

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL

and

TEAMSTERS LOCAL 320

DECISION AND AWARD OF ARBITRATOR

BMS Case # 14-PA-1085

JEFFREY W. JACOBS

ARBITRATOR

May 26, 2015

IN RE ARBITRATION BETWEEN:

Met Council,

and

IBT #320

DECISION AND AWARD OF ARBITRATOR
BMS CASE #14-PA-1085
Bret Fraser Grievance

APPEARANCES:

FOR THE EMPLOYER:

Susan Hansen, Attorney for the Employer
Lt. Troy Schmitz, Met. Council PD, IAD
Joshua Lego, St. Paul Commander
John Harrington, Chief of Police
Brian Lamb, General Manager

FOR THE UNION:

Joseph Kelly, Attorney for the Union
Bret Fraser, grievant
Dave Hutchinson, Metro Transit Police Officer
Steve Anderson, State Fair Police Dep't
Steven Fraser, St. Paul PD

PRELIMINARY STATEMENT

Hearings in the above matter were held on February 2, 3 and 4, and March 6, 2015 at the BMS Offices in St. Paul, MN. The parties presented oral and documentary evidence and the record was closed on February 4, 2015. The parties submitted post-hearing briefs on April 24, 2015.

CONTRACTUAL JURISDICTION

The parties' collective bargaining agreement provides for binding arbitration at Article 13. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural or substantive arbitrability issues and the matter was properly before the arbitrator.

ISSUE PRESENTED

Was there just cause for the 80 hour suspension of the grievant? If not what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The employer took the position that there was just cause for the issuance of an 80 hour suspension for the grievant's actions on the night of October 31, 2013. In support of this position, the employer made the following contentions:

1. The employer noted that most of the operative facts were undisputed and were captured on a video on a LRT platform right where the incident of October 31, 2013 took place. The Employer further acknowledged that this occurred on Halloween and that there was a pub crawl event, which entailed drinking and partying and the occasional disruptive behavior by bar patrons and members of the general public. Accordingly, there was an increased police presence in the area of downtown Minneapolis where this occurred.

2. The employer further acknowledged that at one point at or near bar closing time several Minneapolis and Metro Transit police officers spotted a customer, later identified as Mr. Ciacura, about to engage in a fight with a bar bouncer whom they knew worked at a bar called Sneaky Pete's. They immediately stepped in to prevent a physical altercation between the two men.

3. The grievant stepped in and yelled loudly, "police, stop" and informed Mr. Ciacura that he was under arrest. He placed his hand on the top of Mr. Ciacura's head and placed him under control.

4. The employer noted that officers attempted to place handcuffs on him but that Mr. Ciacura then attempted to flee. At that point several officers tackled him and restrained him so that handcuffs could be placed. They had to double the handcuffs due to Mr. Ciacura's size but eventually he was placed in handcuffs, restrained physically and brought to his feet in order to be transported to a police vehicle for transport to jail.

5. The employer noted that Mr. Ciacura was under control at that point and there was no immediate threat. He was handcuffed and being restrained by two officers; the grievant on one side and another officer on the other. The employer further acknowledged that at this point Mr. Ciacura spit in the grievant's face, which the employer admitted was a felony offense under Minnesota law.

6. The employer asserted however that the grievant's response to that was both unreasonable and excessive and that his training should have taught him that. The grievant immediately struck Mr. Ciacura in the left jaw with a closed fist with considerable force. The force was so great that Mr. Ciacura, who is a large man, can be seen leaving his feet, falling out of the restraint of the other officer who had him by the left arm and crashing to the concrete platform. Since his hands were restrained he could not break his fall or catch himself and he struck his head on the platform. All this is captured on a police video that was on the LRT platform and shows in vivid detail exactly what happened.

7. The employer asserted that this emotional response was exactly what a trained police officer should not do and that the grievant, while clearly offended by the spitting incident should have known that there were other less violent steps that could have been taken to both protect himself, Mr. Ciacura and members of the public.

8. The employer countered the claim by the union that the grievant's training somehow justified this level of force. It asserted that officers are not trained to use the maximum level of force initially but rather the least amount reasonable under the circumstances. The employer further asserted that this is not the sort of "20-20 hindsight" prohibited by *Graham v Connor*.

9. The employer retained a police expert who typically testifies on behalf of officers and renders opinions that force was reasonable. The expert however indicated clearly that the use of force was excessive, unreasonable and could well have resulted in serious injury to Mr. Ciacura, despite the spitting incident.

10. The employer asserted that initially the incident was viewed as being so excessive and so violative of the use of force policy that a 240-hour suspension was recommended. That was later reduced to an 80 hour suspension due to the grievant's good work record and the leniency of the department. The employer asserted however that further reduction by the arbitrator is unwarranted because the penalty has already been reduced considerably.

11. The employer also noted that the incident was on the grievants last day of work as he had already resigned his employment with the Metro Transit Police Department. He had been hired by Minneapolis but when they viewed the video they were so unnerved by it that the offer of employment was rescinded. Despite the fact that the grievant had resigned from the employer, they still allowed him to rescind his resignation and they rehired him with full seniority. This too shows the employer's leniency and good faith in this matter.

12. The employer cited its policy as follows:

300.3 USE OF FORCE

Officers shall use only that amount of force that reasonably appears necessary given the facts and circumstances perceived by the officer at the time of the event to accomplish a legitimate law enforcement purpose.

The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

13. The employer asserted that the grievant was well aware of this rule and of the need to react within reason when using force. The employer argued that the grievant reacted to Mr. Ciacura's action out of anger and emotion, which no trained police officer should ever do. The employer relied upon the video and argued that it shows an immediate closed fist punch to the force of a handcuffed and restrained suspect. The employer further argued that Mr. Ciacura posed no threat even after the spit; there was no weapon or any evidence that he tried to grab a weapon or to get away. The employer argued strenuously that the reaction to this was completely unreasonable and in violation of the policy.

14. The employer also countered the union's claim that the grievant's actions were justified under the *Graham v Connor* standard. The employer asserted that this was no 20-20- hindsight review of the grievant's actions nor was it an attempt to second guess what he did or why, the employer argued that the video shows amply clearly what happened. The employer asserted that even under the *Graham* standard an officer is allowed only to use the amount of force reasonably necessary under the circumstances. Further, even under *Graham*, an employer's policy may be more restrictive than the Court's standard for use in the civil cases under the *Graham* standard.

15. The employer then cited another policy as follows:

300.3.2 FACTORS USED TO DETERMINE THE REASONABLENESS OF FORCE

When determining whether to apply force and evaluating whether an officer has used reasonable force, a number of factors should be taken into consideration, as time and circumstances permit. These factors include, but are not limited to:

- (a) Immediacy and severity of the threat to officers or others.
- (b) The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
- (c) Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects).
- (d) The effects of drugs or alcohol.
- (e) Subject's mental state or capacity.
- (f) Proximity of weapons or dangerous improvised devices.
- (g) The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.
- (h) The availability of other options and their possible effectiveness.
- (i) Seriousness of the suspected offense or reason for contact with the individual.
- (j) Training and experience of the officer.
- (k) Potential for injury to officers, suspects and others.
- (l) Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the officer.
- (m) The risk and reasonably foreseeable consequences of escape.
- (n) The apparent need for immediate control of the subject or a prompt resolution of the situation.
- (o) Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
- (p) Prior contacts with the subject or awareness of any propensity for violence.
- (q) Any other exigent circumstances.

16. The employer spent a large amount of time at the hearing going through each of these factors and asserted that when examined, these factors when applied to this situation at that time did not under any circumstances justify the closed fist strike that was administered here.

17. The employer further noted that the County Attorney declined to prosecute Mr. Ciacura for any of the charges, include the one that involved spitting in the grievant's face, even though that is classified as a felony under State law. The employer posited that this was a correct judgement on the prosecutor's part and "served the interests of justice." This was arguably a situation where a person was arrested for resisting arrest when there was little if any reason to arrest him in the first place. Even though Mr. Ciacura was initially threatening a fight, he never engaged in any physical fight and the officers should have de-escalated this situation. Instead, this escalated far too much far too fast and the prosecutor's judgment was sound here. The employer implied at several points that it is possible that legal action is not done in this case and that it is lucky that the video has not been made public by anyone at this juncture.

18. The employer noted too that even one of the union's expert witnesses acknowledged that the video "looked awful," or words to that effect. He further echoed the other witnesses' testimony that the grievant could have used a wrist compression pain compliance escort hold from the rear while lifting Mr. Ciacura's arms so as to prevent Mr. Ciacura from coming face to face with him and to direct his face downward.

19. The union's expert also identified a hobble carry as a potential option for the grievant as well as side or rear leg sweep could have been utilized to bring Mr. Ciacura to the ground in a controlled manner. The fact that Mr. Ciacura was bleeding slightly due to the fight on the ground should have resulted in an escort that was not face-to-face. Yet the grievant allowed this to occur which means that the grievant had no perception that Mr. Ciacura posed any great threat.

20. The employer also countered the union's claim that the grievant is an experienced trainer and trains other officers from this force as well as from other police departments in the use of force and argued that his training does not supersede or nullify the employer's policy. Irrespective of what he teaches, the employer asserted that its policy requires compliance while he is wearing the uniform of a Metro Transit Police Officer and that in this instance he went well beyond what was reasonable and necessary to restrain Mr. Ciacura and prevent him from spitting or injuring anyone.

21. Moreover, simply training someone on the use of a weapon or other technique does not equate to training on *when* and under what circumstances to use it. This case is about *when* to use force, not *how*. The employer's policy is clear and the training given to its officer, according to the employer trains on the reasonable use of force – which means use the least amount of force necessary to restrain and control. The employer asserted most strenuously that the grievant failed to follow that in this particular instance.

22. The employer also countered the union's claim that even a handcuffed suspect can be dangerous. The employer noted that while there have been instances where even handcuffed suspects have been able to injure and even kill officers, this situation did not rise to anything close to that level. Mr. Ciacura made no efforts to grab a weapon or get physically aggressive with the officers once the initial fight was over and he was handcuffed. While state law classifies the spitting was a felony and a physical assault, it would be inconsistent with the facts as they appear on the video to assume that Mr. Ciacura was going to be any more aggressive or take any other physical action.

23. Moreover, the grievant should not have assumed that Mr. Ciacura was going to do something else but rather should have taken far less aggressive actions to stop him – like a spit hood or simply a leg sweep to take Mr. Ciacura more gently to the ground. The employer's expert testified about several other such options that should have been tried. He opined that a closed fist strike to the face was near the very top of the types of force that could be used and that something far less was called for here.

24. The employer further asserted that it conducted a thorough investigation of the incident and viewed the video and compared it to the policies set forth above. Based on this investigation the employer concluded that the grievant's use of force was under these circumstances excessive and violated the policy. As noted above, the initial reaction was to impose a 240 hour suspension but after due consideration, it was determined to reduce that to 80 hours

25. The employer cited state law and acknowledged that spitting at a law enforcement officer is a felony but asserted that both the employer's expert as well as the union's admitted that while Mr. Ciacura need to be restrained, doing it in this way was unreasonable. The union expert even acknowledged that he would not have taught this response even though he too is a use of force instructor. The employer noted that the first union expert did not fully support the union's case and implied that this was why they needed a second expert.

26. The employer assailed the union's second expert and noted that there were glaring errors in his statement and opinion. He stated that the grievant controlled the rate of descent to the ground and that based on this in part; he opined that the use of force was reasonable. The video tells a very different story and shows that the grievant did not control the rate of descent at all and that he hit Mr. Ciacura so hard he was launched out of Officer Jensen's grasp and hit his head on the concrete without anyone being able to stop his descent.¹

27. Finally, the employer cited several other arbitration decisions in support of the claim that the imposition of the suspension in this case was reasonable. In *Sheriff of Broward County and Broward County Police Benevolent Association*, 98 LA 219 (1991 Frost); *City of El Paso and El Paso Municipal Police Officers Association*, 95 LA 201 (1990 Cohen) and *City of Huber Heights and Fraternal Order of Police*, 102 LA 1060 (1994 Bittel). In each the arbitrators upheld the imposition of a suspension where an officer was found to have struck a suspect in handcuffs.

¹ Officer Jensen was the other officer involved and had Mr. Ciacura by the left arm. He was not called to testify in this proceeding.

28. The employer also asserted that there was no disparate treatment in this case and further argued that the suspension meted out to another officer was based on different facts and different considerations. Thus, while that officer was given a 40-hour suspension, this situation was worse given the totality of circumstances.

29. The essence of the employer's argument is that the grievant's actions were excessive, unreasonable and in clear violation of policy. The suspension imposed was both reasonable and somewhat lenient given that it was reduced internally from 240 hours to 80 hours.

The employer seeks an award denying the grievance in its entirety.

UNION'S POSITION

The union took the position that the grievant's actions were warranted given the events of October 31, 2013 and that no discipline should have been issued at all. In support of this position the union made the following contentions:

1. The union asserted that the grievant is a long-term highly regarded officer with the Transit Police. He has been promoted and is highly trained in the use of force. He not only has received a large amount of such training but has also trained other officers in the use of force and how to properly and safely restrain a combative subject. He actually created the department's hand-to-hand combat training manual and is very experienced and competent in the use of force.

2. The training manuals he created, see union exhibit 14 and employer exhibit 4, have been approved by the department and are used now to train other officers in the use of force and restraint techniques.

3. The union also noted that he and other officers saw Mr. Ciacura in a bladed stance, i.e. getting ready to fight, with a bouncer from Sneaky Pete's bar at or around bar closing time during the so-called Zombie Pub Crawl on Halloween night 2013. Officers immediately stepped in to prevent the fight from happening.

4. The union noted that the grievant placed his hand on Mr. Ciacura's head and restrained him while another officer attempted to place handcuffs on him. The grievant announced that Mr. Ciacura was under arrest and to stop resisting. Mr. Ciacura, instead of submitting to police authority attempted to flee whereupon he was taken down by several officers and restrained.

5. The union further noted that one officer wanted to Taze Mr. Ciacura but that the grievant held that officer back from doing so, saying that they had him under control and that further force was unnecessary. The union noted to that eventually they got Mr. Ciacura under control; but that during the fight on the ground when several officers laid on top of him striking him with closed fists he sustained a cut to his mouth.

6. After he was helped to his feet Mr. Ciacura spat in the grievant's face spewing blood, saliva and mucus directly into the grievant face, eye and mouth. The union cited state law and noted that this is not only a felony but also a physical assault under Minnesota law. See, Minn. Stat. §624.712, Subd. 5 defining such acts as Felony 4th Degree Assault and a crime of violence.

7. The grievant, relied on his training, realizing that what had just happened was a felony assault under Minnesota law and realizing that Mr. Ciacura was now a potentially dangerous subject whose action could put him and other officers in danger, instantaneously reacted to prevent Mr. Ciacura from undertaking any similar actions. He then hit Mr. Ciacura once in the jaw and then attempted to slow his descent to the ground.

8. The union countered the employer's claim that this was a reckless and emotional action by the grievant and asserted that he immediately attempted to help Mr. Ciacura once he was on the ground by administering to him and rendering aid. This was not a situation where he began pummeling Mr. Ciacura again out of rage or disregard for his safety.

9. A spit hood was placed on Mr. Ciacura's head to prevent further injury and he was escorted to a waiting police vehicle for transport to jail and to get medical aid if needed. The union characterized this entire scenario as one of a highly combative suspect who had already fought with officers once, who was a very strong individual capable of resisting with considerable force and who had just spit in the face of a uniformed officer after being handcuffed. He had already injured two of the officers struggling with him on the ground – one of which suffered from a head injury lasting months. He was also quite capable of spitting in people's faces, which could lead to the transmission of a communicable disease, even death.

10. Clearly, according to the union, the grievant's actions were both justified and reasonable to make sure Mr. Ciacura did not undertake any further acts of violence or to do something even more sinister like try to reach for someone's weapon. The union and its experts asserted that Mr. Ciacura need to be taken down and taken down immediately and had to prevent any further outrageous acts.

11. The union asserted that an officer faced with a split second decision does not have the luxury of assuming anything other than the worst. Here the grievant knew that Mr. Ciacura was more than willing and able to physically assault police officers and had just spit in his face. The grievant was not expected to sit around wondering what was next. He had to act and act quickly to prevent further assaults. The closed fist strike to the face was the best and most effective alternative to prevent further injury.

12. The union then went through the factors used by the employer in policy 300.3.2. The union argued that there was an immediate threat to the grievant, having had Mr. Ciacura spit in his face. There was also a very real chance that Mr. Ciacura might have taken other more violent acts. The union cited *Eugene Police Employees Association and Eugene Police Department*, (Axon 2009) as an example of that very thing. There the officer was faced with an immediate threat and his actions were justified even though the suspect was in handcuffs.

13. Further there was overwhelming evidence that Mr. Ciacura was combative, very strong and very large and very dangerous. When viewed from the perspective of a reasonable officer at the time, it was apparent that the actions were justified and that #2 of the factors was met in this case.

14. Likewise, even though the grievant is a large person as well, Mr. Ciacura's size and physical abilities were factors that were and should have been taken into account here. He was able to physically injure at least two officers and the union asserted that if there had been fewer officers there he might well have been able to physically overpower them and argued that this too mitigates in favor of the use of physical force.

15. While there was no evidence of drugs or alcohol use the union noted that this was a bar at bar closing time of the Zombie Pub crawl. It was thus entirely likely that the suspect was under the influence of drugs or alcohol, which can lower inhibitions and make an already combative person even more so. This too went into the calculation of the person's mental state at the time. There was little question that Mr. Ciacura as both ready willing and able to engage in a physical altercation. He was about to engage in a fight with the bouncer and it took very little to engage him in a fight with 5 officers. These facts should also be viewed as favorable to the officer.

16. While there were no guns or knives available, the union asserted that Mr. Ciacura was able to improvise one – his spit to induce injury. This was both disgusting and dangerous, as it is well known that these bodily fluids carry various dangerous pathogens that can cause sickness or death.

17. The union also noted that even though Mr. Ciacura was in handcuffs, that does not mean he was immobile. The union also cited cases where handcuffed suspects have been able to wrestle weapons away from officers and injure or even kill them. Thus the mere fact that he was in handcuffs did not render him any less dangerous – in fact he used a dangerous weapon against the grievant as noted above. He could also have used other means of assault – i.e. legs or head butts for example.

18. The union cited *Graham v Connor* as well as the standard of weighing what other options exist and argued that the employer is engaging in exactly the sort of 20-20 hindsight that is expressly forbidden by *Graham*. The union also noted that the *Graham* standard is expressly incorporated into the employer's policy. More, to the point, the union argued that hindsight is always perfect but no one should second guess an officer in this type of situation, especially when faced with a dangerous person doing a dangerous thing in a dangerous place. Moreover, strikes to Mr. Ciacura had proven ineffective just moments before. He had laughed at one officer's attempts to subdue him by strikes and it was obvious that a slap or a hit with the palm of a hand might well have met with similar disdain by Mr. Ciacura. The union and its experts again asserted that a large amount of force was necessary to subdue this gentleman immediately and effectively. Thus, the closed fist strike was necessary and reasonable.

19. The union also spoke to the seriousness of the crime. While the initial charge would likely have been for misdemeanor assault or gross misdemeanor fleeing under State law, the spit was a felony and a physical assault under law as well. That was a very serious charge and one that justified the amount of force used here.

20. The training factor strongly supports the grievant's case here according to the union. For many of the reasons cited above, the grievant's training and the employer's knowledge of the training he both gets and has taught, shows that the employer tacitly acknowledged and approved this very use of force – because this is exactly the training the grievant has been getting and giving with the employer's full knowledge.

21. There was a grave danger of injury to other officers. Mr. Ciacura had already assaulted several officers and after the spit it was obvious that the handcuffs had not been successful to fully restrain him. Further, there was clearly a risk of injury to the other officers and it was imperative that to reduce this risk the grievant had to immobilize Mr. Ciacura immediately and effectively. These factors too were favorable to the grievant.

22. The union also asserted that because Mr. Ciacura was willing to initiate a felony assault there was a need for immediate control of him and that there was further an ongoing threat as Mr. Ciacura could easily have continued to spit blood and mucous unless immediate steps were taken to immobilize him and take him to the ground. That coupled with the fact that it was obvious from previous contact with him, that Mr. Ciacura was a dangerous individual with a propensity for violence and assaultive behavior.

23. The union assailed the credibility of the employer's expert and asserted further that his statement regarding not being able to assume that someone has AIDS or other infectious disease lacks credibility. In fact, it is the exact opposite – one cannot assume that a person does NOT have AIDS or other infectious disease and must also assume that a person might have such a disease and react accordingly. He also almost incredibly, asserted that spitting is not a crime of violence even though it is specifically classified as such under state law and can easily carry a deadly disease with it. Even after being shown the applicable state statute he then astonishingly asserted that it is only a crime of violence upon an actual conviction. This is neither the law nor consistent with law enforcement training of any kind. Thus his opinions must be rejected as without foundation and no credibility.

24. The employer's expert also opined that the closed fist strike might have been acceptable if Mr. Ciacura had kicked or head butted the grievant. Oddly, though those might have been gross misdemeanors as opposed to the felony spit, which did occur. The union asserted that this answer was inexplicable and inconsistent with State law.

25. Mr. Lego also opined that Mr. Ciacura's spit might have been inadvertent and that he simply sprayed some blood and saliva from the mere act of talking. The union noted that this, which was an apparent basis for the expert opinion, was completely contrary to all of the testimony and the evidence in the case that showed that the spit was intentional and directed specifically at the grievant.

26. Mr. Lego also indicated that a palm strike might have been more acceptable yet he also acknowledged that this too can be a deadly form of force. The union pointed out what it claimed were numerous inconsistencies internally and with the established facts of the case. For example, Mr. Lego opined that there was no evidence that Mr. Ciacura “reared back” before spitting but the union noted that this did not refute the allegations that he spit in the grievant’s face – only that he was nefarious about it.

27. The final union argument is that even if this was a violation of department policy, this grievant is being treated disparately. The union pointed to other similar cases where less than an 80-hour suspension was imposed. Two other officers were charged with striking a handcuffed suspect but who were given only a 40-hour suspension even though the suspect was not resisting, had committed no felony assault and was kicked inside a car. Here the suspect had fought with and spit at officers. The union asserted that the prior instances were at least as violent and serious yet the suspension was half of what was meted out here.

28. The essence of the union’s case is that the use of force was justified and reasonable here as the suspect committed a felony and had already been violent once with every reason to believe he would be again if given the chance. The union presented evidence that the use of force was reasonable and was justified. Even if there is a finding of a violation of policy, the discipline here was simply too great and constituted disparate treatment of this officer.

The union seeks an award overturning the suspension and making the grievant whole.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

The operative facts of this case were generally undisputed and were shown on a video that was reviewed multiple times during the course of this 4-day hearing. The record in this matter was extensive and covered several days of testimony about what the video showed – even though the video and the incident itself lasted only a very short time

The grievant is a police officer and has been with the department for several years. He has a clean disciplinary record and was promoted in 2010 to a training officer. He is by all accounts a very good officer. He has conducted training on the use of force for years and is well regarded in that area. In addition, the department has reviewed and approved his training regimen and exercise and knows well what the grievant teaches and how he conducts his classes. The grievant's prior record is thus devoid of any work related problems or issues. The record also showed that the grievant had as of October 31, 2013, resigned from the Metro Transit Police Department and was scheduled to start working for the Minneapolis Police Department shortly thereafter. October 31, 2013 was planned to be the grievant's last night working for this employer.

That night was the Zombie Pub crawl where on Halloween night people dress up in costumes and patronize local drinking establishments. There was some conflicting testimony about how unruly the crowd can get but there was clear evidence that alcohol is a big part of the event and that people can and do sometimes over imbibe and can get disruptive.

The evidence showed that around bar closing time, i.e. 1:40 a.m., the grievant was working in that area of the pub crawl and that he and several fellow officers as well as some from Minneapolis witnessed a large man, later identified as Mr. Ciacura, in a bladed, i.e. fighting, stance squaring off with a bouncer from Sneaky Pete's. The video showed and officers confirmed that the two were about to engage in a fight and officers knew they had to step in and break it up to prevent an altercation.

The grievant moved in and placed his hands on Mr. Ciacura's head while others got in between him and the bouncer. There was no attempt at that point by Mr. Ciacura to resist and no evidence he had a weapon nor was there any attempt at that moment to flee the officers. The bouncer is seen moving away back into the crowd that was gathered outside the bar. The scene takes place very near a LRT train platform in downtown Minneapolis and in fact on the tracks themselves.²

² The record shed that the LRT trains do not run to that area due to the large crowds and to avoid the likelihood of striking someone who might be wandering around those tracks. Given what occurred in this instance that was a very good idea to prevent serious injury or death to a pedestrian.

Mr. Ciacura was not seen to have a weapon of any kind nor was there any evidence that he had one. Neither was there any evidence that he resisted initially. Once the grievant placed his hands on Mr. Ciacura's head he seemed to calm down. The fact that he was then surrounded by 4 to 6 uniformed police officers at that point may well have had something to do with that as well.

At this point Mr. Ciacura undertook no actions to fight with or threaten the officers. There was also no evidence on the video that a fight had actually occurred nor was there any indication that the bouncer reported that a crime of any sort had been committed by Mr. Ciacura while he was in the bar. There was no evidence on this record at that point to arrest him but for whatever reason, the grievant decided to place handcuffs on Mr. Ciacura.³ At that point Mr. Ciacura did resist and attempted to flee whereupon he was taken to the ground by all the officers who began beating him with closed fists around his head and neck and whole body.

It was clear that Mr. Ciacura was quite strong and there was evidence that either in an attempt to protect himself from the beating he was taking at the hands of 4 to 6 officers or because he was attempting to harm them, he injured two of the officers involved. Mr. Ciacura also sustained a cut to his mouth and lip, as will be discussed later and had blood in his mouth because of it.

The video was reviewed several times and showed that eventually officers were able to get handcuffs on Mr. Ciacura but due to his large size had to place two sets on his hands. This would have given him a somewhat freer range of motion than if they had placed just one set on him but it was apparent for the record that placing anything on his wrists was a challenge so officers opted to get him the set of two cuffs and stand him up.

³ It was a bit curious that even the union cited the various statutes Mr. Ciacura allegedly violated but all were for resisting arrest. The union cited these statutory sections that Mr. Ciacura allegedly violated: Misdemeanor obstructing legal process (Minn. Stat. §609.50 Subd. 1(2)), Misdemeanor fleeing police by means other than a motor vehicle (Minn. Stat. §609.487, Subd. 6), Gross Misdemeanor Obstructing Legal Process with Force (Minn. Stat. §609.50 Subd. 2(2)), and Felony 4th Degree Assault (Minn. Stat. §609.2231 Subd. 1). These were all based on action he took after these officers attempted to handcuff him. There was no citation to any violations he may have committed before these officers tried to handcuff him. Why there was not a greater effort by all the officers to simply calm him down and de-escalate this situation was not presented on this record.

After Mr. Ciacura was brought to his feet he is again seen to be relatively calm. There is no audio on the video viewed at the hearing but it was apparent that the crowd was loud and somewhat unruly, although no one throws anything at the officers as the union alleged in its opening statement.

At one point a person is seen videoing this event and one of the officers, not the grievant, is seen shoving him away even though that person is not seen getting in the way or obstructing the officers' actions in any way. There was no evidence that this officer was disciplined for his actions on this record.

The crowd was not the unruly mob that the union portrayed it. Several people are seen on the LRT platform talking while this melee was unfolding but they do not seem disturbed or nervous about it even though five officers are arresting a man while striking him repeatedly mere feet from where they are standing. The crowd was not, contrary to the union's claim, threatening the officers in any way. Except for the one person who is seen recording the event on his cell phone, none seemed too upset or concerned by it either.

Once Mr. Ciacura is brought to his feet, the grievant had him by the right arm and another officer, Officer Jensen, has him by the left. He is then seen being escorted to a police vehicle that was already on the way to the scene. The three men walk a few feet toward the LRT platform and are about to step up onto it to cross the platform. There was no evidence that Mr. Ciacura was combative or any indication that he might try to flee, grab a weapon or strike the officers at that point.

Whether the event was "over" at that point is debatable given the short time and the fact that the three had gone only a few feet from where the fight on the ground had just occurred. It may have been over for some but not for others. On this record that was not determinable.

At that point Mr. Ciacura is seen turning his head toward the grievant. There is no spitting visible on the video due to the distance between the men in the video and the camera and video quality but the evidence shows that something left Mr. Ciacura's mouth. While it may not have been done by some exaggerated movement of the head it was clear that he spit something at and on the grievant.

The video was slowed down to get a sense of how much time elapsed between the time the head is turned until the grievant strikes Mr. Ciacura on the right jaw. The space in time is almost instantaneous.

The force of this blow literally lifts Mr. Ciacura off his feet momentarily, even though he is a large man, and he is seen striking his head on the concrete pavement of the LRT platform. His hat flies off his head and he is knocked out of Officer Jensen's grasp. Neither officer was able to do much to slow the rate of Mr. Ciacura's descent to the pavement due to the force of the blow.

The grievant then gets on top of Mr. Ciacura while a spit hood is requested and on the way. He was eventually placed inside a police vehicle where there was audio and Mr. Ciacura is heard moaning but saying nothing coherent at that point. There was no further violent action by either the grievant or Mr. Ciacura. The union asserted that Mr. Ciacura was violent at the hospital as well but there was insufficient evidence to establish that on this record. Given what had just happened to him it would not be hard to assume that he was angry and physically hurt by this but there was insufficient evidence that he was assaultive while at the hospital. Further, the officer who transported him to the hospital did not report any overt violent actions while in the car.

It was also shown that a spit hood had been requested before the incident and that another officer was on his way back with one when the spitting incident and strike to the face occurred. Significantly, this was due to the fact that Mr. Ciacura was starting to spit immediately after the fight due to the cut in his mouth and lip. It is thus possible that the spitting incident may not have been intentional and that he was simply trying to look away when he spit and inadvertently hit the grievant. Either way there was evidence that he spit on the grievant and that before anything else happened, the grievant hit him as described above.

Charges were referred to the prosecutor that included all of the resisting arrest, attempting to flee and felony assault charges described in the union's brief herein. Based on the review of this situation, the prosecutor declined to press charges. In so doing the prosecutor wrote as follows:

After review of the surveillance video of the incident, I believe the interests of justice will not be served in charging this case. Specifically, after the suspect has been detained and handcuffed by six police officers, the surveillance video shows an officer punching the suspect in the face without any action taken by the suspect prior to the punch. The punch rendered the suspect unconscious and he was in the hospital for eight hours as a result of the punch. The police reports (and a subsequent conversation with an officer who was at the scene) explained that just prior to the punch, the suspect spit in the officer's face and the punch was administered to incapacitate the suspect and prevent him from further bodily contact with officers. Although force may have been justified in these circumstances, I do not think that a jury would find the force used by the officer to be commensurate with the circumstances of this case (based on the facts the suspect was handcuffed and was surrounded by six police officers). Therefore, I am declining to charge this case in the interests of justice. Employer Exhibit 4, Tab 5.

Thus no charges were ever brought against Mr. Ciacura for the events of that evening.

Further, once the Minneapolis police department saw the video and reviewed the grievant's actions; it rescinded its offer of employment. The grievant then asked if he could be reinstated with the Metro Transit Police Department. Even though they had no obligation to do so, the Chief allowed the grievant to rescind his resignation and allowed the grievant to remain employed.

The employer investigated this incident and initially determined that a 240-hour suspension was appropriate for the excessive use of force in this matter. That was reviewed and Mr. Lamb determined that given the grievant's otherwise good record and experience that was reduced to an 80 hour suspension.

Mr. Lamb indicated that he never reviewed the video in question but reviewed the grievant's record. The Chief indicated that even though he had recommended a far harsher penalty he was satisfied with the 80 hours and was confident that would send the message not to undertake such actions in the future.

The grievance is thus over the 80 hour suspension. The union filed this grievance appropriately and it was processed through the grievance steps to arbitration. It is thus against that factual backdrop that the analysis of the case proceeds.

THE EXPERT TESTIMONY

Both sides called experts who are trained and experienced in the use of force to render opinions on whether the use of force was appropriate here. As one can imagine, their opinions diverged.

Indeed, there were some issues with all of their opinions that each side attempted to exploit in order to bolster their respective cases. The employer's expert opined that there were other less aggressive options available and which should have been used and which were within the grievant's training to use in order to prevent further spitting or any other aggressive or violent actions. He pointed to several pieces of the training materials that outlined these steps. Mr. Lego outlined several such options, including lifting Mr. Ciacura's arms up to automatically direct his face downward. Mr. Lego also opined that a closed fist strike to Mr. Ciacura's torso or gut to redirect his face downward could also have been employed. This would have allowed greater opportunity to control the rate of descent and guide him to the ground as opposed to the uncontrolled crash that did occur.

He further opined that a face lock from the rear to control Mr. Ciacura's head or rear leg sweep could have been used to safely bring Mr. Ciacura to the ground in a more controlled way. The grievant could have used a rear grounding technique to bring Mr. Ciacura to the ground. His testimony was that all of these techniques are taught yet the grievant instead chose, in what appeared to be a momentary fit of anger, a much more aggressive use of force than was necessary or called for.

Juxtaposed against this was the curious testimony he gave regarding the nature of the spitting. He sparred with union counsel over whether intentionally spitting in a police officer's face is a felony crime of physical violence. He claimed that it might not always be even though state statutes clearly make it so. Still though the question here is not the interpretation of statute or whether that act was a felony – it is – but rather whether the use of force under these unique circumstances was reasonable.

While the employer's expert gave testimony that was somewhat contrary to state law in terms of what level of charge the spitting incident would likely have drawn had charges been brought at all, it was persuasive in that he identified various other less aggressive forms of take downs/techniques that could have been used. These would also have been less likely to cause the fall that occurred in which Mr. Ciacura's head hit the pavement with almost full force. Contrary to the union's assertions, there was little effort made to break that fall as the force of the blow to the face was such that it broke the grasp of both the officers holding him up. In that regard the video evidence was quite compelling.

The union's experts went in somewhat different directions as well. The first expert opined that the use of force here may have been reasonable given what occurred but later acknowledged that the video "looked awful," or words to that effect. He further acknowledged that he would not have used that technique. He also noted other forms of restraints that could have been used such as an additional set of handcuffs with that third set connecting the two sets of handcuffs to Mr. Ciacura's belt that would have been a safer method of escorting him.

Further, when asked about other forms of restraints and take downs, he acknowledged many of the same techniques identified by the employer's expert as ways to have prevented further incidents from Mr. Ciacura could have been used and would have done more to prevent injury.

Further there was evidence to support the claim that Mr. Ciacura was already spitting as he was being helped to his feet after the scuffle on the ground and that a spit hood was already requested and on the way. Had the grievant believed that Mr. Ciacura was a threat to spit on him he could have simply waited for the spit hood to arrive and placed it over Mr. Ciacura's head and then escorted him to the police car. The employer asserted that this was either bad planning or a sign that the spit was not intentional or seen as a potential threat as he was being stood up and escorted away. Either way, the employer's expert's and witnesses testified credibly that the level of force used was out of proportion to the incidents observed on the video.

The union's second expert was of the opinion that even more force than was used could have been reasonably used here. He also based his opinion in part on the assertion that the grievant controlled Mr. Ciacura's descent to the ground and that the use of force was reasonable and effective and did not cause undue injury. The evidence was in stark contrast to that statement by the union's second expert. The video shows that Mr. Ciacura's descent was not controlled at all and that he hit his head sharply on the ground since he was unable to break his fall due to the handcuffs. This undercut the persuasiveness of his opinions considerably. Thus, his testimony was not persuasive on this record and was frankly somewhat troubling in that his main focus was on the very aggressive take down of anyone in that situation.

On balance the experts showed that the use of force under these circumstances may well have been motivated by a quick reaction in anger and disgust (admittedly a normal reaction to having been spit on) but that this is what the training dictates should not be done.

The union asserted that the grievant reacted without emotion but the video and other testimony demonstrated the opposite. There was considerable emotion from what the video showed. While it was completely understandable that the grievant was angry and disgusted by what happened but his reaction was exactly what a trained police officer should not do and what he was trained not to do. It is also well known that officers place themselves in situations like this all the time and must be prepared to deal with them in a reasonable fashion and not overreact. As a trainer the grievant should have known that yet his reaction was also what one of the union's experts indicated – it looked awful. On this record it was also fortuitous that Mr. Ciacura was not hurt any worse than he was given the rate of descent to the ground after the strike to the face and the force with which he was hit. It was also apparent that the Minneapolis Police Department shared this view since they withdrew their offer of employment when they investigated that happened.

The remaining analysis though is over whether the employer's policy was violated.

THE EMPLOYER'S POLICY – 300.3.2

The parties went through in some detail the factors to determine whether the grievant adhered to the policy set forth above and whether under the *Graham v Connor* standard, the grievant's actions were reasonable under the circumstances. The video and other evidence was reviewed multiple times here to determine if the grievant followed the policy and the training he was given and has given and whether the employer was simply using 20-20 hindsight to impose discipline in contravention to the *Graham v Connor* holding.

1. Immediacy and severity of the threat to officers or others.

The union made a good point in that there was a threat to the officers of getting spit on by Mr. Ciacura. The employer downplayed this but as noted above, this act, if intentional is a felony and defined by state law as an act of physical violence. On that point there was little question. The notion that it would not be such until a conviction was unpersuasive.

The question here was whether the act was truly intentional or not and it was unclear from the video. The evidence however showed that Mr. Ciacura spit on the grievant during this incident.

Thus there was an immediacy to this but the severity was something of a mixed bag. It was also clear that he undertook no other act to try to wrestle away from officers, grab their weapons or physically assault them in some other way. On this record there was certainly some risk to the officers.

The employer argued that after the initial battle on the ground, Mr. Ciacura was compliant and remained a low risk of a threat. This was counterbalanced by the fact that he spat on the grievant but there was some indication that this may not have been intentional. On balance this factor was rated slightly in the grievant's favor simply due to the fact that there was a spit of some sort and there was some risk of a pathogen being transmitted.⁴

⁴ The employer argued that the grievant did not know if Mr. Ciacura had any communicable diseases and thus should have been less aggressive with him. That however is an assumption that one cannot make; there is always a risk of some sort of pathogen and until one knows that a person does not have such a disease, one cannot assume it away.

2. The conduct of the individual being confronted, as reasonably perceived by the officer at the time.

The union argued that after the fight on the ground Mr. Ciacura remained a potential threat for all sorts of physical and verbal violence. He had just fought with multiple officers and was able to injure at least one or even two of them and was a difficult person to restrain.

The difficulty with this argument is that on this record the video and other evidence showed that once the initial fight was over, Mr. Ciacura seemed to become calmer. He did not continue the fight after he was brought to his feet. There was considerable evidence about what a reasonable officer might have thought at the time but the video showed that the grievant and Officer Jensen took no particular precautions to prevent further injury or a second attempt to flee other than to hold him by his arms near the elbow with one hand each and walk him toward the approaching police vehicle.

The question, to paraphrase the language of the factor set forth above, is what was the “conduct of the individual being confronted, as reasonably perceived by the officer” at *what* time? There was no unusual activity immediately before the spitting incident and prior to that for a few moments as Mr. Ciacura was brought to his feet. Thus, the notion that he remained a dangerous and wild individual was not shown on this record.

Clearly at the time of the spitting there remains the ultimate question of what was going through the grievant’s mind. Here though the notion that he went through all of the options in the millisecond between the spit and the punch to the face was unpersuasive. He reacted instantaneously without much thought at all other than in anger – as anyone might. If the video shows anything at all it shows that. But that is not what the training and policy dictates. While it is understandable that he would be angry and offended, it is not reasonable that he reacted in this way. Thus this factor weighed in the employer’s favor as well.

The union argued that to second-guess this is to engage in the sort of hindsight the *Graham v Connor* holding prohibits. The video presents a far clearer picture than 20-20. It shows exactly what happened and when. On this record it was plainly apparent that the grievant's reaction to this was out of reflex and anger rather than training. While that is understandable, given the disgusting action that had just occurred, it is contrary to both training and police procedure and weighed in favor of the employer on this record.

3. Officer/subject factors (age, size, relative strength, skill level, injuries sustained, level of exhaustion or fatigue, the number of officers available vs. subjects)

This factor weighed heavily in the employer's favor. While Mr. Ciacura was shown to be a powerful man, the grievant is a much taller and physically fit individual. Plus, Mr. Ciacura had just been set upon by 4 or even more officers and hit repeatedly until he was bludgeoned into submission and placed in handcuffs. It was clear that he posed a very low risk of escape and a low risk of anything more physical with his arms or legs. Other than the spit, he undertook no further actions towards the officers prior to the fist strike he suffered.

Further, he was escorted by two uniformed officers, both of which were seen on the video to be large individuals and quite capable of defending themselves. There were other officers in the immediate area who could have helped with any sort of conduct Mr. Ciacura engaged in. Finally after the closed fist strike, it was obvious that Mr. Ciacura was incapacitated and unable to stand by himself.

The union argued that Mr. Ciacura was "able to overpower the officers." This was not at all shown to be the case on the video. It showed quite the opposite. When he attempted to flee he was immediately taken down and pinned to the ground. Certainly he resisted and was able to inflict some injury to one or two of the officers but this did not result in overpowering the officers. Moreover, once up he remained compliant and walked with the grievant and Officer Jensen to the car for a few feet until the spitting incident. Thus, this factor was clearly in the employer's favor on this record and supported the claim that the use of force in this unique instance was not reasonable.

4. The effects of drugs or alcohol/subject's mental state

There was no direct evidence as to drug or alcohol use by Mr. Ciacura on this record. However given the place and time it was likely that he had used alcohol. It does not take a leap of faith to infer that a person coming out of a bar at 1:40 a.m. during the Zombie Pub Crawl and who has obviously gotten into some sort of conflict with the bar bouncer has had a few drinks.

That cuts in both directions here. On one hand, having too many drinks may make a person more likely to be combative but on the other they are less likely to be able to carry that aggression off. On this record, this factor was neutral and did not weigh heavily for either party's position.

There was evidence that Mr. Ciacura was about to engage in a fight with the bouncer and he was certainly more than willing to engage officers in a physical battle. Once that was over he was more compliant and did not actively physically resist once handcuffs were placed and he was brought to his feet.

He began walking without much resistance as both the grievant and the other officer walked him toward the LRT platform. There was no evidence that Mr. Ciacura suddenly became enraged or that he was about to actively resist arrest again. On this record, this was not given a great deal of weight but was slightly in the employer's favor in that Mr. Ciacura was not shown to be actively resisting or in a mental state that required the sort of physical assault that was delivered in this case.

5. Proximity of weapons or dangerous improvised devices.

There was no evidence at all that Mr. Ciacura had any weapons nor was there any evidence that he was attempting to grab for the officers' weapons. The union argued that even handcuffed individuals can pose a threat, and there are instances where they can, but on this record there was frankly no evidence of that at all and that argument was mere speculation. It was clearly a factor that weighed in favor of the employer.

6. The degree to which the subject has been effectively restrained and his/her ability to resist despite being restrained.

This too clearly weighed in the employer's favor on this record. Mr. Ciacura was handcuffed and being escorted by two uniformed and armed police officers while several other officers were within a few feet of him when this occurred. The chances of him being able to do anything untoward at that moment is wildly speculative and frankly unsupported by the facts here.

7. The availability of other options and their possible effectiveness.

This was the subject of great debate and dissension. As discussed above, there were many other options available both before and after this incident to deal with Mr. Ciacura in a less intrusive and violent way. A spit hood had already been requested and it was clear that he was bleeding from the mouth already, albeit from the repeated beatings he took at the hands of the police a few moments before. They could have simply waited. There was no need to rush despite the union's contention that the crowd was growing restless and ugly.

The video shows very little evidence of the crowd "getting ugly" nor that there was any attempt to rescue Mr. Ciacura by onlookers or his friends. The video showed that the crowd was mostly unmoved by the commotion that occurred when Mr. Ciacura was taken down and beaten by the officers and later brought up and struck again.

Further, as several of the use of force experts testified, including those on behalf of the union, there were other options available to make sure Mr. Ciacura would not spit again that involved lesser force than a full force strike to the face. The employer made an excellent point in this regard; if the point was to prevent further spitting a leg sweep or other technique would have accomplished that. If the intent was to punish him for spitting in the first place, the strike would certainly have accomplished that but that would have been entirely inconsistent with police procedure and the employer's policy and support the claim that this was excessive and unreasonable and done out of anger rather than to accomplish a legitimate law enforcement purpose. This factor also weighed in the employer's favor.

8. Seriousness of the suspected offense or reason for contact with the individual.

This was discussed above. The union made Mr. Ciacura out to be a very dangerous and violent individual. Clearly he was about to engage in a fight when officers stepped in to prevent it. Why they continued to arrest him once that happened even though there was little if any evidence on this record as to any actual crimes he committed prior to that time remained a mystery. It was noted that the prosecutor declined to press charges and it is unknown what actual evidence was brought to the prosecutor in support of any charges. Obviously, it was not enough to support a charge beyond a reasonable doubt. More to the point, all the officers knew when they first confronted him was that he was probably drunk, about to spar with a bar bouncer in the middle of the street but little else. That alone did not justify the punch.

The union of course noted that spitting in a police officer's face is both a felony and a crime of physical violence under state law. That is true but that alone did not justify this level of force. There are many felony offenses under state law and if a person is apprehended after committing one physical force of this nature is not always required. The question is whether this was reasonable under these circumstances. Even the offense with which Mr. Ciacura could have been charged would not on this record have justified this level of force; especially when so many other less aggressive options existed.

9. Training and experience of the officer.

This factor also cut in both directions. The grievant is clearly a well-trained and experienced law enforcement officer. His training and experience are exemplary. He has trained other officers on the use of force and effective restraint techniques. It was clear from this record that he knows what he is doing in this regard. It is also clear on the other hand that he should have known better than to do this. As the employer's use of force expert noted, being trained on how to use such force does not equate with when one should use it.

The union argued that one should defer to the grievant's expertise in the area of use of force given his training and experience. That is too simplistic an approach and would essentially render almost every use of force case moot if the analysis were to stop with the claim that the officer has training in the use of force, as most are, therefore everyone should defer to that. On this record, it was clear that training should have taken precedence over the emotional response that occurred.

10. Potential for injury to officers, suspects and others.

Certainly the spit could have carried with it pathogens or other diseases. It was certainly a vile act if done intentionally and certainly an offensive one even if done inadvertently. As discussed at some length above though, there were many other options available that could have prevented further spitting, including waiting for the spit hood that had already been requested. The union claimed that Mr. Ciacura could have become more violent and that every effort had to be made to "take him down" as the one union expert characterized it, in order to prevent further attempts at violence.

Simply stated, that claim had little evidentiary support. The fight on the ground was effectively over; Mr. Ciacura was already in handcuffs; was being compliant and was being escorted to a waiting car. There was no evidence that he was or even that he was about to try to flee or become more physically violent.⁵ Again, this factor supported the employer's claim.

11. Whether the person appears to be resisting, attempting to evade arrest by flight or is attacking the officer.

This was discussed above as well but again there was little evidence that Mr. Ciacura was about to actively resist once the handcuffs were placed and he was being escorted to a waiting car. The union argued that he could have been violent, since he had already been but the record here showed that he was not violently resisting arrest at the time of the spitting incident.

⁵ The union also claimed that Mr. Ciacura was being less than compliant and was resisting being walked to the car. The video showed something different. The video shows that he was unsteady in his gait and that this was likely due to the beating he took on the ground and being hit in the head so many times. The argument that he was still actively resisting did not hold true on this record.

There was also support for the employer's claim that none of the officers there, including the grievant, took any extraordinary steps to prevent Mr. Ciacura from becoming more violent again. They could have placed additional handcuffs to his belt, placed a spit hood or had more officers there to escort him yet none of that was done. It was clear on this record that at least up until immediately before the spit, Mr. Ciacura was restrained and under control and posed little if any threat to run, grab a weapon or get physically aggressive again.

Clearly he attacked the grievant with the spit, assuming it was an intentional act, but the question here is whether the use of this force under these circumstances was reasonable or not. As the cases show, the fact of an attack may justify the use of some force but does not always justify this degree of force.

12. The risk and reasonably foreseeable consequences of escape.

On this record there was no evidence of any risk of escape. This factor was essentially a non-factor on this record. Mr. Ciacura was not going anywhere and thus no need to use this factor as justification of this level of force.

13. The apparent need for immediate control of the subject or a prompt resolution of the situation.

There was clearly a need for immediate control of the subject here. That part was in the union's favor. The grievant needed to be able to make sure that Mr. Ciacura did not spit at him or anyone any more.

The question though in this case is not whether there was a need to further restrain Mr. Ciacura but rather whether this level of force was necessary or reasonable under these circumstances. There were, as discussed above, other less aggressive options available that would have accomplished the objective of preventing further spitting and keeping officers and the public safe without the closed fist strike that ensued here.

14. Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.

There was, as noted above, a need to make sure the spitting did not recur and to take steps to keep Mr. Ciacura from continuing this behavior. He certainly could have continued to spit had nothing been done so something needed to be done to stop it. Knocking him to the ground in the manner done here though was shown to be excessive, especially when other methods of preventing further such behavior were available and could have been used.

The union argued that this factor should weigh heavily in the grievant's favor due to the need to stop the threat of continued spitting. On this record while there was a need to prevent further spitting, the manner in which this was done was overly aggressive and unnecessary. Moving Mr. Ciacura's head, a leg sweep or other less physically violent measures could have and should have been used.

15. Prior contacts with the subject or awareness of any propensity for violence.

There was certainly some propensity for further violence. Mr. Ciacura had already fought with officers, albeit in a fight they essentially started and he had just shown that he was capable of spitting. Whether this was done intentionally or not was considered but for purposes of this argument it was assumed he did it intentionally with the purpose of harming or at least offending the grievant. There was some reason to believe that he might do it again.

While there was little if any chance of Mr. Ciacura breaking away or taking any further physically aggressive action, there was a need to restrain him further and to position him in such a way as to prevent anyone else from getting spit on or at. However, this could have been done differently, as discussed at length above.

Taking all these factors into account it was apparent that the use of force here was excessive when viewed from the perspective of the employer's policy and the total record here. The expert opinions were considered as well and were helpful in determining whether there were other options available that would have accomplished the legitimate purpose of making sure Mr. Ciacura would not spit on anyone else. On balance, the closed fist strike was not the most reasonable option here.

THE PRIOR ARBITRATION AND COURT CASES CITED BY THE PARTIES

Both parties cited cases in support for their respective positions. However those cases very much depend on their unique facts – just as this one does.

The union relied heavily on *Graham v Connor* 490 U.S. 386 (1989) and asserted that one should not second-guess an officer's decision given the exigencies they are faced with. Hindsight is thus not the standard by which officers' actions should be judged.

The *Graham* court noted as follows: “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id* at page 396.⁶

The union further asserted that under *Graham* the proper standard is “what the use of force instructors taught the members of the Department with the Department's approval. Nowhere in the use of force instruction is there any reference to Policy 300. The Department knew this and did not provide any supplemental training.” The union then asserted that since there is no specific reference to Policy 300, there was no proper training to require the least amount of force necessary to properly and safely retrain or control a subject.

⁶ The *Graham* case arose out of a Section 1983 action by a citizen against an officer for excessive use of force. This case involved the determination of whether the grievant's actions were in violation of the employer's policy rather than whether they violated Mr. Ciacura's constitutional rights. It should also be noted that in the actual case, an officer saw a person who was diabetic and having a reaction to lack of blood sugar, leaving a convenience store in a hurry, followed the car, stopped it, did not allow the person to drink some orange juice that his friend offered. He was arrested but later released when it was discovered that nothing happened at the store. He sued claiming excessive use of force after he was injured due to police actions. The District Court granted a directed verdict and the appellate Court affirmed. The Supreme Court reversed and vacated holding that it was error to require the plaintiff to show malice or sadistic actions. Thus, the case actually stands for the proposition that such cases are to be analyzed under an objective standard of reasonableness rather than a subjective one and are to be judged by that objective standard irrespective of the officer's motivation or intent. The case was thus allowed to go to trial.

That argument was unpersuasive. Certainly the grievant was trained and provided training on the proper use of force but simply training someone on the proper use of a handgun for example does not equate to when and under what circumstances to use it. The question here is what was objectively reasonable under the circumstances.

The union further asserted that the crowd was unruly and that the scene that night was chaotic. The video and other evidence did not support that. The crowd was not unruly nor were they shown to be throwing bottles at the officers. The union asserted that in both its opening statement and again in the brief but the evidence simply did not bear those allegations out. The video was reviewed multiple times and on a larger screen than was provided at the hearing yet at no point is anything seen being thrown at the officers.

Further, other than the one person who was seen video recording the melee on the ground no one else intervened or interfered with the officers or came to Mr. Ciacura's aid. Even the friend with the phone was unceremoniously shoved out of the way by another officer and he then left the scene without further incident. Thus, the union's claim that swift and aggressive action needed to be taken was unfounded.

Moreover, it was unclear how hitting Mr. Ciacura was going to somehow calm the crowd even if the crowd had been somewhat unruly. There was insufficient evidence to show that the closed fist strike to the head of Mr. Ciacura was reasonable in these unique circumstances that evening.

The union also relied on *Eugene Police Employees Association and Eugene Police Department*, (Axon 2009). There, a 40 hour suspension was overturned by the arbitrator after a suspect was hit with a backhand closed fist even though the suspect was handcuffed at the time. There though it was abundantly clear that the suspect was intentionally trying to spit in the officer's face and that he had been told at least twice not to do it. Slip up at page 16. There was thus no question of the suspect's intent to both spit and to do it again – since he had already done it before. .

Further there was evidence in the Eugene case that the strike to the mouth was nowhere near the force that was delivered here. The punch was delivered inside a car with limited opportunity to rear back and deliver the sort of “haymaker,” to use the words of Arbitrator Axon, that was delivered here. The punch in the *Eugene* case was described as a “jab” with the back of the hand. Under those circumstances the split second use of force *and*, more importantly, the limited options available given the circumstances supported the union claim in that matter that the use of force was reasonable. This case presented a very different scenario for all the reasons already outlined.

The union also asserted that the closed fist strike was necessary to prevent any other sort of aggressive actions by Mr. Ciacura that night. The union produced a video during the hearing of an officer physically assaulting a suspect in a wheelchair after that suspect who was also handcuffed tried to grab the officer’s gun. That case was, of course, radically different and even though that particular officer was cleared of wrongdoing it is hardly precedent setting here.

On this record it was established by clear and convincing evidence that the grievant's actions were in violation of the employer’s policy and were excessive under that language. It was also contrary to his training and the general admonition which is in the policy, and which the grievant acknowledged, to use the least amount of force necessary under the circumstances to restrain and control a subject.

APPROPRIATE PENALTY – DISPARATE TREATMENT CLAIMS

Having determined that there was a policy violation in this case the remaining question was the appropriate penalty to be assessed. As noted above, the employer initially imposed a 240-hour suspension for this. The employer through Mr. Lamb reduced that to an 80-hour suspension. He noted that he had not reviewed the actual video of the incident and relied instead on the documents provided and the grievant’s overall record.

Both sides referenced a prior incident involving Officer Grant Jacobs who was issued a 40-hour suspension for kicking a handcuffed suspect while in the back seat of a squad car because he was allegedly angry with the suspect.

The union argued that that officer was verbally and physically abusive to the suspect and that the suspect involved there was detained, handcuffed and under control. The officer admitted that he kicked him for no other reason than he was angry. The union further argued that Mr. Ciacura was violent and had committed a felony assault by spitting on the grievant. The union argued that it was disparate treatment to issue a 40-hour suspension there and an 80-hour suspension to the grievant here.

The employer noted though that the suspect in the other matter was armed with a knife whereas Mr. Ciacura was unarmed. The employer also asserted that the level of force used here was far greater. The closed fist strike to the head caused considerable injury and could have caused even greater potential injury had things gone slightly differently when Mr. Ciacura hit his head on the concrete platform, than a kick in the leg.

The employer argued that these two cases cannot be compared side by side as they are very different. The employer argued that the grievant's actions here were far worse and could have been even worse still. The employer has already shown its leniency by reducing the original suspension and by allowing him to return to employment even though he had already resigned and was about to leave the department when this incident occurred. Thus there was ample reason for the 80-hour suspension.

The evidence and testimony of these two cases were compared and reviewed thoroughly. Clearly there was anger by both officers at what had apparently transpired between them and the suspects in their respective cases. However, the grievant's actions were indeed worse in that there was a closed fist strike to the head and jaw which caused Mr. Ciacura to literally leave his feet and crash to the ground striking his head on a concrete LRT platform. The potential for harm was thus far greater as was the strike itself.

Each case must be examined on its own unique facts and analyzed under the just cause standard. Here the overall facts and circumstances show that further reduction of the suspension would be somewhat arbitrary by an arbitrator. Accordingly the 80-hour suspension will stand and the grievance denied.

Accordingly the grievance is denied.

AWARD

The grievance is DENIED.

Dated: May 26, 2015

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Jeffrey W. Jacobs, arbitrator