exhibits.

BACKGROUND

On August 6, 2020, the City issued a Notice of Intent to Terminate (CE6) to Officer Matthew Barbieri stating discipline is being considered for violations of certain “Florida State Statutes, Departmental Rules and Regulations and Standard Operating Procedures . . .”. Specifically, the following:

1. Florida Statute 784.03 Battery; felony battery;
2. City of Hollywood Police Department Standard Operating Procedures SOP 200 – Response to Resistance.

The Notice of Intent to Terminate concludes in part that the Grievant “clearly used excessive force against Mr. Schachner, who was handcuffed and did not appear to be resisting arrest when he [Barbieri] slapped Mr. Schachner’s face. That the facts of the case regarding the use of force are undisputable based on the residential surveillance video and Barbieri’s comment, “I’m gonna have to say he was kicking.” CE6. The Notice also states the investigation determined the Grievant’s slaps to Mr. Schachner’s face were unreasonable and unjustified, violating Florida State Statute 784.03, Battery (1st Degree Misdemeanor).” *Id.*

The Notice of Termination, dated September 6, 2022, upheld the intent to terminate. The Conclusion section of the Notice to Terminate is set forth in full here:

It is clear you were properly performing your duties and were within your legal authority to detain and investigate what Mr. Schachner was doing at the time of your initial encounter. This investigation focuses on what occurred after Mr. Schachner was handcuffed.

Although a draft narrative was completed on your department-issued laptop, the document was never submitted and remains exactly as it was photographed, a draft. Therefore, the finding for the allegation of Official Misconduct is unfounded.

Although current policy and procedure dictate you were to complete a supplemental report, the Internal Affairs Unit instructed you to stand by while communications between Internal Affairs and your PBA Attorney, Michael Braverman, ensued. During

those conversations, it was explained to Mr. Braverman that the request for the Supplemental Report came from the Department's Case Filing Unit as it pertained to the narcotics arrest made by you. Also discussed was your viewing of the surveillance video before completing the required supplemental report. These conversations did not conclude before the time you were placed on Administrative Leave Without Pay and served with your Internal Affairs Subject Member notification letter. Considering that Internal Affairs instructed you to stand by, the allegation that you failed to complete the required Supplemental Report is exonerated.

While handcuffed and not apparently physically resisting you, you delivered two open hand strikes to Mr. Schacher's (sic) face while yelling at him, "How about now? Do I have permission now?" The internal affairs investigation has determined that your use of physical force was not an attempt to gain physical compliance of Mr. Schachner, but rather an effort to reestablish consent to search. Later, after you looked into the video surveillance camera, you were heard saying, "I'm gonna have to say he was kicking." This statement supports the fact that Mr. Schachner did not appear to be resisting physically on camera. Had Mr. Schachner rescinded his consent to search, there are procedures in place to obtain evidence properly under those circumstances. These parameters do not include strikes to the face or verbal demands for permission.

Regarding the subsequent use of force, the internal affairs investigation has determined that your use of physical force was excessive and in direct violation of Standard Operating Procedure #200 Response to Resistance. Your actions on August 6, 2019, are inexcusable, adversely impacted your ability to perform the required duties of a law enforcement officer, and negatively impacted the Hollywood Police Department's ability to maintain trust with the community we serve.

Based on the totality of the facts included in the internal affairs investigation, I am upholding my original intent to terminate, and your termination is effective immediately. A copy of this disciplinary action shall become a permanent part of your Internal Affairs and personnel files.

RELEVANT PROVISIONS

Florida Statute §784.03 Battery; felony battery

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other;
or
2. Intentionally causes bodily harm to another person.

Article 11 of the CBA: Management Rights

The Union and its members recognize that the City has the exclusive right to manage and direct all of its operations. Accordingly, the City specifically, except as otherwise limited by this Agreement, reserves the exclusive right to:

b) Hire, fire, demote, suspend or otherwise discipline for just and proper cause, etc.

City of Hollywood Police Department Standard Operating Procedures 200 (III)(B)-Use of Non-Deadly Force

Members will only use the Response to Resistance Option that is objectively reasonable to:

- 1 De-Escalate the incident and bring it under control.
- 2 Make a lawful arrest.
- 3 Defend or protect themselves or others.

City of Hollywood Police Department Standard Operating Procedures 200 (VII)(B)-Use of Force Guidelines:

The Force Guidelines provide a framework for making decisions involving the reasonable use of force by Law Enforcement officers. The structure of the Force Guidelines is based on constitutional considerations and case law and describes the appropriate decision-making in a fluid and dynamic situation. The Guidelines consider the relationship between subject resistance and various situational factors in determining the officer's response options.

City of Hollywood Police Department Standard Operating Procedures 200 (VIII): Factors for Deciding the Use of Force provides:

Members are to use the totality of the circumstances and "force that is objectively reasonable" to effectively bring an incident under control, make arrests and protect the lives of the members and/or others.

City of Hollywood Police Department Standard Operating Procedures 200 (IX): Totality of Circumstances provides:

The totality of the circumstances is a term used to refer to all facts and circumstances known to the officer at the time, or reasonably perceived by the officer as the basis for a use of force decision. This will be viewed in the totality of the circumstances in determining whether the decision was objectively reasonable and, therefore, legally justified. The totality of circumstances includes consideration of the subject's form of resistance, all reasonably perceived situational factors that may affect the situation, and the response options available to the officer.

City of Hollywood Police Department Rules and Regulations 1.20-

Conduct Unbecoming or Detrimental, which states:

Any conduct or act has an adverse impact upon the operation of the Department, adversely affects the Member's ability to perform the required duties or brings discredit to the Department.

City of Hollywood Police Department Rules and Regulations 1.109
Use of Force, which states:

A defense response by an Officer to overcome a person's physical resistance to an Officer's performance of Legal Duty; to protect an Officer or another person from physical resistance or acts of aggression that are likely to cause bodily harm or is used to apprehend a fleeing criminal suspect.

ISSUES

1. Whether the Grievant was terminated for just and proper cause per Article 11 of the CBA?
2. If not, what shall the remedy be?

THE TESTIMONY²

The City's Witnesses:

The City's first witness was Detective Diante Roots. He has been with the Hollywood Police Department (HPD) since 2018 and described his several positions. He said he previously worked with the Grievant and had a good relationship with him and was a friend. He said the call came as a domestic altercation with the caller saying his son was high on drugs and behaving erratically. The caller (the subject's father) said he felt like the suspect would possibly kill him. Detective Roots had no experience with this subject but said the Grievant told him the subject was a problem, that he had dealt with him before, and had Baker Acted him before. He said the call was a "Signal 20" which is a mentally ill person.

Detective Roots described where he and the Grievant entered the residence and heard screaming and yelling from inside. He said when they entered, he saw Mr. Schachner inside the bathroom with a belt in one hand and a syringe in the other hand. At this point the videos were

² This section is intended only as a summary of the testimony for context and understanding.

played and Detective Roots was asked questions as the videos were played. Mr. Schachner was handcuffed behind his back. At some point, they had Mr. Schachner sit down. He said the Grievant said “that’s how you get shot” in response to Mr. Schachner reaching for something but Detective Roots did not know what that might have been. He said Mr. Schachner stopped reaching. He said they did not need Mr. Schachner’s permission to search.

At a point, Detective Roots was standing over/straddling Mr. Schachner and Mr. Schachner was kicking his legs, flailing his body, and turning around to see what the Grievant was doing. Detective Roots said he felt in danger because he could get kicked by Mr. Schachner, so he stepped back away from Mr. Schachner and was then not in danger of getting struck but still felt in danger because Mr. Schachner was still acting erratically and kicking pretty hard. Detective Roots also described Mr. Schachner at this point as throwing a “temper tantrum.”

At a point, the Grievant came back to where Detective Roots and Mr. Schachner were and grabbed him under his arms to stand him up. Mr. Schachner was kicking his legs and trying to drop his body weight to avoid being picked up. The Grievant pulled Mr. Schachner back into the room and struck him twice with his open hand and Mr. Schachner lowered himself down to the wall and the Grievant asked Mr. Schachner if he had permission now: “how about now? Huh? How about now?” Detective Roots did not believe at that point Mr. Schachner was an immediate threat to himself but could not say if the Grievant felt there was a threat to him [the Grievant]. At a point, Officer Barclay advised the Grievant there is a camera and the Grievant said “I will have to say that he was kicking me.”

On cross-examination, Detective Roots said he had been on the road by himself less than a year when these events occurred. He said a domestic disturbance is one of the most dangerous a police officer responds to. He said drug users are unpredictable when they are high. He said he

drew his Taser, but not his firearm, when he walked into the home, and he did not notice the Grievant draw any weapon. He said the house was full of clutter, clothes everywhere, and he could not see under the clothes. He said he told Mr. Schachner to relax but to no avail. During the approximate minute and a half gap between the two videos, Mr. Schachner was still not complying with him and the Grievant, even though he was handcuffed, and was bringing his hands up to and around his side. He was trying to stand up.

He heard the Grievant say to Mr. Schachner "That's how you get shot, isn't it?" and heard Mr. Schachner say "Yes, I do." At a point, Mr. Schachner became erratic, flailed and kicked his legs and turned his body. When Detective Roots moved back from Mr. Schachner, he said the situation was escalating and, based on his experience, things can go from bad to worse in a blink of an eye. He said the Grievant heard what was going on between him and Mr. Schachner and the Grievant was coming to assist him. The Grievant grabbed Mr. Schachner, who was flailing his legs and moving his body, under his armpits and pulled Mr. Schachner away from Detective Roots. At this point, Mr. Schachner is resisting the Grievant and that is around when the Grievant struck Mr. Schachner the first time. Mr. Schachner continued to scream and move around and that is when the Grievant struck Mr. Schachner the second time, at which point Mr. Schachner stopped screaming and moving. Detective Roots said by the Grievant putting his hand under Mr. Schachner's chin prevented him from falling forward.

Detective Roots said the open hand strikes are distractionary tactics used to gain compliance. He said the Grievant did not hit Mr. Schachner with a closed fist, did not pull out his baton, did not pull out or use his Taser, did not pull out his firearm, and did not choke Mr. Schachner. He said Mr. Schachner was screaming later when he was in the patrol car and saying he wants to fight.

On re-direct examination, there were some questions confirming the size and shape of the residence. Detective Roots said he never called out to the Grievant that he was in trouble; that he scanned the area for weapons but did not pick up anything, move anything, or look under anything. He described Mr. Schachner's ability to reach around his body while handcuffed. He did not consider Tasing Mr. Schachner once he was in control and especially considering he was under the influence. He said the Grievant let Mr. Schachner fall forward when Officer Barclay called his name and pointed to the camera. He said he never felt the need to use force on Mr. Schachner or that Mr. Schachner was an immediate threat to him.

The City's next witness was Officer Ryan Barclay, an approximate ten year employee of the HPD, currently assigned as a Field Training Officer (FTO). He has been a FTO for approximately five years. He had been called to this house previously for disturbances between Mr. Schachner and his father, resulting in either an arrest or Mr. Schachner being Baker Acted. On this occasion, he went to the house even though not directly dispatched, because the call came out as a potentially violent person under the influence of a narcotic.

When Officer Barclay first got to the house, he observed the Grievant helping put pants on Mr. Schachner. Officer Barclay did not see the Grievant strike Mr. Schachner. At a point, he called the Grievant's name three times and shined his flashlight at the camera and pointed it out to the Grievant who turned his head and looked at the camera.

On cross-examination, Officer Barclay estimated he had been in contact with Mr. Schachner two or three times in the past. He said he knew Mr. Schachner had been violent with law enforcement in the past and knew he had been arrested a number of times for both misdemeanor and felony possession. He said the reason he called the Grievant's name was because

he was yelling at Mr. Schachner and to say he would not respond to yelling. He said he was not warning the Grievant about the camera but just pointing out the camera was there.

On re-direct examination, Officer Barclay repeated he pointed out the camera just showing him it was there, which he described as a normal procedure to look for cameras. This is not a HPD procedure, just what he does.

The City's next witness was Patrol Sergeant Wadson Sainvil. He became aware of the incident when he was called by the Grievant. He went to the scene, and later that shift filed a report. When he arrived at the scene the Grievant told him he had used force on Mr. Schachner. Sergeant Sainvil made contact with Mr. Schachner's father who told him his son was taking drugs and acting out and the elder Schachner constantly having to call the police. He also told the witness he had video footage which the witness viewed at the scene. CE1.37. Based on the footage he reviewed, he did not believe Officer Roots was in immediate danger when the Grievant struck Mr. Schachner. He did not believe the Grievant used reasonable force.

On cross-examination, Sergeant Sainvil said the elder Schachner only showed him a short clip of video (CE1.37) but did not show him what had been going on between him and his son before the police arrived, or the threats his son made before the police arrived, or during the minute and a half gap in the videos. Sergeant Sainvil did not ask the elder Schachner for any other video, nor did he seize the video system. Sergeant Sainvil said he did not check out the house to see if there was any other camera. He said he was not familiar with Mr. Schachner's criminal history or violence with other police officers.

Sergeant Sainvil said he made a determination there was a policy breach based on the video clip he was shown by the elder Schachner. He said he told the elder Schachner to hold onto any videos he had. He was never interviewed by Internal Affairs and he did not recall if he asked the

elder Schachner if there were any other camera views of the incident. He said he did not initiate a crime scene unit to come to the house, or ask anyone to take measurements of the house, or interview the Grievant after he viewed the video provided by the elder Schachner. He said he initiated this investigation based only on the portion of the video he was shown by the elder Schachner. He said it appeared to him from the video that the Grievant choked Mr. Schachner.

On re-direct examination, Sergeant Sainvil said every instance of use of force has to be justified. He believed that after Mr. Schachner had been removed away from Officer Roots, there was no reason to have slapped him. He said when he was in the residence he did not see any cameras. He said under the Law Enforcement Officers Bill of Rights he was not allowed to take a statement from the Grievant at that point.

On re-cross examination, he said nothing prohibited him from speaking with an officer at the scene as part of fact finding.

The City's next witness was Lieutenant Cherie Cohn. She was hired by HPD in August 2004 and described her various assignments and promotions. She estimated she has been involved in 10-15 internal affairs investigations and was involved in the instant case and prepared a close-out memorandum. CE1. She was not aware of any video IA did not get. She said she understood the Grievant's draft memo (CE1.32, p.2) is his explanation of why he used force on Mr. Schachner.

Lt. Cohn said her review of the video did not show Mr. Schachner bending his knees in what appeared to be an attempt to strike anyone. She said based on the statements taken in conjunction with the video it was determined the Grievant's statement would not have done anything to aid their investigation. She also said complications with the State Attorney's office played a role in her decision not to take a statement from the Grievant. The video was played for Lt. Cohn and she offered her view of what the video showed and said from what she observed, she

did not see or hear anything indicating Mr. Schachner was a threat of violence to the safety of the officers. She said the video shows the Grievant striking Mr. Schachner twice open-handedly and each time Mr. Schachner is moving further from the Grievant who is moving with him. After hearing the Grievant saying words to the effect “do I have it now, do I have it now,” the Grievant placed his hand on Mr. Schachner’s throat as Mr. Schachner either falls or squats.

Lt. Cohn said the Grievant cannot be heard saying anything about stop kicking or stop resisting. She said she believed the “do I have it now” language was taunting Mr. Schachner. She believes the audio shows the Grievant’s reason for using force was to gain permission to search. Lt. Cohn said the Grievant’s comment that he would have to say Mr. Schachner was kicking came after Mr. Schachner said “I got you now. I will prosecute you” indicated to Lt. Cohn that the Grievant was lying. Lt. Cohn said the Grievant’s legal counsel did not request IA take a statement from the Grievant and objected to him being required to submit a supplemental report.

On cross-examination, there were questions about the applicability of the Law Enforcement Officers Bill of Rights. She said it was her understanding communication from the State Attorney’s office was that the City was to close its investigation. She said the IA investigation was not tolled and that no one offered the Grievant a Miranda warning. She did not know or recall if anyone in IA asked if Mr. Schachner would go in with the City’s IT people and download the material on the video camera. Lt. Cohn did not know if there was a search inside the house to see if there were other cameras available for download. She did not know if anyone visually determined if there were other cameras that could have seen what happened between the Grievant and Mr. Schachner. She did not know if a crime scene tech was sent to the house to take pictures of the interior or if any measurements were taken of the interior and she did not do a criminal background check.

On re-direct examination, Lt. Cohn said Mr. Schachner was charged with possession of heroin and was not charged with resisting arrest with or without violence. She said in her experience she would expect to see a resisting charge if a suspect battered or assaulted an officer. She said the HPD force policy requires force to be justified at the time it is being used. She said none of the statements made reference to Mr. Schachner reaching for the Grievant's gun.

On re-cross examination, Lt. Cohn said no one in HPD sent the Grievant a message to come in for an interview.

The City's next witness was Chief of Police Chris O'Brien. He has been with the HPD 25+ years and has been Chief since February 2018. He described his various positions in the HPD and said he has either worked in, supervised, or managed every unit or division in the HPD. He said he has been involved in dozens of IA investigations. Chief O'Brien said he reviewed the video dozens of times and the entire investigative package and said the termination was not based solely on the video. He said he delayed the termination so the Grievant, who recently had a baby, could continue to receive medical insurance through the City.

Chief O'Brien testified about the Grievant's un-submitted report describing what he deemed to be inconsistencies in the report and the video and other statements. He said that Mr. Schachner may have been charged with domestic violence did not justify the Grievant's use of force. He said the video did not indicate Mr. Schachner was a threat to the Grievant, or might spit at the Grievant, or anything that would justify the Grievant slapping Mr. Schachner.

Chief O'Brien said each use of force must be justified and is based on the objective reasonableness standard. He said taunting Mr. Schachner justified the conduct unbecoming charge. He said it is unacceptable for officers to lose their temper even if provoked verbally by a heroin addict or crackhead. He said the Grievant's statement that he would have to say Mr.

Schachner had been kicking meant to the Chief that the Grievant recognized his use of force was improper and he was trying to justify his actions. There was some discussion of the Grievant's past history of complaints. He said the use of force alone justifies termination and if he is reinstated there are serious negative consequences with the community and the police profession. Chief O'Brien said it was a consideration that the Grievant tried to justify his actions regarding the kicking comment and said the Grievant would have a huge credibility issue when called to testify.

On cross-examination, Chief O'Brien said he did not do any investigation other than as described reviewing the investigative package and he did not get any direction from the State Attorney's office. He said the case of *Graham v. Connor* governs what is a proper response to resistance. He said of all the prior matters about which the Grievant was investigated, were not sustained. He said that the action he took against the Grievant was not based on his history, but only on this incident.

The City rested its direct case after Chief O'Brien's testimony.

The Union's Witnesses:

The Union's first and only witness was the Grievant, Matthew Barbieri. He was hired by the HPD in July 2012 and described his prior law enforcement experience. He described his law enforcement certificates, training documents, and evaluations. He said the call in this event came in as a domestic violence call which, in his experience, can be violent and dangerous. He said the complaint came in from Mr. Schachner's father who said he could not control his son, that he was irate, and out of control. The Grievant said he had been to this residence previously and had to remove Mr. Schachner at his father's request. He said Mr. Schachner was known as a heroin addict.

When he arrived at the residence he could hear screaming while he was still outside the residence. City Exhibit 1.36 was played and the Grievant was asked a series of questions to describe what was happening at various times during the video. He described the interior of the residence. When he went into the residence, he saw Mr. Schachner completely naked in the bathroom where he threw a belt, a baggy, and a needle toward the bottom of the sink and then went back and grabbed the needle which is when the Grievant put his hand on his gun for his safety because he did not know what Mr. Schachner's intentions were with the needle.

The Grievant placed him in handcuffs and arrested him for felony possession of heroin and paraphernalia. During this time, Mr. Schachner kept yelling the name "Chris" referring to Officer Alban for whom he was a confidential informant. The Grievant said Mr. Schachner yelled and resisted throughout the time he was in the residence. He said Mr. Schachner was not listening to Officer Roots and was high on drugs.

During the approximate one and one-half minute gap between the two videos, the Grievant said he did not put on a pair of shorts that Mr. Schachner had been requesting because the Grievant did not know if there was a needle in them. He said Mr. Schachner got really upset at that and kept moving around and fidgeting with his hands and looking around. At a point, the Grievant said he turned his back to Mr. Schachner and that is when Mr. Schachner grabbed the back of his gun belt, which alarmed the Grievant, after which the Grievant put him down and put the shorts on Mr. Schachner. The Grievant said he was aware Mr. Schachner had slipped out of cuffs before (meaning moving his hands from his back to his front). This is when the Grievant said to Mr. Schachner "That's how you get shot."

At a point, the Grievant was coming out of the bathroom and saw Mr. Schachner kicking or kick Officer Roots and there was nothing obstructing his view to Officer Roots and Mr.

Schachner. It was his perception the kicks were intentional. The Grievant said it was his perception Officer Roots did not have control of Mr. Schachner so he took the two or so steps toward them and his intention was to get Mr. Schachner away from Officer Roots. He said a situation can get out of hand in a split second and he had to make a split second decision and he moved Mr. Schachner away.

The Grievant said he delivered the first hand strike with the palm of his hand, like a brachial stun, trying to use the least amount of force necessary to gain compliance. He said this technique was taught at the academy. The Grievant said Mr. Schachner was still combative and out of control after the first strike so the Grievant delivered a second open hand strike which was effective.

When asked why he said to Mr. Schachner "Do I have permission now?" it was just in the heat of the moment and it was the last thing Mr. Schachner said (that the police did not have permission to search) and the Grievant was just repeating it to him. The Grievant noted the video shows the armoire moving and said it was because Mr. Schachner put his legs or body towards it to kind of push against it.

When asked why he said "I'm going to have to say he was kicking," the Grievant said he was referring to Mr. Schachner being a confidential informant and knowing he has gotten out of arrests before with Officer Alban and knowing it is on camera and that he was going to report the use of force that there's the video. He said he couldn't just walk away from this-I have to say he was kicking. He said he was referring to the kick to Officer Roots.

The Grievant said during the entire incident in the house, Mr. Schachner never calmed down despite being told to do so, was always resisting, violent, and erratic. The Grievant said he perceived Mr. Schachner to be a threat to himself and to Officer Roots' safety.

On cross-examination, the Grievant said on prior interactions with Mr. Schachner he never put his hand under his chin or used force on him in any way. He said he did not witness Mr. Schachner move his handcuffs from his back to his front but was told by Officer Owoc that he had done so. He said Mr. Schachner did not stab him with the needle or make any threatening gestures with the needle, but the Grievant was exercising due caution because needles are dangerous.

CE 1.36 was played and the Grievant was asked questions at various points in the video and the Grievant gave his interpretation at those various points regarding Mr. Schachner's conduct toward the Grievant and Officer Roots.³ At time 10:27:58 the Grievant said Mr. Schachner did not physically attack him, or lunge, strike, reach for his weapon, or push against him. The Grievant said Mr. Schachner did brace himself. The Grievant said he did not strike Mr. Schachner during the gap between the two videos. He said Mr. Schachner was making movements like he wanted to move his hands to his front and he did see Mr. Schachner move his hands from his back laterally around the side of his body.

The Grievant said he observed Mr. Schachner make contact with his gun belt which he felt was a particularly threatening gesture, but Mr. Schachner never touched his gun. He said he saw Officer Roots get kicked and saw Officer Roots step away or lose his balance. He believed Mr. Schachner could still have kicked Officer Roots again. He said dealing with stressful, dangerous situations and keeping cool are important parts of his job as a police officer. The Grievant said Mr. Schachner was a danger to himself and to Officer Roots because he had just kicked a police officer and could potentially do anything and his mood tendency was going up and down. The Grievant referenced the totality of the circumstances. He also mentioned that Mr. Schachner's father was so scared of him he had to run out of the house naked. He referenced Mr. Schachner's

³ I will not detail the questions or the Grievant's responses to most of the questions asked during the playing of the video. Suffice it to say I have reviewed the video numerous times.

criminal/drug history, that he hadn't listened to anything they told him to do and he had just kicked a police officer and he was obviously under the influence of heroin and/or fentanyl.

The Grievant mentioned that he slapped Mr. Schachner the second time after the first slap was not effective because Mr. Schachner might spit on him or come towards him for whatever reason. He said it was not appropriate to yell at Mr. Schachner "how about now; how about now, do I have your permission now." That he was just repeating what Mr. Schachner had just said. The Grievant explained why he said "I'm going to have to say he was kicking" as because Mr. Schachner is a confidential informant, if he gets charged with what the Grievant wanted to charge him with, that Mr. Schachner will lose his status as a confidential informant working for the City so he would not be able to get paid to fund his habit. And because a use of force is on the video because he kicked an officer with all that being said, they could not just get rid of it with a minimal type of crime.

THE PARTIES' ARGUMENTS⁴

The City's Arguments

The City argues the Grievant was in no danger at the time he slapped Mr. Schachner. It states the video evidence, documents, and testimony reveal the Grievant was not dealing with a dangerous or resistant arrestee, and the Grievant let his emotions and frustration get the best of him. The City argues the Grievant's actions were not objectively reasonable under the facts and circumstances.

The City states while Officer Roots was straddled over Mr. Schachner, who was on the ground and began flailing and kicking his body, Officer Roots took a step back and the Grievant approached Mr. Schachner, lifted him off the floor and carried him into the bedroom. That the

⁴ This section is intended to only highlight the arguments contained in the parties' extensive Briefs. The omission of any arguments should not be construed to mean I have not carefully considered all arguments.

Grievant then spun Mr. Schachner around so that the two were facing each other and the Grievant then delivered two open palm strikes to Mr. Schachner's face. Mr. Schachner then slid to the floor and cowered in the corner of the bedroom against the wall and the Grievant repeatedly screamed "How about now? How about now? Do I have permission now?" The City states the record establishes Officer Ryan pointed out the camera to the Grievant who said "I'm gonna have to say that he was kicking" just after Mr. Schachner could be heard saying he was going to prosecute the Grievant and "I got you this time." The City argues the Grievant's draft narrative report falsely states the reason for the slaps was Mr. Schachner was tensing his upper body in an attempt to push off of the Grievant and bending his knees to strike the Grievant.

The City argues it has proven it had proper cause to terminate the Grievant's employment and the record establishes it met all of the criteria set out in *Enterprise Wire Co.*, 46 LA 363 (Daugherty, 1966). In that regard, the City states the rules and regulations in issue are reasonable and the Grievant, as a seasoned officer, was well aware, and had adequate notice, of them. The City states it conducted a fair and thorough investigation by interviewing all relevant witnesses and viewing the video footage. The City dismissed the Union's argument that the Florida Police Officer's Bill of Rights requires the investigation to have been completed within 180 days and that the exclusive remedy for a violation is injunctive relief. It also states the 180 day deadline does not apply when the complaint is generated internally, as here. It states no statement was taken from the Grievant because the Grievant's Union attorney objected and the Grievant could have offered information in his defense at the pre-determination meeting which he declined to do.

The City argues Chief O'Brien reviewed the video footage many times at various speeds and could not find any indication Mr. Schachner lunged at the Grievant or exhibited behavior that would have justified the Grievant striking him. That force must be justified the moment it is used

so that any threat at Officer Roots that had ended could not be the basis for use of force after Officer Roots was no longer in danger.

The City states the Grievant's conduct was unbecoming in violation of Chapter 1.20, which provides:

Any conduct or act has an adverse impact upon the operation of the Department, adversely affects the Member's ability to perform the required duties or brings discredit to the Department.

It argues the Grievant made "abhorrent" comments after striking Mr. Schachner and the "I'm gonna have to say he was kicking" comment jeopardizes the department's mission and the safety of the community.

In terms of equal treatment for similar offenses, the City argues the Grievant failed to present relevant comparator police officers who engaged in the same or similar conduct and were treated differently.

In terms of the discipline imposed, the City argues the charge of excessive force is supported by the evidence and that an arbitrator should not overturn a police department's choice of penalty unless it is not reasonably supported by the facts, referencing a number of arbitration awards. The City argues the Grievant's testimony should be given little weight in view of the many inconsistencies, including an inconsistency between his testimony and his draft report which does not mention Mr. Schachner attempting to touch his gun belt or seeing Mr. Schachner kick Officer Roots.

The Union's Arguments

The Union set out the factual basis of the case, noting the Grievant's law enforcement history and employment record with the City for his seven years of employment. It states he

consistently met or exceeded department standards and received commendations including a Meritorious Service Award in 2013.

The Union described the events at the Schachner home on August 6, 2019, with citations to the record. It states a call for service came in at approximately 10:30 pm as a domestic disturbance and a signal 20 mentally ill person. It was not the first time police had been called to this residence as Mr. Schachner was known as a heroin addict who had previous arrests for drug felonies and a reputation for always being under the influence of narcotics, being loud, obnoxious, and violent, especially during arrests. The Union states the entire time the officers were dealing with Mr. Schachner he was screaming, resisting, and demanding the officers put clothes on him. Because Mr. Schachner was a C.I., the Union states it was in his interest to avoid being arrested as this would jeopardize his C.I. status. Accordingly, while the officers were escorting Mr. Schachner away from the bathroom (where the drugs and paraphernalia were), he would move his body, arms and legs, would fidget his hands and refuse to leave the house without a pair of shorts and audibly raised and lowered his voice.

While on the floor in the hallway, Officer Roots had to repeatedly tell Mr. Schachner to relax, sit down, shut up, all of which Mr. Schachner refused. Rather, he escalated the situation by bringing his handcuffed hands from behind to the side of his body and at a point grabbed the Grievant's gun belt in the process at which time the Grievant said "that's how you get shot. Do you understand." When the Grievant was in the bathroom recovering evidence, the Union states Mr. Schachner became violently irate and screamed that the officers did not have permission to search. The Union states when the Grievant heard Mr. Schachner demanding to talk to Officer Alban (his C.I. contact), the Grievant took two steps out of the bathroom and saw Mr. Schachner

kick Officer Roots who, the Union states, was losing control over Mr. Schachner causing him to step back.

The Union states the Grievant tried to de-escalate the situation by taking Mr. Schachner under the armpits and lifting him off the ground and away from Officer Roots. While this was going on, Mr. Schachner continued to physically resist the Grievant by kicking his legs, flailing his upper body, dropping his body weight, and pushing the Grievant out of the hallway toward the bathroom. The Grievant then turned Mr. Schachner around and attempted to deliver a brachial stun which was ineffective because, according to the Union, Mr. Schachner heightened his erratic and combative behavior and moved his position slightly forward toward the Grievant. Because at this point the Grievant did not know what was going to happen, he put his left hand up to brace himself and delivered a second brachial stun with his right hand which was effective. The second blow caused Mr. Schachner to become disoriented and the Grievant guided him to the floor.

The Union states as this was happening and in the heat of the moment caused by stress, the Grievant yelled back at Mr. Schachner "How about now? Do I have your permission now." Officer Barclay, who was in the hallway and could not see into the bedroom said "Matt, Matt, Matt" to get the Grievant's attention and pointed his flashlight toward the camera. Officer Barclay said he called out to the Grievant to get his attention off of Mr. Schachner because there was no point in yelling at a violent heroin addict. The Union states Mr. Schachner's resistance continued and was great enough to shake the armoire as he pulled the officers into it. The Union states after Mr. Schachner was placed in a patrol car the Grievant made contact with Mr. Schacher's father, told him what occurred, and that he had to use force on his son, and if there was a video, he needed to review it for his report.

The Union notes the Grievant was charged with one count of misdemeanor battery, was tried, and found not guilty by a jury.

The Union argues the City's case fails virtually all of the seven tests of just cause as set out in the *Enterprise Wire* case, 46 L.A. 359 (Daugherty, 1966) which I paraphrase as (1) was the employee on notice of the probable consequences of misconduct; (2) is the rule or order reasonably related to the orderly and safe operation of the employer's business; (3) did the employer conduct a reasonable investigation prior to imposing discipline; (4) was the investigation conducted fairly and objectively; (5) was there substantial evidence of proof the employee was guilty as charged; (6) did the employer apply its rules fairly and without discrimination; and (7) was the penalty reasonably related to the seriousness of the offense and the employee's employment record.

The Union argues it is the City's burden to prove it is more probable that the Grievant abused his authority and used excessive force than under the totality of circumstances the force was reasonable to get a violent criminal and a quickly escalating scene under control. The Union argues the City's "conduct unbecoming" rule is vague and overbroad depriving an employee of forewarning of what conduct violates the rule thus depriving the employee of due process and that a person of common intelligence will be properly apprised of the conduct proscribed by the rule.

The Union argues the City's investigation was flawed, unreliable, and biased in that it was started by nothing more than Sgt. Sainvil's review of a short clip of the video evidence, his failure to talk to the only available fact witnesses on the scene; that Lt. Cohn failed to follow her own investigative strategy because she only gathered evidence that supported her theory and made no effort to gather evidence that might disprove it; that there are gaps between each of the video clips and the camera did not pan around the room so that only one point of view is shown; and no one asked the Grievant a single question.

The Union argues when viewed in light of the U. S. Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), analyzing the Grievant's conduct requires a balancing of the nature and quality of the intrusion on Mr. Schachner's Fourth Amendment interests against the government's countervailing interests. This includes an evaluation of the severity of the crime at issue; whether Mr. Schachner posed an immediate threat to the safety of the officers or others; and whether Mr. Schachner was actively resisting arrest or attempting to evade arrest by flight. The Union argues the two brachial stuns were reasonable in that Mr. Schachner had already committed felony and misdemeanor crimes before the Grievant ever touched him (assaulting his father and being in possession of heroin and a syringe). That the Grievant had well-founded reasons to believe the situation was dangerous and that Mr. Schachner would be high, violent, erratic, and unpredictable. That the brachial stuns were reasonable considering Mr. Schachner posed an immediate danger to himself and Officer Roots and was actively breaking Florida law by resisting arrest. The Union argues the Grievant used *de minimus* force to gain control of Mr. Schachner (citing several cases in which more serious injury was inflicted but was determined to be *de minimus* force).

DISCUSSION

This case presents the question whether the Grievant's conduct violated the City's rules and regulations set out above as those rules and regulations are viewed in light of applicable case law applied to the instant facts. The parties' Briefs make clear they agree, as do I, the controlling case on use force is *Graham v. Connor*, supra.⁵

The issue in *Graham* was the constitutional "standard that governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory

⁵ Both parties cited numerous other applicable cases supporting their arguments including *Enterprise Wire*.

stop, or other 'seizure' of his person." 490 U.S. at 388. Graham was injured during the course of an investigatory stop and the Court said such claims of excessive force are to be analyzed under the Fourth Amendment's reasonableness standard. *Id.*, at 395. Whether a seizure is reasonable under the Fourth Amendment "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.*, at 396. Proper application of the standard is based on a careful attention to the facts and circumstances of each particular case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether his is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396.

The right to arrest or make an investigator stop necessarily "carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* The determination of reasonableness in a particular case is judged from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight. *Id.* That is, whether the officer's actions are "objectively reasonable in the facts and circumstances confronting him without regard to his underlying intent or motivation." *Id.*, at 397. The determination of reasonableness must account for the fact that police officers "are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.*

The most consequential evidence in this record are the videos, particularly CEs 1.36 and 1.37. As I reviewed the videos, I saw a calm and collected Grievant at the beginning of the sequence, who at a point seemed to lose his temper or get frustrated with Mr. Schachner and slapped him twice with his open hand around the area of the side of his face or neck. The Grievant called these blows brachial stuns which he said are used to gain control of a subject. These strikes

came during a time Mr. Schachner was yelling/screaming/cursing that the police did not have a right to search his house. Given that a legal arrest was being or had been affected for possession of heroin (and perhaps assault on Mr. Schachner's father and/or Officer Roots), there was no dispute among the parties the police had a right to search the residence and did not need Mr. Schachner's consent. That part of the termination notice (CE11) which states the use of force was "an effort to reestablish consent to search" seems clearly erroneous since the Grievant, an experienced law enforcement officer, surely knew he had a right to search the residence without Mr. Schachner's consent.

The City's use of force rules and regulations appear to have been drawn with *Graham* in mind and, therefore, an analysis of *Graham* as applied to these facts is applicable to the City's rules and regulations under which the Grievant was charged. In accordance with *Graham*, a balancing "of the nature and quality of the intrusion on [Mr. Schachner's] Fourth Amendment interests against the countervailing governmental interests" must be applied to the instant facts and circumstances. Some of those interests are the severity of the crime(s), whether Mr. Schachner posed an immediate threat to the safety of the officers or others, whether Mr. Schachner was actively resisting arrest, or attempting to evade arrest by flight.

Mr. Schachner is heard making incomprehensible sounds and noises, yelling and screaming. CE1.35. He is seen completely naked in the bathroom making incomprehensible noises, screaming, and yelling. He appears to be high on some drug(s). CE1.36 at 10:25:50 to 10:29:56.⁶ The Grievant first appears at approximately 10:27:34 in CE1.36. Mr. Schachner is led out of the bedroom area by the Grievant to the hallway (off camera) and is arrested at approximately 10:27:59. He continuously asks in a loud voice for shorts to put on and for Officer

⁶ These are the times of the day (all are pm) shown on the videos.

Alban for whom he is a C.I. The Grievant is seen going back into the bedroom looking for shorts for Mr. Schachner at approximately 10:28:24.

The Grievant is heard saying to Mr. Schachner “that’s how you get shot” at approximately 10:31:14 of CE1.37. The Grievant testified he said this when Mr. Schachner reached for or touched his gun belt. At 10:31:22 the Grievant is seen going into the bathroom to collect evidence. During this time, Mr. Schachner cannot be seen but is heard repeatedly yelling that there is no permission to search the house. The Grievant starts to come out of the bathroom and go toward where Mr. Schachner and Officer Roots are in the hallway at approximately at 10:31:44. The Grievant is next seen back in camera view starting to come back into the bedroom area dragging/pulling Mr. Schachner at approximately 10:31:49. The first slap is seen at approximately 10:31:50 and the second slap at approximately 10:31:52. The glow of a flashlight at the camera is seen at 10:32:04 and at 10:33:22 the Grievant is heard saying “I’m going to have to say he was kicking.” During the interim between the glow of the flashlight and the Grievant’s remark, he was back and forth several times between the bedroom/bathroom and hallway. The time between the glow of the flashlight and the Grievant’s kicking comment is one minute and 18 seconds.

As I attempt to balance the nature and quality of the use of force against the countervailing government’s interests, I find there are factors that both support and count against the Grievant’s use of force. The factors that to me indicate an unreasonable use of force in these circumstances include:

- (1) Mr. Schachner was not presenting an immediate danger to the Grievant, Officer Roots, Officer Daly, or Mr. Schachner’s father. While Mr. Schachner was being loud and incomprehensible during most of the encounter in the house, he was handcuffed in the back almost from the very beginning and there is no indication he had access to any weapon

during this period. Although Mr. Schachner reached for or touched the Grievant's gun belt less than one minute before the first slap, that danger, if there was any real danger, was over once the Grievant and Mr. Schachner were face to face and Mr. Schachner was still cuffed to his back and being controlled by the Grievant.

- (2) The severity of the crimes (possession of heroin and resisting orders) in terms of how it might relate to danger to the officers on the scene was minor.
- (3) Although Mr. Schachner was resisting the Officers' commands to shut up and be still, his resistance was minor and more annoying than dangerous.
- (4) Mr. Schachner was not attempting to flee.

The factors that indicate reasonable use of force include:

- (1) The call that came in from Mr. Schachner's father was that he was high on drugs and might kill him and that he was mentally ill.
- (2) Officer Roots described Mr. Schachner at one point as throwing a tantrum.
- (3) The officers testified that domestic disturbance calls, as this one, can be very dangerous to the responding officers and others.
- (4) The Grievant's perception was that Officer Roots did not have control of Mr. Schachner while the two of them were in the hallway just before the Grievant went to remove Mr. Schachner from that area.
- (5) Mr. Schachner has a criminal drug history per the Grievant's testimony and CE1.29
- (6) The officers testified Mr. Schachner was not obeying their commands.

These countervailing factors present a very close call. There are factors on both sides of the excessive/appropriate use of force scale keeping in mind the issue is viewed from the perspective of a reasonable police officer in these circumstances. It is not easy for a non-law enforcement

person to make this judgment, but that is the system and I am in the same position as grand and trial jurors, judges, and arbitrators called upon to determine if excessive force has been used by police officers in various circumstances. In this context, I find the scale balances slightly in favor of finding minimal excessive use of force. Had Mr. Schachner not been cuffed to his back at all times during the meaningful times of the encounter, given his mental state, I would have no difficulty finding the Grievant's conduct perfectly acceptable.

I appreciate the split-second nature of decision making required to be made by police officers but find split-second decision making not a critical element during this encounter. The officers had been in the residence for approximately four minutes and 16 seconds by the time the first slap was administered. For virtually all of this time, Mr. Schachner was handcuffed to his back and except for perhaps some kicking at Officer Roots who stepped back and away from Mr. Schachner, it cannot reasonably be said Mr. Schachner was a danger to the officers though he was resisting their orders to shut up and be still.

I recognize and acknowledge the Grievant's previous experiences with Mr. Schachner and his history of domestic violence likely put the Grievant on his guard. However, considering the totality of the circumstances, I find a reasonable officer in these circumstances would not reasonably perceive himself or others to be in danger or need use of force to maintain control or effect an arrest or prevent flight. The City's Rule 1.109 refers to "physical resistance" as justifying use of force and I do not see physical resistance on Mr. Schachner's part such as to justify use of force. Officer Roots testified he never felt the need to use force on Mr. Schachner and felt Mr. Schachner was not an immediate threat. While the *Graham* Court stated the right to make an arrest may require some degree of physical coercion or the threat thereof to affect the arrest, the two

slaps exceeded what I believe to be a reasonable amount of “physical coercion” in these circumstances.

On the issue of “conduct unbecoming” I agree with the Union the rule is so vague as to not provide adequate notice to officers as to what conduct is acceptable and what is not. I also view the conduct unbecoming charge as derivative of the excessive use of force charge and does not support a separate basis for discipline in these circumstances.

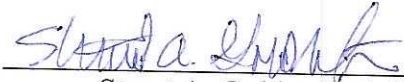
For the reasons set out above, I find the City proved the Grievant used minimal excessive force on Mr. Schachner, but the excessive force was at a very low level and does not justify termination. I am further persuaded in my finding by the facts the Grievant has no prior sustained excessive use of force charges and his performance evaluations (UE3) are uniformly good. He never received a performance evaluation that was other than acceptable (the only “overall performance” categories being “acceptable” and “unacceptable”) and his supervisors’ comments are uniformly complementary and paint a picture of a good police officer who meets the standards set out by the Department. Therefore, it is unreasonable to conclude the Grievant is beyond rehabilitation as the City’s choice of penalty suggests. Further, the City presented no evidence of similar punishment for similar offenses.

Accordingly, I make the following

AWARD

The Grievance is GRANTED in part and DENIED in part. The termination of the Grievant’s employment is hereby overturned and, instead, the Grievant shall be on suspension retroactively from the date of his termination for a continuous period of sixty (60) days. Upon conclusion of the sixty (60) day suspension, the Grievant shall be made whole in all respects. All income received from all sources shall be deducted from back pay. I shall retain jurisdiction in the event

the parties are unable to agree on back pay. The Grievant shall be offered immediate reinstatement to his former position.



Stuart A. Goldstein, Arbitrator

Dated: February 14, 2024.