

IN THE MATTER OF ARBITRATION)	GRIEVANCE ARBITRATION
)	
between)	
)	Police Officer
)	Brett Palkowitsch
City of St. Paul, Minnesota)	
)	
-and-)	BMS Case No. 17-PA-0412
)	
St. Paul Police Federation)	April 3, 2017
))		

APPEARANCES

For City of St. Paul, Minnesota

Gail L. Langfield, Assistant City Attorney

For St. Paul Police Federation

Christopher K. Wachtler, Attorney, St. Paul, Minnesota

JURISDICTION OF ARBITRATOR

Article 6, Employee and Federation Rights Grievance Procedure, Section 6.4, Procedures, Step 4 of the 2016-2017 Collective Bargaining Agreement (City Exhibit #1) between City of St. Paul, Minnesota (hereinafter "Employer" or "City") and St. Paul Police Federation (hereinafter "Federation") provides for an appeal to arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard J. Miller, was selected by the Employer and Federation (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services ("BMS"). A hearing in the matter convened on February 27-28, 2017, at the BMS offices, 1380 Energy Lane,

Suite 2, St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' counsel elected to file electronically post hearing briefs with receipt by the Arbitrator no later than March 13, 2017. The post hearing briefs were submitted in accordance with that deadline date. The Arbitrator then exchanged the briefs electronically to the Parties' counsel on March 14, 2017, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Did the City have just cause to discharge the Grievant Brett Palkowitsch?
2. If not, what is the appropriate remedy?

STATEMENT OF THE FACTS

The 1800 block of Seventh Street East in St. Paul, Minnesota, which consists of many apartment buildings, is considered to be a high-crime area. (Federation Exhibit #9). Thus, this area is familiar to east side Police Officers ("Officers") due to aggravated assaults, shootings, aggravated

robberies, gang related incidents, weapon offenses, narcotic offenses and drive-by shootings. Much of the drug activity occurs in the parking lots behind the buildings.

On the evening of June 24, 2016, the Ramsey County Emergency Communications Center received an anonymous 911 call from a resident at 1891 East Seventh Street, St. Paul, Minnesota. The caller reported that there were 13 people fighting with bats and golf clubs outside the building. The caller also reported observing a black male with dreadlocks wearing a white T-shirt in possession of a firearm.

Officers Tony Spencer and Joe Dick were the first to respond to the call. As Officers Spencer and Dick approached the apartment buildings on the 1800 block of East Seventh Street in their marked St. Paul squad, the Officers saw several people outside of the buildings, but none seemed to be alarmed, arguing, or fighting. They did not see anyone matching the description of the gun suspect. The Officers turned their squad north on Hazel Street finding no one outside of 1891 Seventh Street East, the location of the call. The Officers then proceeded down the alley behind the buildings and observed a black male sitting in a parked Jeep in the parking lot behind 1871 Seventh Street East. The Officers did not stop to investigate the occupant as they had no legal basis to approach him. (City Exhibit #5).

Thereafter, Officer Brett Palkowitsch, the Grievant in this case, who has been employed as an Officer for three-and-a-half-years, and his partner, Officer Brian Nowicki, arrived in the area. The Grievant saw seven individuals go inside the front of 1871 Seventh Street East, a neighboring apartment building three buildings away from the reported location for the initial call. (City Exhibit #5). Because he was responding to a weapons call, the Grievant drew his firearm and kept it in a ready position.

On foot, the Grievant and Officer Nowicki conducted an initial investigation of the call. They talked to two individuals outside of 1871 Seventh Street East who said they did not see a fight. The Grievant and Officer Nowicki talked to three individuals sitting outside of a building directly east of 1871 Seventh Street East who said that no one was fighting. The Grievant and Officer Nowicki walked east looking for suspects. They then received a radio transmission from canine ("K-9") Officer Brian Ficcadenti indicating that he had located "[o]ne in car with dreads/white t-shirt in back of the lot." The Grievant and Officer Nowicki ran to the scene. Officers Spencer and Dick arrived on the scene moments later. (City Exhibit #5).

Because this person, who was later identified as Frank Amal Baker, matched the description of the person reportedly possessing a firearm, Officer Ficcadenti made contact with him and ordered him to get out of his vehicle. He did so, but then

failed to obey further commands to keep both hands in the air and approach Officer Ficcadenti. Officer Ficcadenti eventually made the decision to deploy his K-9. (Federation Exhibit #1). It would later be revealed through medical records that Mr. Baker had a cocktail of illegal narcotics in his system at this time, including cocaine, opioids and THC. It would also later be revealed that Mr. Baker had a warrant out for his arrest, giving him reason to flee from Officer Ficcadenti on foot.

The events that occurred thereafter were captured on squad car videos at the scene, Officer reports and/or Internal Affairs statements. The incident video from Officers Spencer and Dick's in-car camera, taken from a perspective of about 50 feet away, provides the most complete view of the scene. The video shows a parking lot, a line of cars, another squad car, three apartment buildings, five Officers standing near Mr. Baker, and a sixth Officer walking casually behind the group. Officer Dick can be seen resting his hands on his hips with his gun holstered.

When the Grievant and Officer Nowicki arrived at the scene, K-9 Falco had Mr. Baker on the ground in a firm bite. (City Exhibit #5). Officers Palkowitsch and Nowicki both testified that they firmly believed, as a result of the K-9 being deployed, and the person on the ground matching the description that they had received from dispatch, this was, in fact, the person who was seen with a weapon. They proceeded with the call

under the assumption that there was a weapon present on the person being bite by the K-9.

While Falco had Mr. Baker on the ground in a firm bite, Officer Ficcadenti was yelling commands. The K-9 was dragging Mr. Baker in circles on the pavement. Mr. Baker's hands were out and visible at times and, at other times, were close to his body while the K-9 was biting him. None of the responding Officers saw a weapon in Mr. Baker's hands.

Officer Nowicki provided "lethal cover" with his AR 15 rifle while the Grievant gave Mr. Baker directives to stop moving and provide his hands and arms so that he could be handcuffed. Mr. Baker failed to do so and according to the Grievant continued to move his hands near his waistband and tried to get up off the ground.

The video shows Officer Dick pointing to an apartment building and Officer Spencer walking in that direction to talk to individuals out of view. Officer Spencer testified that Mr. Baker was under control and not a threat when he left the immediate scene to address individuals in the neighboring apartment. There is no surrounding crowd. Individuals are not closing in on the Officers so the Officers were not being threatened.

During the incident, Mr. Baker screams in pain, claws at the ground, and asks, "Please what did I do?" (City Exhibits

#7, #8). Mr. Baker, however, continues to fail to comply with the Grievant's directives and that of other Officers to get on the ground and put his hands out. The Grievant waits about 30 seconds and then administers two standing kicks to Mr. Baker's midsection. The Grievant testified that he could not and did not target the area below Mr. Baker's waist with kicks or knee strikes because of the presence of the K-9; he did not want to be bitten for mistakenly kicking the dog or for any other reason. He also did not want to target Mr. Baker's shoulder area because he did not want to mistakenly kick him in the head because this would have been considered "deadly force." Therefore, the Grievant targeted Mr. Baker's midsection, which was his only available area on his body. (Federation Exhibit #1, p. 16).

Following his training to "strike and assess," the Grievant took a step back and gave Mr. Baker the opportunity to comply with his directives to put his hands out and be handcuffed. Mr. Baker stops moving temporarily, but would not show his hands and then continued to try to rise off the ground. The Grievant testified and reported that he used approximately 14 seconds to reassess the situation. Mr. Baker, who was still being bitten and dragged by the K-9, moves again. The Grievant kicks Mr. Baker in the torso a third time. After the third kick, Mr. Baker decides to comply with the directives from the Grievant

and the Grievant handcuffs Mr. Baker and Officer Ficcadenti pulls off the K-9. (City Exhibit #7, pp. 27-29).

After the Grievant handcuffed him, Mr. Baker complained that his ribs hurt, he could not breathe, and that his leg hurt where the K-9 had bitten him. Officer Dick called paramedics. Officers Spencer and Dick waited with Mr. Baker in the parking lot for approximately ten minutes until paramedics arrived, and then another four-and-a-half minutes while paramedics loaded Mr. Baker into the ambulance. During that time, no individuals threatened Officers and no one from the neighborhood rushed the scene.

Officers Spencer and Dick accompanied Mr. Baker to the hospital to document his injuries. Staff at the hospital informed Officers Spencer and Dick that Mr. Baker had broken ribs. They returned to the East District team house. Officer Spencer testified that he overheard the Grievant talking about his actions, stating that the first two kicks were not good, but he got Mr. Baker with the third. Officer Dick confronted the Grievant directly and told him he was out of line and that he broke Mr. Baker's ribs. Medical records show that Mr. Baker suffered several rib fractures on both sides and two collapsed lungs.

On June 23, 2016, Todd Axtell became St. Paul's Police Chief. Days later, he learned about the incident from Joel

Franklin, a representative of the St. Paul chapter of the NAACP. Police Chief Axtell visited Mr. Baker in the hospital and saw the extent of his injuries, including obvious bite wounds and tubes coming from Mr. Baker's chest. Police Chief Axtell promised Mr. Baker that he would order an investigation.

Police Chief Axtell ordered Senior Commander Robert Thomasser, a Police Department veteran of 27 years who leads the Internal Affairs Unit, to lock down the files and conduct a full investigation. Pending the outcome of the investigation, Police Chief Axtell reassigned the Grievant to a position with limited public interaction. Senior Commander Thomasser and Acting Commander Tony Greene, a veteran of 22 years who is assigned to the Internal Affairs Unit, led the investigation.

Acting Commander Greene led the investigation of both the Grievant and Officer Ficcadenti. Acting Commander Greene reviewed all police documents, incident videos, and 911 and dispatch audio. Acting Commander Greene requested written statements from Officers Nowicki, Dick, Spencer, Raether, and Sergeant Ryan Murphy. Acting Commander Greene visited the scene and conducted field interviews of residents in the neighboring apartment building. Acting Commander Greene reviewed Mr. Baker's medical records. Acting Commander Greene interviewed the Grievant, Officer Ficcadenti and Mr. Baker. He prepared a summary of his findings. (City Exhibit #7).

In his interview, the Grievant stated that he believed his use of force was reasonable because Mr. Baker would not stop moving, was not following commands, sat up at one point, and Mr. Baker's hands were moving freely about, including toward his mid-section. The Grievant stated that he chose to kick Mr. Baker rather than use his hands to handcuff Mr. Baker because he did not want to get down to the same level as the K-9 because he was afraid of being bit. The Grievant further stated that he kicked Mr. Baker in his midsection rather than below his waist because he did not want to risk kicking the K-9. (City Exhibit #7).

In his interview with Acting Commander Greene, Officer Ficcadenti stated that he did not remove the K-9 because Mr. Baker would not stop moving and yelling, and he was reaching toward the K-9. Officer Ficcadenti described Mr. Baker's hands immediately before the Grievant's first two kicks as out, toward the center, down by his legs, and moving all around. Officer Ficcadenti told Acting Commander Greene that Officers were telling Mr. Baker to put his hands out and stop moving. (City Exhibit #7).

Acting Commander Greene also interviewed Mr. Baker. Mr. Baker told Acting Commander Greene that during the K-9 bite he was trying to get away from the pain, scratching and clawing at the dirt and calling for his girlfriend. Mr. Baker remembered

asking Officers why they were doing this to him, but could not remember the response. Mr. Baker only remembered the K-9 growling and his own screaming. (City Exhibit #7).

In addition to interviews, Acting Commander Greene conducted a thorough review of written statements from other Officers at the scene. Acting Commander Greene considered only what Officers knew or would have reasonably believed at the time of the incident, and objectively applied to those facts the Grievant's use of force training and all Police Department Policies regulating use of force. Acting Commander Greene studied various training materials for use of force and K-9 apprehension, and consulted the Training and K-9 Units. Acting Commander Greene objectively compared the facts of the incident to Police Department Policies regarding use of force, K-9, restraint procedures, Officer discretion and legal justification, conduct unbecoming an Officer, and the City's civil service rules. After Acting Commander Greene's thorough gathering of all relevant information, the Internal Affairs Unit compiled the complete investigation and recommended to sustain findings for excessive force and improper procedure in violation of Police Department Policies for both the Grievant and Officer Ficcadenti. (City Exhibit #7).

The Internal Affairs Unit completed the investigation on October 12, 2016. On October 20, 2016, the Police Civilian

Internal Affairs Review Commission ["PCIARC"] reviewed the Internal Affairs investigation of both Officer Ficcadenti and the Grievant. A sworn Officer serves as a PCIARC commissioner and was present for and voted on the cases with respect to the Grievant and Officer Ficcadenti. The PCIARC determined by a majority or by unanimous vote that the Grievant and Officer Ficcadenti's use of force were both excessive and improper and recommended sustained disciplinary findings of excessive force and improper procedure in violation of Police Department Policies. For their actions, the PCIARC recommended that Officer Ficcadenti receive a 10-day suspension and the Grievant receive a 30-day suspension. (City Exhibit #12).

Police Chief Axtell reviewed the Internal Affairs investigation and the PCIARC's recommendation and suspended the Grievant on October 27, 2016, based on the severity of his misconduct. (City Exhibit #2). Police Chief Axtell notified the Grievant that he was considering terminating the Grievant's employment based on his violation of Police Department use of force policies while effecting an arrest resulting in serious injury, and improper procedure during the encounter. Id. Police Chief Axtell explained that the Grievant's actions impacted the safety of fellow Officers and their ability to patrol the streets in an environment already skeptical of police responses. Id.

On November 3, 2016, Police Chief Axtell met with the Grievant and provided him an opportunity to respond to the findings of the Internal Affairs investigation. (City Exhibit #2). In that meeting, the Grievant denied any wrongdoing and showed no remorse or compassion for Mr. Baker's injuries. Police Chief Axtell believed that the Grievant failed to demonstrate that his actions in the future would be different. Id. Police Chief Axtell deliberated his decision carefully, considering the Internal Affairs report, the PCIARC recommendation, and the Grievant's statements. On November 7, 2016, Police Chief Axtell terminated the Grievant's employment due to the seriousness of his misconduct and the Grievant's lack of remorse and good judgment.

Police Chief Axtell decided to give Officer Ficcadenti a 30-day suspension with no appeal unless he wants to be terminated for his actions on June 24, 2016. Obviously, Officer Ficcadenti has decided to not grieve Police Chief Axtell's suspension.

The Federation, on behalf of the Grievant, however, decided to appeal Police Chief Axtell's discharge determination by filing a written grievance on November 4, 2016. (City Exhibit #4). The grievance was denied by the City on December 2, 2016. Id. The grievance was ultimately appealed to final and binding arbitration by the Union.

CITY POSITION

This case is simple. The Grievant's actions on June 24, 2016 flagrantly violated clear and long-standing Police Department Policies prohibiting excessive force. The Grievant's level of force under the undisputed circumstances was never authorized, trained or sanctioned by the Police Department. Moreover, the Grievant's refusal to accept any responsibility or even consider that he could have done anything differently in this incident makes him dangerous and untrainable.

The Grievant's misconduct calls for his termination. The whole of Grievant's case demonstrates that he engaged in uniquely serious misconduct and lacks the judgment and compassion to safely serve as an Officer. The Grievant's brief three-and-a-half-year career with the Police Department had a lifetime of potential, but his inability to realize that his force was excessive and continued attempts to justify his actions based on a multitude of unsupported conclusions demonstrate ample just cause for termination. Any lesser discipline would only endorse this type of conduct to the more than 600 women and men serving the City—to the detriment of the entire Police Department and the 300,000 residents who entrust Officers with their safety and security.

Accordingly, the City's termination of employment should be upheld and the grievance be denied.

FEDERATION POSITION

The discipline imposed by the City against the Grievant was without just cause. The Complaint in this case came to the Police Department in the form of a memorandum from the NAACP facilitated by Mr. Baker's civil attorney. The case received media attention locally and nationally. Police Chief Axtell's testimony that he felt no pressure from the community to terminate the Grievant is suspect. The Grievant is the first employee he has terminated. This was Police Chief Axtell's first high-profile use of force case, and his first arbitration as Chief. It appears to be a classic example of the City/Police Department taking, unwarranted disciplinary action for political reasons, following an incomplete investigation in a high-profile case, and forcing the Officer and his Federation to fight for his job at arbitration.

Police Chief Axtell testified that he terminated the Grievant not just for utilizing kicks, but for the "totality of the circumstances." It is unclear what he meant by this statement. The Grievant was terminated for excessive use of force. The only force he used during this arrest were the kicks. He cannot be terminated for the actions of others, or for the "totality of the circumstances."

The PCIARC, after thoroughly reviewing and discussing the Internal Affairs investigation, which both Police Chief Axtell

and Acting Commander Greene agreed was full, fair, complete, professional, and unbiased, recommended a 30-day suspension. The City has provided no factual basis to justify the upward departure to termination in this case.

The Grievant has been a very effective Officer and should be given a chance to serve in that capacity once again. He testified that he will follow the new Police Department Policy forbidding Officers from kicking suspects while they are on the ground. This Policy did not exist at the time of Mr. Baker's arrest.

The Federation requests that the grievance be sustained, and the Grievant be reinstated as an Officer and made whole, including full back pay.

ANALYSIS OF THE EVIDENCE

At the onset, this is a situation that never should have evolved into these unfortunate circumstances. This situation has severely impacted the lives of Mr. Baker, a St. Paul citizen, the Grievant, Officer Ficcadenti, the Police Department, especially Police Chief Axtell who had to deal with this incident only one day after becoming the Chief, and the citizens of St. Paul.

This situation could have been easily avoided had Mr. Baker simply complied with the reasonable commands of Officer Ficcadenti's to leave his vehicle and keep both hands in the air

and approach the Officer. Had Mr. Baker complied, there would have been no need to deploy K-9 Falco and/or be kicked in the torso by the Grievant. Conversely, had Officer Ficcadenti and the Grievant elected to not deploy Falco and/or kick Mr. Baker, Mr. Baker would have avoided the pain and suffering from the dog's leg bite and/or broken ribs and collapsed lungs from the kicks.

The City terminated the Grievant for delivering three separate kicks to the torso of Mr. Baker on June 24, 2016. The kicks were delivered while Mr. Baker was on the pavement while in the leg grasp and bite of Falco, a K-9 under the guidance and supervision of Office Ficcadenti.

The City claims that these kicks were intentionally delivered by the Grievant to the torso, a non-approved target area, resulting in Mr. Baker suffering substantial injury, including broken ribs and two collapsed lungs. The City alleges that the Grievant's conduct in delivering the three kicks to Mr. Baker's torso constitutes "excessive force" in violation of the following Police Department Policies, as cited in the suspension and proposed termination notice on October 27, 2016:

- **246.00 Officer Response to Resistance and Aggression:**
An Officer's response to an individual's resistance and aggression must be objectively reasonable and necessary and based on the totality of the circumstances, including the severity of the crime, whether the individual poses an immediate threat to the safety of the officer or others, and whether the individual is

actively resisting arrest or attempting to evade arrest. The reasonableness of an officer's response will be based on the perspective of a reasonable officer on the scene.

- **246.01 Response to Resistance and Aggression Continuum (Force is used "when and only to the extent reasonably necessary).** Reasonably necessary - means that no reasonably effective alternative appears to exist and the amount of force used is reasonable to affect the lawful purpose intended.
- **230.12 City of St. Paul Civil Service Rules, 16.B**
 - (3) Culpably negligent brutality to a person in custody;
 - (4) Willful violation of any of the Civil Service Rules;
 - (5) Conduct unbecoming a city employee;
 - (11) Incompetent or inefficient performance of the duties of the employee's position.
- **150.02 Conduct Unbecoming a Police Officer** - An officer must, at all times, conduct himself/herself in a manner which does not bring discredit to him/her, the department or the City...when an officer exceeds authority by unreasonable conduct, s/he thereby violates the sanctity of laws sworn to uphold.
- **150.03 Respect for Constitutional Rights** - No person has a constitutional right to violate the law nor may a person be deprived of constitutional rights because they are suspected of having committed a crime.
- **160.02 Individual Dignity** - Recognition of individual dignity is vital in a free system of law. Just as all persons are subject to the law, all persons have a right to dignified treatment under the law, and the protection of this right is a duty which is as binding to the department as any other.
- **170.01 Police Action Based on Legal Justification** - ...an officer must act reasonably within the limits of authority as defined by statute...thereby ensuring that the rights of individuals and the public are protected. Your actions constitute a serious breach of conduct; violation of departmental general orders; show extremely poor judgment and incompetence; and show you are not fit

to remain a police officer. You have engaged in conduct that undermines your competency and ability to perform your duties as a Saint Paul Police officer and the department's ability to maintain public safety.

In addition, the City claims that the Grievant violated Police Department Policy 150.04 as follows:

150.04 Officer Response to Resistance and Aggression

In a complex urban society, officers are called upon to defend themselves and others, and control individuals to manage volatile situations, effect arrests or prevent escape, enforce court orders, prevent persons from harming themselves or others, and protect public safety. Officers have many options when responding to an individual's resistance and aggression; these may include officer presence, de-escalation, and non-lethal, less than lethal, or lethal response to resistance and aggression options.

While the use of reasonable physical response to resistance and aggression may be necessary in situations which cannot be otherwise controlled, physical response to resistance and aggression may not be resorted to unless other reasonable alternatives have been exhausted or would clearly be ineffective under the particular circumstances. Physical response to resistance and aggression is permissible in situations in which the events give rise to a reasonable belief the officer or others may be harmed. Personnel will use only the response to resistance and aggression necessary to affect lawful objectives.

The Employer has the right under Article 5, Employer Authority, of the Collective Bargaining Agreement to promulgate the above work rules/policies ("policies") in order to direct the conduct of bargaining unit members of the Police Department. These policies are reasonably related to the lawful, efficient and safe operation of the Police Department.

While all of the above Police Department Policies and St. Paul Civil Service Rules maybe applicable to some extent to the instant incident, the City has placed greater emphasis on Police Department Policies 246.00 and 246.01, which directly address appropriate use of force, to sustain their position. General Order 246.00 requires that

[a]n Officer's response to an individual's resistance and aggression must be objectively reasonable and necessary and based on the totality of the circumstances, including the severity of the crime, whether the individual poses an immediate threat to the safety of [Grievant] or others, and whether the individual is actively resisting arrest or attempting to evade arrest. The reasonableness of an officer's response will be based on the perspective of a reasonable officer on the scene.

(City Exhibit #14, p. 1). General Order 246.01 further defines reasonably necessary force to mean that no reasonably effective alternative appears to exist and the amount of force used is reasonable to achieve the lawful purpose intended. (City Exhibit #14). Under these Police Department Policies, the Grievant's use of force would have been permissible only if it was both reasonable and necessary and there was no reasonably effective alternative, as determined from the perspective of a reasonable Officer under the circumstances.

The Police Department's Use of Force Policies, which go to the heart of policing, are built on a foundation of constitutional and statutory standards that apply to every peace officer's use of force in the State of Minnesota. The Fourth

Amendment's prohibition against unreasonable seizures, as articulated in Graham v. Connor, 490 U.S. 386,395 (1989), requires that police officers use force that is reasonable according to the unique facts and circumstances of each individual encounter. (City Addendum Exhibit F). The factors that determine whether force is reasonable are: the severity of the crime; whether the suspect poses an immediate threat to the safety of the officers or others; whether the subject is actively resisting arrest; and whether the subject is attempting to evade arrest by flight. Graham, 490 U.S. at 396. Under Graham, officers must have an objectively reasonable belief that their force is justified. Id. The Graham factors are more specifically articulated in the following commonly used considerations: the conduct and behavior of the subject at the time of the incident; the relative age, size, strength, and physical capability of the officer compared to the subject; any opportunities for, and attempts by, the officer to de-escalate the situation; force options available to the officer; the experience of the involved officer, including years of service, types of assignments, and training; the number of officers present; presence (or likely presence) of drugs or alcohol used by the subject; mental status of the subject if known or if probable; weapons in possession, or within reach of the subject, and threats of violence (if any) made by the subject;

seriousness of crimes suspected to have been committed by the subject; the subject's criminal history if known; whether it was reasonable to believe that the subject was, or would present, a danger to the public if he or she escaped, and the risk of escape; the manner and degree in which the subject resisted arrest or otherwise used force against the officer; and the types of restraints used on the subject. International Association of Chiefs of Police, 2016, Officer-Involved Shootings: A Guide for Law Enforcement Leaders, Washington, DC: Office of Community Oriented Policing Services, p. 21, (City Addendum Exhibit G).

As a licensed peace officer under the laws of the State of Minnesota, the Grievant must also adhere to statutory standards of conduct. The Grievant's peace officer license grants him the power of arrest. Minn. Stat. § 626.84. But this power is not unlimited. Minnesota's reasonable use of force statute only authorizes peace officers to use force that is reasonable to achieve a lawful objective. Minn. Stat. § 609.06. State law requires that "[a] peace officer making an arrest may not subject the person arrested to any more restraint than is necessary for the arrest and detention." Minn. Stat. § 629.32. Finally, state law only authorizes the use of force by a peace officer to arrest after the subject flees or resists. Minn. Stat. § 629.33.

In summary, the applicable Police Department Policies, St. Paul Civil Service Rules, the United States Supreme Court decision in Graham, published commonly used excessive force considerations, and statutory limits of a peace officer are clear in this case. As a St. Paul Police Department Officer, the Grievant had an obligation to use force only when reasonable and necessary and to use no more force than what was required to make a lawful arrest.

Article 28, Discipline, Section 28.1 of the Collective Bargaining Agreement states that "[t]he Employer will discipline employees for just cause only and in accordance with the concept of progressive discipline." Section 28.1 articulates that "[t]he Employer may discipline employees in any of the forms listed below: Oral reprimand, Written reprimand, Suspension, Demotion, Discharge."

It is clear from this Contract language that the Employer does not necessarily need to follow progressive discipline starting with an oral reprimand if the conduct committed by an Officer is so egregious to warrant a higher form of discipline, including termination for a first offense. Consequently, the paramount issue in this case is whether the Grievant used excessive force on June 24, 2016 when he kicked Mr. Baker three times in the torso while attempting to handcuff and arrest Mr. Baker, which if proven by the evidence, would

justify the Grievant's discharge for just cause under Section 28.1.

At first blush, the video of K-9 Falco grabbing and biting Mr. Baker, twisting Mr. Baker around in a circle and then having the Grievant administer two consecutive kicks to Mr. Baker's torso and then waiting about 30 more seconds to administer another kick to Mr. Baker's torso would be proof alone to terminate both Officer Ficcadenti for his mishandling of his K-9 and for the Grievant kicking Mr. Baker three times. While this video might "shock the conscious" of most citizens, most of them are not versed in the role of arbitration, like the courts, to provide due process and reason to both the accused and the accuser.

It is important at the onset of this case to accurately state the setting of the events surrounding the incident that occurred on June 24, 2016 before the Grievant administered the kicks to Mr. Baker. The record discloses that the Grievant faced a tense, uncertain and rapidly evolving situation involving an uncooperative individual, whom he believed had a firearm, as stated by dispatch. As a result, the Grievant believed that Mr. Baker posed an immediate threat to the safety of the Officers at the scene. The Grievant responded to the scene as it was presented to him. The Grievant was not present during the time that Mr. Baker got out of his vehicle and

interacted with Officer Ficcadenti. He was not present when Officer Ficcadenti released his K-9. What the Grievant believed to be true when he arrived on the scene was that Officer Ficcadenti and his K-9 partner were doing everything in their power to arrest and secure a person who had been observed carrying a firearm. While it is true that Mr. Baker never had a firearm, neither Officer Ficcadenti nor the Grievant knew this to be a fact at the time the K-9 was deployed or during the three kicks administered by the Grievant. It was not until Mr. Baker quit resisting and was handcuffed by the Grievant did everyone, for the first time, learn that Mr. Baker had no firearm on him while he was being bite by the K-9 and kicked by the Grievant.

With this background in mind, there are several reasons why the discharge of the Grievant was not for just cause under Section 28.1. The City could not point to any specific Police Department Policy that expressly prohibited the use of kicks to the torso area as a means to achieve compliance from an uncooperative arrestee, such as Mr. Baker. Numerous witnesses testified at the hearing that it has been only recently, beginning in early 2017, that the City is now conducting in-service training sessions and instructing Officers that kicking an individual who is on the ground is no longer an acceptable use of force.

The fact that there was no Police Department Policy prohibiting the use of kicks does not automatically allow the Officer to engage in this activity. The determination of whether the Grievant used excessive force by kicking Mr. Baker three times in the torso must be determined by the guidelines contained in Police Department Policies 246.00 and 246.01, as well as the standards set forth in Graham.

Although the Arbitrator has rendered decisions on numerous alleged excessive force cases involving local, state, federal, and international law enforcement agencies, he does not claim to be an "expert" in this field, just an Arbitrator with extensive experience in this subject matter. The Union elected to have two "experts" testify on behalf of the Grievant, both stating that what they observed on the video, along with receipt of certain documentation entered into the record, show that the actions of the Grievant by kicking Mr. Baker three times in his torso was not excessive and does not warrant his discharge.

One of the Union's use of force expert witnesses was Sergeant Cory Tell, who actually trained the Grievant during the time the Grievant attended the police academy in 2013. Sergeant Tell testified that he was a use of force instructor for six different City police academies, and was the lead instructor for five of those academies. His curriculum vitae speaks to his training and experience as a use of force

instructor. (Federation Exhibit #15). Sergeant Tell viewed the Grievant's "red man" training scenario, as well as the video of what occurred on June 24, 2016, as part of his preparation for appearing as a witness in this case. Sergeant Tell stated that the Grievant's actions during Mr. Baker's arrest were well within his training, and the training of other cadets, and stated that at the time the Grievant was trained in the 2013 Academy kicks were authorized as a use of force option. In fact, all of the Officers who testified for the Federation confirmed that they have been trained at the academy to use kicks as a use of force option.

Sergeant Tell also confirmed that the torso (midsection) area was never construed to be a "non-approved target area," as alleged by the City. In fact, it appears that with regard to the use of kicks and perhaps with regard to other use of force techniques, the phrase "non-approved target area" seems to have appeared for the first time in the Grievant's termination letter. This phrase does not appear anywhere in the training materials for the 2013 Academy, or anywhere else in other training materials. (Federation Exhibits #3, #3-1, #3-2).

The Federation also presented the testimony of Stuart Robinson, a very well-known, highly-qualified and well-respected use of force expert who has been consulted on numerous occasions by the City for his opinion on use of force cases. Mr. Robinson

has been recognized as a use of force expert in both state and federal court. (Federation Exhibit #7). He performed a thorough review of the entire investigation in this case, including reviewing the video the incident on June 24, 2016. He testified that the Grievant's use of force during Mr. Baker's arrest was reasonable under both the City's use of force policies and was consistent with the Graham reasonable conduct standard.

The City did not present any use of force expert or trainer, internal or external, as part of their Internal Affairs investigation or at the hearing. The City rested its case on the testimony of Commander Julie Maidment and Officers Spencer and Dick. Commander Maidment, who appears to be a capable administrator, and who now is the Commander of the Training Unit, unfortunately had no previous experience at the 2013 academy or elsewhere as a use of force trainer. Any information she received regarding use of force and the use of kicks in particular had come from others.

As for Officer Dick and former-Officer Spencer, neither has experience as a use of force instructor, and both clearly were bias against the Grievant, as well as bias against other less experienced Officers in the Eastern District during the early part of 2016. It is telling that neither of these Officers expressed their "concerns" related to the evening of

June 24th in their reports, or in their statements to Internal Affairs. To uphold the Grievant's termination based on the fact that these two Officers "were not completely comfortable" with the force used against Mr. Baker on June 24, 2016, and have not been use of force trainers, would be without merit.

With regard to other use of force options, the Grievant testified that using a Taser when a K-9 has been deployed is forbidden. He also testified that he did not use ASR (mace) because he could not handle both his handcuffs and the ASR canister at the same time, and wanted to be prepared with handcuffs the moment Mr. Baker complied; and 2) he was not sure what the dog's reaction to the ASR would be.

It is reasonable and understandable that no one wants to be bitten by a K-9. In fact, the Grievant and Sergeant Jason Brodt, a supervisor in the K-9 Unit, both testified that there have been instances where Officers have been accidentally bitten by K-9s and permanently scarred by the bites.

Sergeant Tell also corroborated the Grievant's testimony that a Taser could not be used in the presence of the K-9, and that ASR was not a realistic option in this case. He recounted a case where a K-9 had nearly bitten him and had ripped the watch off his wrist after ASR was used near the K-9.

It is noteworthy that the training received by the Grievant with respect to a K-9 has been minimal, at best. He received a

few minutes of instruction with regard to this issue four years ago as part of a half day K-9 training at the state fairgrounds, and has had none since that date. (Federation Exhibit #3-1). This training instructed Officers to follow directions from the K-9 handler, and to refrain from petting a K-9 or getting too close to its face. The Grievant followed this training during Mr. Baker's arrest. Other Officers testified at the hearing that they had no additional K-9 training following their academy training. Officers who were members of the SWAT team testified that they received more in-depth K-9 training than Patrol Officers.

Another important reason not to terminate the Grievant is Officer Ficcadenti's admission that his directives to other Officers, including the Grievant, could have been stronger, and that his handling and control of the K-9 during this arrest could have been better. The City decided on its own volition to suspend Officer Ficcadenti for 30 days for his role in the arrest of Mr. Baker, but he was given no opportunity to contest the suspension if he wished to avoid termination, while terminating the Grievant.

The City claims that the reasons for the different penalties for the same incident was that the Grievant's misconduct was more egregious and that Officer Ficcadenti admitted that his role in the encounter was wrong, and accepted

responsibility and significant discipline. By contrast, the City states that the Grievant has refused to acknowledge that he committed any wrongdoing and continues to assert that his actions were reasonable and necessary under the circumstances.

It is difficult to believe that being dragged on the pavement in circles by a K-9 who is biting your leg is less traumatic and painful than being kicked in the torso three times. Thus, whether or not the Grievant's misconduct was more or less egregious than the misconduct of Officer Ficcadenti misses the point. Both of their actions were egregious and not distinguishable to warrant one receiving a 30-day suspension and the other termination. They both deserve to be penalized for their actions, but the penalty should be the same for their misconduct.

The fact that the Grievant stated to Police Chief Axtell during their November 7, 2016 meeting that he was "sorry for the circumstance" is a general apology. While the Grievant did not apologize for the harm caused by kicking Mr. Baker, there was no evidence that had he made this specific apology that Police Chief Axtell would have only suspended the Grievant rather than terminate him.

Another important reason to suspend the Grievant for 30 days is that this is the exact recommendation of the PCIARC. The function of the PCIARC is to provide a "check and balance"

system for the Police Department and the citizens of St. Paul. The PCIARC, which consisted of seven members in this incident, voted 6-0 (one member abstained) that the Grievant receive a 30-day suspension for his actions on June 24, 2016. If the PCIARC is to have any meaningful purpose in the community, the Police Department ought to give their recommendations considerable or absolute weight unless the PCIARC was bias or discriminatory in their recommendations to the Police Department. This was not the case here. The PCIARC made a recommendation with respect to the Grievant that was free of bias and was reasonably related to the information that was received by representatives from the Police Department.

There was evidence presented by the Federation showing that other Officers in the past that deployed kicks to suspects were not discharged, but received a lesser discipline or no discipline. They include the following incidents:

IAU File #12 - 0506: Three Officers who administered kicks to the head of a suspect during the execution of a warrant were issued suspensions rather than terminations and remain employed with the Department today. One of these Officers, Adam Bailey, testified at the hearing. Officer Bailey has previously been shot in the line of duty, is a decorated Officer, and today serves on a special safe-streets assignment with the Police Department.

IAU File #13 - 0304: Two officers, Officer Adam Bravo and Officer Kou Yang, administered kicks to achieve compliance from an arrestee, specifically Officer Bravo used three kicks to the arrestee's right side, while the arrestee was on the ground. A three-day suspension occurred. Both of these Officers remain employed by the Police Department.

CN 15071661: Reports from an April 10, 2015, arrest executed by Officers Palkowitsch and Nowicki where Officer Palkowitsch delivered a kick with his right foot, as well as a knee strike, to the left middle torso area while the suspect was on the ground. Officer Nowicki also delivered knee strikes to the arrestee's midsection. No known discipline was administered to the Officers.

CN 16003881: Reports from an arrest at 1069 Lafond Avenue in January 2016, where Officer Palkowitsch administered kicks to the shoulder area of an arrestee to obtain compliance. Officer Nathan Smith utilized a kick to the head of another suspect, and Officer Marshall Titus utilized a kick to a suspect left side/rib area. The Officers involved in this arrest were praised by their Senior Commander, Matt Toupal.

CN 16 - 217 - 334: Officer Titus delivered two closed fist strikes to an arrestee's torso and Officer Smith delivered two strong sidekicks to the arrestee's midsection to gain compliance for an arrest. Both were praised by Commander Steve Anderson.

(Federation Exhibit #8). It is a well-established arbitral principle that employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variation in assessing punishment. In some of these comparison cases above, the utilization of kicks to even areas such as the head has not been questioned, and in fact has been praised. It should be noted, however, that none of these cases involved a K-9, which is distinguishable from the instant case.

Finally, the Grievant has been a very effective law enforcement Officer in the City of St. Paul as shown by his performance reviews and should be given a chance to serve in

that capacity once again based upon the totality of the circumstances that transpired on June 24, 2016. He testified that he will follow the new Police Department Policy forbidding Officers from kicking suspects while they are on the ground. This Policy, unfortunately, did not exist at the time of Mr. Baker's arrest.

AWARD

The Grievant's termination is reduced to a 30-day suspension without pay. He is entitled to be reinstated to his former Police Officer position and be made whole in all respects, including, but not limited to, back pay and other benefits (minus 30-day suspension period).

The Grievant's outside earning and unemployment benefits, if any, shall be deducted from the back pay award. The City is entitled to receive and review all documents indicating the Grievant's source(s) of income and the amount of income during this back pay period.

Richard John Miller

Dated April 3, 2017, at Maple Grove, Minnesota.