

IN THE MATTER OF ARBITRATION BETWEEN

)	BMS Case No. 18-PA-0250
)	
CITY OF DULUTH, DULUTH, MINNESOTA)	Issue: Use of Force/Discharge
)	
(“City” or “Employer”))	Site: Duluth, Minnesota
)	
&)	Hearing Dates: February 27 & 28, 2018
)	
DULUTH POLICE UNION, LOCAL NO. 807)	Briefing Date: April 6, 2018
)	
(“Union”))	Award Date: June 22, 2018
)	
)	Arbitrator: Mario F. Bognanno
)	

I. JURISDICTION

The parties to the above-captioned matter are the City of Duluth, Duluth, MN (“City” or “Employer”), and Duluth Police Union, Local No. 807 (“Union”). The parties are signatories to a Collective Bargaining Agreement (“CBA”). (Joint Exhibit A) At all times material to the present matter the CBA was in full force and effect.

The Grievant in this matter is Adam Huot. On February 4, 2008, Mr. Huot was hired by the Duluth Police Department as a Police Officer (“PO”) assigned to the Patrol Division. (Joint Exhibit L) Previously, from May 2006 through January 2008, Mr. Huot was a PO for the City of Henderson, Henderson, MN. That was his first PO job subsequent to graduating in 2005 from the University of Minnesota-Duluth with a BA in Criminology and attending the Fond du Luc Tribal and Community College where he was certificated in Minnesota POST skills program. (Tr., Vol. 2, pp. 308-309)

A nine (9) year employee, PO Huot’s employment with the Duluth Police Department, City of Duluth, was terminated on June 5, 2017. (Joint Exhibit E) The event that resulted in his termination occurred on the night of May 20, 2017. Video and audio recordings of same were captured by the

body cameras of the POs who were dispatched to the scene of the event. The referenced POs are Morgan Cekalla, Beau Hughes, and Adam Huot. Their individual body camera recordings are in evidence and they are marked as City Exhibit 16.1/Union Exhibit 2 (Cekalla's Body Camera); City Exhibit 16.2/Union Exhibit 3 (Hughes' Body Camera); and City Exhibit 16.3/Union Exhibit 4 (Huot's Body Camera). Consequently, the material facts bearing on the events of May 20, 2017 are largely uncontested.

The Duluth Police Department's duty roster for May 20, 2017 shows that from 1800-to-0600 PO Cekalla, a six and one-half (6 ½) year employee who, *inter alia*, was a Field Training Officer ("FTO"), and PO Hughes, a rookie officer, were assigned to patrol Duluth's downtown area.¹ (Union Exhibit 5) That same night, PO Huot, working the 1900-to-0700 shift, was also assigned downtown patrol duties along with PO Jayson Dardis, who reported-off sick. (Id.)

On May 20, 2017, at approximately 9:30 p.m., POs Huot, Cekalla, and Hughes were dispatched to a specific stairwell location in Duluth's skywalk system. Their charge was to check on the welfare of two (2) men later identified as Sean Neveaux and Brandon Houle (hereafter "subjects"). The subjects were known alcoholics.² Mr. Neveaux was "hanging out," "... sitting on the stairs, head slouched down," and Mr. Houle was "lying down," either "sleeping" or "passed out." (Tr., Vol. 1, p. 32, and p. 67; Tr., Vol. 2, pp. 317-318) PO Hughes awakened the men, directing them

¹ At the time, PO Hughes was a Phase 4 recruit. He was in his final four (4) weeks of rookie "training" before assuming solo law enforcement responsibilities. (Tr., Vol. 1, pp. 27-28 and pp. 31-32) On the evening in question, PO Hughes was allowed to "... take the brunt of the calls," and PO Cekalla was "... there as backup..." (Tr., Vol. 1, p. 68)

² PO Cekalla testified that he had "... a fair number of dealings ..." with Mr. Houle whom he characterized as being "homeless," "excitable," and "kind of loud," but not a "safety risk." (Tr., Vol. 1, pp. 29-30) PO Huot's agreed with PO Cekalla's characterization of Mr. Houle: He was "never violent," "very loud, kind of in- your-face," and "just kind of taunting toward the police." (Tr., Vol. 2, pp. 315-316)

to move along and, without incident, the subjects left the skywalk. (Tr., Vol. 1, pp. 32-33; Tr., Vol. 2, p. 318)

An hour or so later both squads responded to a 911 call about trespassers in the Tech Village parking ramp. The latter, located adjacent to Duluth's skywalk system, is private property. By the time the POs arrived at the scene, the alleged trespassers had walked into the skywalk system: The intruders were Messrs. Neveaux and Houle. (Tr., Vol. 1, p. 33; Tr., Vol. 2, pp. 318-319) With body cameras activated throughout the unfolding of subsequent events, the three (3) POs walked down a skywalk corridor toward the subjects. The following description of what transpired during this second encounter with the subjects is based on the Arbitrator's multiple viewings of the POs' body camera recordings:

- Seeing the approaching POs, Mr. Houle shouted "Holy fuck!" (City Exhibit 16.3, Huot's Body Camera, 00:36) As the senior officer, PO Huot assumed the role of "lead" officer. He told the subjects they had trespassed, which Mr. Houle challenged, asserting they "were walking." (Id., 00:40-00:45) Speaking in a calm tone of voice, PO Huot advised the subjects to "... find somewhere else to go." (Id., 01:37) Then, Mr. Houle stated: "I'm looking for my girlfriend." (Id., 01:49) PO Cekalla suggested he call her to ask that she pick him up. (Id., 02:07-02:10) This encounter and these exchanges occurred within approximately two and one-half (2½) minutes.
- Next, PO Huot told the subjects they would be mailed "tickets for trespassing." (Id., 02:07-02:10) Mr. Houle responded, "For what?" PO Huot repeated, "For trespassing." This exchange was repeated three (3) times, after which PO Huot more fully explained to the subjects that the parking ramp is private property; that its security guard called 911, reporting them as trespassers, which was why citations would be mailed. (Id., 02:07-03:05) At this point, Mr. Houle became provocative. He stated, "What about disorderly conduct and all that shit?" PO Huot's replied, disorderly conduct "... does not seem to apply." (Id., 03:05-03:10) "You'll be ticketed, now walk away," to which Mr. Houle said, "What the fuck did I do?" Again, PO Huot urged, "Walk away now." (Id., 03:18-03:24) Next, in a loud and acerbic tone of voice, Mr. Houle declared, "I want to go to jail right fucking now!" (Id., 3:35-3:40) Hearing that, POs Huot and Hughes handcuffed Mr. Houle: Hands behind his back. These inter-party exchanges occurred in slightly more than two (2) minutes.
- Mr. Neveaux walked away from the scene shortly after Mr. Houle was handcuffed and just as POs Huot and Hughes begin to walk Mr. Houle down a skywalk corridor toward the Tech

Village parking ramp where their squad cars were parked. Then, within 45 seconds of said walk, Mr. Houle fell to the ground. PO Hughes remarked: "Really!" (Id., 05:25) While lying on the corridor floor, Mr. Houle uttered, "I ain't gonna to make it easy for you guys." (Id., 05:27-05:29) Within 10 seconds, PO Huot, saying nothing, reaches down, grabbed the handcuff's chain and, walking quickly, began dragging Mr. Houle down the corridor, arms behind his back. Walking more slowly, PO Hughes followed PO Huot down the corridor. Within seconds, PO Cekalla directed PO Hughes to "Pick him up, help him." (City Exhibit 16.1, Cekalla's Body Camera, 05:30) However, PO Hughes was too far back to be of immediate help. As PO Huot approached the skywalk elevator leading up to the parking lot's landing, he dragged Mr. Houle through a doorway where his head struck the door's metal frame. (Id., 05:41) At that point, PO Cekalla shouted, "Adam." (Id., 05:42) It took PO Huot approximately 30 seconds to drag Mr. Houle approximately 100 feet to the elevator. When the elevator arrived, POs Huot and Hughes helped Mr. Houle to his feet, escorting him into the elevator. Then, holding him under his arms, the three (3) exited the elevator, and the POs walked Mr. Houle to the Tech Village parking ramp. As they did so, Mr. Houle, intoxicated, plodded along, head and shoulders slouched downward, sometimes mumbling inaudibly, and dragging his feet. At one point he stumbled, almost to his knees, PO Huot said: "Brandon, grow the fuck up, right now" and, moments later, after Mr. Houle was again walking, he said, "You're such a child." (Huot's Body Camera, 07:44-07:51). From the time, Mr. Houle was initially handcuffed to the time he was escorted to the parking ramp approximately three and one-half (3½) minutes had elapsed.

From start to finish, the above set of bulleted events transpired in fewer than ten (10) minutes.

Once at the parking ramp, Mr. Houle was taken by ambulance to a local hospital. PO Huot followed in his squad car. While at the hospital, PO Huot advised the emergency room staff to check Mr. Houle's head and wrists for possible injuries. (Tr., Vol. 2, p. 333)

The Police Department's May 21, 2017 audio recording of its interview with Mr. Houle captures his recollections about the previous night's events. Among his statements were the following: His relationship with the police is "friendly" (City Exhibit 16.8, PO McShane's Interview of Mr. Houle, 1:59); He was "toasted" (Id., 6:25); "... the cuffs were too tight – "My wrists were all twisted up ... " (Id., 7:05); "They dragged me like a dog ... " (Id.,7:14); and "It's not like they damaged me 100% ..." but "he [PO Huot] was just a little excessive." (Id., 14:55)

Subdivision 5 of the Minnesota State Statute 626.9, Police Officer Discipline Procedures Act, requires that before a PO is asked to respond to a complainant's allegation(s), it (they) must be made known to the PO. On May 23, 2017, Mike Ceynowa, Lieutenant, Duluth Police Department, gave PO Huot a signed complaint that read:

On 05/20/17 under ICR #17107371 officers were dispatched to the report of trespassers in the Tech Village Ramp. Officers located two individuals, one identified as Brandon Houle was detained and was dragged by officer Huot down a hallway while handcuffed and brought to St. Luke's on a medical hold.

(Joint Exhibit D) *Apropos* this complaint, Mike Tusken, Chief, Duluth Police Department, convened a *Loudermill* hearing on June 1, 2017. (City Exhibit 16.4) On June 5, 2017, Chief Tusken sent a memorandum to PO Huot stating: (1) the referenced complaint was investigated by the Department; (2) your actions violated the Duluth Police Department's Policy 300, Use of Force, and Policy 323, Code of Conduct; and (3), consequently, your employment is terminated. (Joint Exhibit E)

On June 21, 2017, PO Tom Maida, President, Duluth Police Union, Local 807, wrote to Chief Tusken, challenging PO Huot's termination. Therein, he maintained, the City's action violated Section 34.1 of the CBA, which provides:

- 34.1 a. Any Employee who has completed their initial probationary period may be suspended without pay, *discharged or disciplined only for just cause.*
- b. *Discipline shall be corrective and progressive.* Except for cases of serious offense, any suspensions, demotions or removal action shall be preceded by a written warning.

(Joint Exhibits A and F; Emphasis Added) Maintaining that PO Huot was termination without just cause, PO Maida initiated a grievance *per* Article 39, Grievance Procedure, in the CBA. As remedy, he asked that PO Huot be reinstated and made whole for lost wages and benefits. (Id.)

On July 6, 2017, Chief Tusken replied to the grievance filed by PO Maida. (Joint Exhibit G) Chief Tusken reaffirmed his decision to terminate PO Huot's employment. The Grievant's violation of Policy 300, Use of Force, and Policy 323, Code of Conduct, were sufficient and just grounds for his termination. Further, he opined, PO Huot's misconduct violated the Duluth Police Department's "social contract" with the public. (Id.)

On August 9, 2017, the Huot grievance was moved to Step 2 of the Grievance Procedure, meaning that it was advanced to David W. Montgomery, Chief Administrative Officer, City of Duluth. (Joint Exhibit H) In a letter dated September 21, 2017, Mr. Montgomery remarked that he and the Union had met on August 28, 2017 to discuss the Huot grievance. (Joint Exhibit J) Still, he continued, after giving the May 20, 2017 incident due consideration, reviewing the Grievant's prior discipline for violating the City's use of force policies and as well as complaints about same, and after going over his training record, the City determined "... that it is not in the best interest of the City of Duluth, the Duluth Police Department, or the general public ..." to reinstate PO Huot's employment. (Id.) In reply, on October 2, 2017, *per* Article 39.3 in the CBA, the Union referred the matter to Arbitration. (Joint Exhibit K)

In an e-mail dated October 6, 2017, the undersigned was advised that he had been selected as the disputed matter's Arbitrator. The case was heard on February 27 and 28, 2018, in Duluth, Minnesota. Appearing through their designated representatives, the parties received a full and fair hearing. Said representatives affirmed that arbitrability was not an issue, the matter was properly before the Arbitrator for a final and binding determination, and there was no need to redact/disguise the names of concerned parties. (Tr., Vol. 1 pp. 11-12) Further, it was agreed that while PO Huot and Chief Mike Tusken would not be sequestered, all other witnesses would be

sequestered until each had testified. (Id.) All witnesses were sworn and cross-examined. Exhibits were accepted into the record, and a verbatim transcription of the hearing was made. On April 6, 2018, the parties filed timely post-hearing briefs. Thereafter, the matter was taken under advisement.

II. APPEARANCES

For the City:

Nathan N. LaCoursiere	Assistant City Attorney, City of Duluth
Morgan Cekalla	Patrol Officer, Duluth Police Department
Beau Hughes	Patrol Officer, Duluth Police Department
Timothy Jazdzewski	Lieutenant, Duluth Police Department
Robert Shene	Lieutenant, Duluth Police Department
David Montgomery	Chief Administrative Officer, City of Duluth
Michael T. Tusken	Chief, Duluth Police Department

For the Union:

James P. Michels	Attorney-at-Law
Adam Huot	Grievant
Dana Letica Rhodes	Patrol Officer, Duluth Police Department

III. RELEVANT DULUTH POLICE DEPARTMENT POLICIES

POLICY 300 - DULUTH POLICE DEPARTMENT USE OF FORCE

300.1 PURPOSE AND SCOPE

The Duluth Police Department values and respects the sanctity of every life and identifies our role as a lifesaving organization. When officers are engaged in law enforcement activities, there is an immense responsibility that comes with the authority to use reasonable force, including deadly force, in overcoming resistance and/or protecting the public. As such, we have policies, procedures, and training which encourages tactics and strategies to gain voluntary compliance. It is the Duluth Police Department's expectation officers will make tactically sound, reasonable use of force decisions which demonstrate our value of every life.

300.1.1 Definitions

Definitions related to this policy include:

Deadly Force – Force reasonably anticipated and intended to create a substantial likelihood of causing death or great bodily harm.

Force – The application of physical techniques or tactics, chemical agents or weapons to another person. It is not the use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

300.2 POLICY

The use of force by law enforcement personnel is a matter of critical concern, both to the public and to the law enforcement community. Officers are involved on a daily basis in numerous and varied interactions and, when warranted, many use reasonable force to carry out their duties.

Officers must have an understanding of, and true appreciation for, their authority and limitations. This is especially true with respect to overcoming resistance while engaged in the performance of law enforcement duties.

The Department recognizes and respects the value of all human life and dignity without prejudice to anyone. Vesting officers with the authority to use reasonable force and to protect the public welfare requires monitoring, evaluation and a careful balancing of all interests.

300.2.1 Duty To Intercede

Any officer present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. An officer who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a superior.

300.3 USE OF FORCE

Officers shall only use 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 reasonably appears necessary to a particular situation, with limited information and in circumstances that are tense, uncertain and rapidly evolving.

Given that no policy can realistically predict every possible situation an officer might encounter, officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in every incident.

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the

Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions that they are confronting. In such circumstances, the use of any improvised device or method must nevertheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

Nothing in this policy requires an officer to retreat or be exposed to possible physical injury before applying reasonable force. However, this policy does recognize that a tactical retreat may be reasonable given the totality of the circumstances.

300.3.1 Use of Force to Effect an Arrest

An officer may use reasonable force (Minn. Stat. §609.06 and Minn. Stat. § 629.33):

- (a) In effecting a lawful arrest.
- (b) In the execution of a legal process.
- (c) In enforcing an order of the court.
- (d) In executing any other duty imposed by law.
- (e) In preventing the escape, or to retake following the escape, of a person lawfully held on a charge or conviction of a crime.
- (f) In restraining a person with a mental illness or a person with a developmental disability from self-injury or injury to another.
- (g) In self-defense or defense of another.

An officer who makes or attempts to make an arrest need not retreat or desist from his/her efforts by reason of resistance or threatened resistance of the person being arrested; nor shall such officer be deemed the aggressor or lose his/her right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

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 (sic) 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.

300.3.3 Pain Compliance Techniques

300.4 DEADLY FORCE

300.4.1 Shooting at or from Moving Vehicles

300.5 REPORTING THE USE OF FORCE

Any use of force greater than handcuffing a cooperative person by a member of this department shall be documented promptly, completely and accurately by an appropriate narrative report, and Subject Resistance Report.

The officer should articulate the factors perceived and why he/she believed the use of force was reasonable under the circumstances. The purpose for the Subject Resistance Report is to collect data for training, resource allocation, analysis and other related purposes.

300.5.1 Notification to Supervisors

Supervisory notification shall be made as soon as practicable following the application of force in any of the following circumstances:

- (a) The application caused a visible injury.
- (b) The application would lead a reasonable officer to conclude that the individual may have experienced more than momentary discomfort.
- (c) The individual subjected to the force complained of injury or continuing pain.
- (d) The individual indicates intent to pursue litigation.
- (e) Any application of an Electro-Muscular Disruption Technology (EMDT) device or control device.
- (f) Any application of a restraint device other than handcuffs, shackles or belly chains.

- (g) The individual subjected to the force was rendered unconscious.
- (h) An individual was struck or kicked.
- (l) An individual alleges any of the above has occurred.

300.6	MEDICAL CONSIDERATION	...
300.7	SUPERVISOR RESPONSIBILITY	...
300.8	TRAINING	...

(Joint Exhibit B; Immaterial text designated as “ ... ”)

POLICY 323 - DULUTH POLICE DEPARTMENT CODE OF CONDUCT

323.1 Purpose and Scope

This policy establishes standards of conduct that are consistent with the values and mission of this department and are expected of its members. The standards contained in this policy are not intended to be an exhaustive list of requirements and prohibitions but they do identify many of the important matters concerning member conduct. Members are also subject to provisions contained throughout this manual as well as any additional guidance on conduct that may be disseminated by the Department or member’s supervisors. This policy incorporates the elements of the Peace Officer Standards and Training Board (POST) Model Policy regarding the professional conduct of peace officers. However, this policy shall apply to all employees of this department (including volunteer, part-time and auxiliary employees).

The provisions of this policy are in addition to collective bargaining agreements or any other applicable law (see generally Minn. R. 6700.1500).

The Department shall report annually to POST data regarding the investigation and disposition of cases involving alleged misconduct of officers (Minn. Stat. §626.8457, Subd.3).

323.2.1 Lawful Orders

Employees shall comply with lawful directives and orders from any supervisor or person in position of authority absent a reasonable and bona fide excuse. ...

323.3 CONDUCT THAT MAY RESULT IN DISCIPLINE

The following causes for disciplinary action constitute a portion of the disciplinary standards of this department. This list is not intended to cover every possible type of misconduct and does not preclude the recommendation of disciplinary action for specific action or inaction that is detrimental to efficient department service.

Employees shall conduct themselves, whether on-or-off-duty, in accordance with the Constitution of the United States, the Minnesota Constitution, and all applicable laws, ordinances and rules enacted or established pursuant to legal authority.

Employees shall refrain from any conduct in an official capacity that detracts from the public's faith in the integrity of the criminal judicial system. Police officials shall not, whether on or off duty, exhibit any conduct which discredits themselves or their department or otherwise impairs their ability, the ability of other officers, or the department to provide law enforcement services to the community.

Any of the following actions may be deemed sufficient cause for the discipline, discharge, suspension, demotion or removal of any employee:

...

(b) Activity that is incompatible with an employee's conditions of employment established by law or that violates a provision of any agreement or contract.

...

(e) Willful neglect of duty, including failure or refusal to perform a known mandatory, non-discretionary, ministerial duty of the office or employment within the time or in the manner required by law to perform (Minn. Stat. § 609.43(1)).

...

(g) Unreasonable and unwarranted violence to a person encountered or person under arrest.

...

(n) Any on-or off-duty conduct that any employee knows or reasonably should know is unbecoming a member of the Department or that is contrary to good order, efficiency or morale, disgraceful or that tends to reflect unfavorably upon the Department or its members.

323.3.1 Attendance ...

323.3.2 General Conduct

(a) Any failure or refusal of an employee to properly perform the function and duties of an assigned position.

...

(k) Failure of any employee to promptly and fully report activities on his/her part or the part of any other employee where such activities may result in criminal prosecution or discipline.

...

323.3.3 Discrimination, Oppression, Harassment or Favoritism

(a) Discriminate against, oppress or provide favoritism to any person because of ... race, ... , national origin, ...

(b) Discourteous, disrespectful or discriminatory treatment toward any member of the public or any member of this department.

...

323.3.4 Intoxicants ...

323.3.5 Performance

...

(p) Failure to take reasonable action while on-duty and when required by law, statute, resolution or approved Department practices or procedures.

...

(r) Exceeding lawful peace officer powers by unreasonable, unlawful or excessive conduct.

...

323.3.6 Safety ...

323.3.7 Security ...

323.3.8 Supervisor Responsibilities ...

323.3.9 Use of Influence ...

(Joint Exhibit C; Immaterial Text Designated as ...)

IV. ISSUE STATEMENT

The parties agreed to the following statement of the issue:

Did the City of Duluth have just cause to terminate the employment of Officer Adam Huot? If not, what is an appropriate remedy?

(Tr., Vol. 1, p. 13)

V. FACTS AND BACKGROUND

A. TESTIMONY BY THE CITY’S WITNESSES:

PO MORGAN CEKALLA: PO Cekalla was the City’s first witness. He testified that PO Huot was professional and is sync with standard procedures when he informed Mr. Houle of the trespassing charge brought against him and the consequence of same. (Tr., Vol. 1, pp. 36-37) However, after the subject fell to the floor – expressing passive resistance – PO Huot mishandled the situation. He could have been talked into getting up, or POs Huot and Hughes could have picked him up, or medics could have been called. (Id., pp. 38-40) Instead, PO Cekalla recounted, the Grievant reached down grabbed the chain on Mr. Houle’s handcuffs and began to drag him. PO Cekalla told PO Hughes to

“pick him up.” The subject’s arms were awkwardly positioned behind his back possibly straining his shoulder joints. Later, he shouted “Adam,” hoping that PO Huot would stop after the subject had struck his head against a doorframe. (Id., pp. 41-43) (Henceforth, this narrative will be referenced as the **Houle Incident**.)

The **Houle Incident** left PO Cekalla “shell shocked.” (Id., p. 47) He feared that PO Hughes, his Phase 4 rookie, might think this was the way to handle passive resistance. Later, throughout the remainder of the shift, he said that he and PO Hughes discussed what had transpired. PO Hughes was stressed: When first getting into their squad car “... he immediately let out a large sigh, you know, and he said, that fucking sucked.” PO Cekalla replied, “Yep.” (Id., pp. 48-49) The two (2) officers recognized that the dragging incident was a reportable incident. (Id., p. 50)

Later that night, PO Cekalla stated, PO Huot contacted him *via* the squad’s computer, and the three (3) met, car-to-car, for a brief conversation. PO Huot stated that he wanted to make sure that all were “... on the same page about what happened ...” PO Huot did not apologize for his conduct, nor acknowledge that it was inappropriate. (Id., pp. 51-52) Sometime after 2:00 a.m., PO Cekalla testified, he went back to HQ to view his body camera recording of the incident. After doing so, he contacted Lt. Jazdzewski, the supervisor on duty, recounting the **Houle Incident**. Next, he prepared an incident report. (Id., pp. 52-54) Last, PO Cekalla testified that he reported the incident because it was the right thing to do. He had never seen “... use of force taken to that level, I knew that it wasn’t right.” (Id., p. 55)

On cross-examination PO Cekalla acknowledged that during his car-to-car discussion with PO Huot, he did not state that he was upset about what had transpired. Further, he neither stated that

the **Houle Incident** should be reported nor that PO Huot owed both him and PO Hughes an apology. (id., p. 63)

PO BEAU HUGHES: Concerning the **Houle Incident**, he testified that PO Huot took the “lead,” while he assisted. After Mr. Houle became agitated, stating that he wanted to go to jail, he and PO Huot handcuffed him. Inexperienced, PO Hughes believed that he and PO Huot would escort the subject out of the skywalk and, possibly, send him to Detox. He did not believe that Mr. Houle would actually be jailed. Mr. Houle did not pose a safety threat. (Id., pp. 69-72)

PO Hughes testified that Mr. Houle’s collapse to the floor was, in his opinion, an expression of passive resistance. At the time, his initial thoughts were to let him lie there for a minute, establish communications and wait him out: A tactic learned in Crisis Intervention Training (“CIT”). Failing that, PO Hughes thought they could either call the medics or use a wheelchair. (Id, pp. 73-74) In actuality, after the subject said he was not going to make it easy on the two (2) of them, PO Hughes stated that PO Huot reacted immediately. He did not confer with colleagues. He grabbed the chain on Mr. Houle’s cuffs and began to drag him. PO Hughes testified that foremost on his mind was that he and PO Huot could have lifted and walked the subject out of the skywalk. He was shocked, he testified, and he did not know why PO Huot was dragging the subject: A tactic he not been taught while in recruit training. (Id., pp. 75-76) It happened so fast, he testified, that he was denied the opportunity to assist. (Id., p. 103)

After PO Cekalla directed him to “Pick up” the subject, PO Hughes testified he tried to catch up with PO Huot who was walking quite fast. Then, the subject hit his head on the doorway. After hitting his head, PO Huot did not stop, did not ask whether the subject was O.K. and he did not apologize to the subject. (Id., pp. 78-79) While standing at the elevator door, PO Hughes testified,

“... honestly I thought I was probably going to be losing my job;” and “... this was bad, I was part of it, you know, that might be it for me.”(Id., p. 80) After the incident, PO Hughes testified that he felt “Pretty rotten.” Further, he affirmed PO Cekalla’s testimony about the parties’ post-incident car-to-car conversation. He believed that he needed to report the matter to supervision, but PO Cekalla suggested he sleep on it, which he did. The next day, he discovered that PO Cekalla had reported the incident. Too, PO Huot did apologize to him for “... making him a part of it.” (Id., pp. 85-89)

Under cross-examination, PO Hughes, like PO Cekalla, testified that in general PO Huot’s conduct before and after the dragging incident was not the subject of criticism and, further, PO Huot did not lose his temper, hit or kick the subject. (Tr., p. 93) Nevertheless, PO Hughes stated: he could have done more to correct the incident; he had been trained to stop partners’ wrongdoings; and he was not disciplined as a result of the **Houle Incident**. (Id., pp. 94-97) Continuing, PO Hughes testified, he did not believe that the incident had been made public. (Id., Tr. p. 99)

LT. TIMOTHY JAZDZEWSKI: As a 28-year employee of the Duluth Police Department, Lt. Jazdzewski supervises the C Patrol Crew, which is made up of three (3) sergeants and fifteen (15) officers. Over the years, he has served as the department’s defensive tactics (renamed, use of force) instructor, he has been on the department’s Tactical Response Team, and he has served as a FTO. Since 2014, PO Huot was on Lt. Jazdzewski’s C crew. The latter testified that *via* numerous conversations, he coached PO Huot about not letting his passion for the job interfere with how he should handle subjects. Before acting, he advised, step-back, inhale and relax. (Id., pp. 106-112)

In 2014, Lt. Jazdzewski testified, PO Huot was the subject of a use of force investigation, herein dubbed the **Zontelli Incident**. PO Huot had punched Joe Zontelli in the head several times. Lt. Jazdzewski investigated the incident, presented his findings to then Deputy Chief Tusken and to

Chief Ramsey, who in turn, issued a 1-day suspension for his violation of the department's Policy 300, Use of Force. (Id., pp. 112-113) Nevertheless, the department remained concerned. On point, Lt Jazdzewski related the following:

(1) On an occasion prior to 2009, while at Grandma's Saloon and Grill, PO Huot spotted and ran down an individual about whom an arrest warrant had been issued. Herein dubbed the **Grandma's Incident**, the Grievant wrestled the subject to the ground and proceeded to verbally abuse him; and

(2) On July 20, 2015, at the Red Lobster seafood restaurant, PO Huot and four (4) or five (5) youths had a face-off. PO Huot called for backup, Code 3 – lights and sirens. Lt. Jazdzewski opined that this incident, the **Canal Park Incident**, could have been resolved through talk, rather than yelling.

The witness stated that the latter incident did not result in discipline. Rather, the command staff used it as a performance enhancement tool designed to make PO Huot a more productive officer. (Id., pp. 113-115) In a related vein, Lt. Jazdzewski testified that he subsequently urged the command staff to affirm the Grievant's petition to attend a Verbal Defense & Influence Instructor Course ("VDIIC") (a/k/a "verbal judo training"), which began on August 20, 2015. (City Exhibit 13) He remarked that to learn to *teach* defensive tools – "words" rather than "force" – is more rigorous than learning to *use* defensive tools. Thereafter, Lt. Jazdzewski stated, PO Huot's OJT decision-making had improved. (Tr. Vol. 1, pp. 115-117)

Next, on February 8, 2017, the **Dunphy Incident** occurred. Said incident is summarized below.

- On the above-noted date at approximately 6:18 p.m., a citizen called 911 to report a man was down, lying on the sidewalk. PO Huot was dispatched for a "welfare check." Prior to his arrival, the man, intoxicated, was up and walking. When PO Huot arrived at the scene, the man, subsequently identified as Derrek Dunphy, was walking with a female. (City Exhibit 11)
- Driving slowly, he pulled his squad car next to them, rolled down his window, and repeatedly asked Mr. Dunphy to stop. He refused, cursing. PO Huot called for a backup. Next, he exited his squad, again asking Mr. Dunphy to stop. He continued to refuse, stating that he was on

his way home. (City Exhibit 16.12, Huot's Body Camera – **Dunphy Incident**, 0:48-1:06) As the subject continued to walking away, PO Huot grabbed him and throwing him chest-down onto the hood of his squad, he struggled to cuff him, and stating that he was under arrest. (Id., 1:08-1:20)

- Throughout, his sister was shouting, demanding that PO Huot leave him along, announcing that she had called their mother, and demanding that he give her his badge number. (Id., 1:20-2:00) As PO Huot endeavored to get Mr. Dunphy into the squad's backseat, the sister, hysterically, continued to yell and swear at him, demanding that her brother was being illegally detained. (Id., 1:20-2:55) Once in the back seat, Mr. Dunphy kicked at the squad's back door and managed to slip his cuffs out from behind his back to the front of his body. (City Exhibit 11) PO Huot had determined that he was under the influence of alcohol. (Id.)
- Next, Mr. Dunphy's mother arrived. PO Huot advised that Mr. Dunphy was going to jail. As he later stated in the narrative part of his incident report: The subject refused to stop when ordered to do so – "fleeing;" he was uncooperative - "obstruction;" and he physically fought off being cuffed - "resisting." As events continued to unfold, the subject's mother's asked PO Huot to ticket him and release him in her care: He refused her request. (Id.; City Exhibit 16.12, 3:36-5:10) Moreover, after another squad arrived to assist, Mr. Dunphy's sister telephoned him while he sat in the squad. Inasmuch as persons in custody are not allowed to have a phone, PO Huot attempted to take the cell phone from him and, while doing so, a physical struggle ensued, which was followed by more struggling when Mr. Dunphy tried to exit the squad. (Id., 6:05-6:41) Mr. Dunphy shouted "What the fuck am I under arrest for? I didn't do nothing. I was walking home." (Id., 6:44-6:49) The assisting patrol and subsequent arrival of Sergeant Tony Radloff, spoke with the two (2) women, both irate, as PO Huot gathered identifying information from Mr. Dunphy. (City Exhibit 11)
- The Dunphy incident did not result in complaints filed against PO Huot. (Tr., Vol. 1, p. 121)

Regarding the forgoing, Lt. Jazdzewski opined that PO Huot should have been more verbal. Too, since the call was a "welfare check" and because Mr. Dunphy was O.K., up and walking when PO Huot arrived at the scene, and because he was on his way home, Officer Huot could have simply left the scene. The subject did not want police assistance. (Id. p. 117-120)

Finally, concerning the **Houle Incident**, Lt. Jazdzewski testified that PO Cekalla called in his report at around 6:00 a.m., soon after the former's shift had ended and just as he was getting ready for bed. At around 3:00 p.m., Lt. Jazdzewski reported for duty, read PO Cekalla's report and viewed his body camera footage of the incident. He was shocked: Said use of force was unnecessary. Next,

Lt. Jazdzewski reported the incident to Deputy Chief Lukovsky and Chief Tusken. It was decided to place the Grievant on administrative leave. As a member of the C crew, Lt. Jazdzewski testified, his trust was violated. Moreover, PO Huot did not immediately report the incident, as he should have. Lt. Jazdzewski was at wits end. He stated that after the **Zontelli Incident** he tried to give PO Huot the tools needed to succeed as a police officer. However, dragging Mr. Houle was not a tactical use of force – it was unnecessary. Rather, said dragging was an act of frustration and anger. (Id., pp. 121-127)

While being cross-examined, Lt. Jazdzewski clarified that the Grievant's 1-day Zontelli-related suspension amounted to a twelve (12) hour reduction in banked non-paid vacation time. (Id., pp. 128-129) Also, Lt. Jazdzewski agreed that it was PO Cossi, not PO Huot, who chased the subject of the **Grandma's Incident**. Regarding the **Canal Park Incident**, the witness acknowledged that several months had elapsed before he spoke to the Grievant about same; PO Huot's opening discussion with the youths is unknown because of his recording equipment's built-in time delay; and, finally, yelling at subjects who refuse to obey a just command is not necessarily a tactical misstep. (Id., pp. 129-132)

Regarding his recommendation to grant the Grievant's requests to attend the VDIIC, the Lieutenant acknowledged that the former did not realize that his support was for remedial purpose. He also reiterated that after that week-long session, PO Huot's performance improved. (Id., pp. 133-134) However, on redirect, the witness made clear that with the **Houle Incident's** advent, he was not "confident" that more training would correct the Grievant's inclination to misuse force. (Id., p. 142)

LT. ROBERT SHENE: Lt. Shene is a 20-year employee of the Duluth Police Department. Promoted in 2016, he currently supervises the B Patrol Crew and commands the Tactical Response Team. Highly trained in use of force disciplines, during his previous four (4) years with the department, as a Sergeant, he was the use of force training coordinator. Lt. Shene first met the Grievant in 2005 at the Ford du Lac Tribal and Community College where he was an instructor in its use of force program. (Id., pp. 143-146) PO Huot had attended Lt. Shene's in-service training programs since joining the department; as directed by the command staff, Lt. Shene conducted reviews of PO Huot's use of force incidences; and, based on the latter, Lt. Shene coached PO Huot. Further, during PO Huot's early years with the department, he and Lt. Shene performed extra duty security work at Grandma's saloon, while in uniform. Regarding the latter, Lt. Shene opined that PO Hout tended to be impatient with customers, pushing or shoving rather than taking the time to win their voluntary compliance.³ (Id., pp. 147-149)

At the command staff's request, Lt. Shene wrote incident reports involving the Grievant, as next described.

- **Canal Park Incident:** This incident involved five (5) African American teenager boys – 14 and 15 year olds – on bicycles. Adjacent to the sidewalk where the boys were assembled are private boat docks. A 911 caller reported that the boys were trespassing on private docks. (City Exhibit 16.9, Huot's Body Camera – Canal Park incident, 00.34; City Exhibit 8)

Based on his review, which included viewing of PO Huot's body camera footage, Lt. Shene opined that this was a "one-officer call." (Tr., Vol. 1, p. 153) However, within a few minutes of PO Huot's arrival at the scene, a mutual yelling match ensued, one (1) boy was wrestled to the ground, cuffed, seated in his squad, and a crowd was gathering. PO Huot called for back-up support and the matter soon turned into a Code 3 incident with six (6) additional

³ When serving as the department's use of force coordinator, Lt. Shene taught "verbal judo." Officers learn how to win a subject's voluntary compliance through "talk," and by treating them as you would like to be treated under similar circumstances. PO Huot attended said in-service classes and, also, he attended a VDIIC. The latter teaches that subjects want (a) respect/dignity, (b) to be asked, not told, (c) options; (d) to know "why," and to be given a "second chance." (Id., pp. 157-159)

squad cars arriving at the scene. (City Exhibit 16.9, 3:30-3:36; Tr., Vol. 1, p. 156) Ultimately, two (2) boys were ticketed for disorderly conduct. (Id., 14:48-15:00)

The **Canal Park Incident's** use of force report included several ideas that PO Huot's supervisors were supposed to use in coaching. (Tr. Vol., p. 156)

- **Zontelli Incident:** This matter involved a subject who was committed to St. Luke hospital's mental health ward. He had threatened to kill his wife and her boyfriend. When the call for police assistance came in, he had broken a window at St. Luke's, jumped to the ground and was on the run. Too, he was believed to have a shard of glass, a knife of sorts, in his possession. (Tr., Vol. 2, p. 342) Subsequent to his escape four (4) officers, including the Grievant had trapped Mr. Zontelli in an apartment building's elevator. After refusing commands, the officers wrestle him to the ground. One of the subject's arm and hand was underneath his body. Hence, a struggle ensued to free them in order to repossess the threatened shard of glass. To gain compliance, the officers began delivering strikes, with PO Huot hitting him five (5) or six (6) times with a closed fist. At that point in time, the subject's head was against the floor and it sustained injury. While coaching, Lt. Shene, reminded the Grievant that: (a) use of "pain compliance" can distract rather than prompt the subject's cooperation; (b) the potential for injuring a subject due to strikes to the head are greater when the subject's head is against the floor or a wall; (c) PO Huot, who is approximately 6'4" inches tall and solidly built, and the three (3) other officers who were on top of Mr. Zontelli made it virtually impossible for him to cooperate with their command, voiding the need to use force; and (d) as taught in CIT, the Grievant was coached to slow down, give himself time to evaluate the situation, to devise a strategy and to effect the appropriate tactics. (Tr., Vol. 1, pp. 160-164)
- **Dunphy Incident:** Lt. Shene's testimony about the facts in this incident's review matched those depicted in City Exhibit 16.12, footage from PO Huot's body camera, and in City Exhibit 11, PO Huot's incident report. Mr. Dunphy was cited for fleeing and obstruction. (City Exhibit 11) On the morning of February 8, 2017 – the date of the **Dunphy Incident** – the supervising lieutenant on duty was Lt. Shene. Regarding the incident, Lt. Shene remarked, disparagingly, that PO Huot cannot be the officer depicted in the video footage because the former had been through VDIIIC. Further, Lt. Shene questioned whether PO Huot learns from his mistakes. (Tr., Vol. 1, pp. 168-169)
- **Houle Incident:** The command staff asked Lt. Shene to review this incident. He characterized the situation as an unwitnessed misdemeanor that may warrant a citation but not jail, and that PO Huot and Hughes managed the encounter perfectly up to and including the subject's collapse to the floor. Thereafter, Lt. Shene's reaction while viewing the video, was "... here we go again." PO Huot, within seconds, made the decision to use force – to drag him – even though there was no exigency or threat, to prompt such a decision. Mr. Houle represented "dead weight," not a physical threat to the officers. PO Huot did not speak; he did not attempt to gain the subject's voluntary compliance. Further, in spite of being well versed about handcuff-related shoulder injuries, PO Huot dragged the subject by the chain of the

cuffs, his arms behind his back and extended toward his shoulders. Before dragging the subject, PO Huot should have considered alternative options. There were two (2) officers there: Pick him up and carry him out! Call Gold Cross, call fire rescue personnel. Still further, the Grievant was “obligated” to insure that the subject was okay upon striking his head on the doorframe: Whether the subject was injured was never asked. (Id., pp. 171-180)

On the night in question, there were 14 patrol officers on duty, a count that increases to 18 once K-9 officers, among others, are counted. Lt. Shene opined that having 18 officers at work on a Saturday night was more than sufficient, countering PO Huot’s [Garrity interview] observations about the force having been shorthanded. Moreover, Lt. Shene determined there were no other high priority calls at the time that might justify the **Houle Incident**: The facts did not involve a dynamic, rapidly changing situation that demanded PO Huot make a “split second” decision. (Id., pp. 181-183) Between January 1, 2016 and May 20, 2017, the subject generated 70 calls for service, four (4) of which were taken by PO Huot. While frustrating, Mr. Houle cannot be a target for excessive use of force. PO Huot violated the department’s use of force policy and Lt. Shene stated, additional training and coaching are no guarantee that PO Huot would not again violate the policy. The **Houle Incident** was not a rapidly evolving situation and, yet, with all of his past training, coaching and discipline, PO Huot’s decision was to drag the cuffed subject. (Id., pp. 184-186)

On cross, Lt. Shene acknowledged that the reports he prepared for the command staff did not involve an in-person interview of PO Huot and, as such, the reports lacked the Grievant’s perspective of then prevailing circumstances. (Id., p. 189) Regarding the **Houle Incident**, Lt. Shene agreed that PO Cekalla, rather than PO Hughes, could have said, “... stop, wait, let me help ... “ the moment the dragging began; regarding the **Dunphy Incident**, he agreed that PO Huot correctly moved an intoxicated subject from the middle of a snowy road where he was walking, at night, to the sidewalk; regarding the **Zontelli Incident**, he agreed that the threatened shard of glass posed a threat to the officers involved; and regarding the **Canal Park Incident**, Lt. Shene agreed that the likelihood of force is reduced when there are more officers at the scene, and that PO Huot actually radioed-in three (3) squads, not six (6) squads. (Id., pp. 91-96)

DAVID MONTGOMERY: Since 2009, Mr. Montgomery has been the City of Duluth’s Chief Administrative Officer. In that role, he functions as the City’s COO, he assists the Mayor in

formulating policies, and all of the City's department heads, including the Chief of Police, reports to him. Moreover, grievances not resolved at the departmental level are presented to him, and he is the City's last word on all matters related to discipline and discharge. Mr. Montgomery's review of disciplinary grievances is comprehensive. He reviews the facts of the matter, the discipline's underlying rationale, comparable cases and the grievant's training, disciplinary history and opportunities for corrective action. Further, he evaluates the case's impact on the department and the City as a whole. He remarked that he often times he has reversed a department's decision to terminate an employee. (Id., pp. 205-208)

Regarding the **Houle Incident**, Mr. Montgomery reviewed the three (3) officers' body camera footages, discussed the matter with relevant individuals, and reviewed the Grievant's prior use of force incidents. Cognizant of the power vested in police officers, as well as their pressures and risks, he, nevertheless, concluded that said incident is what destroys the community's trust in policing and its trust in the Duluth Police Department. Mr. Houle was vocal but, not violent, not a threat and, while on the floor manifesting passive resistance, and absent time pressures, PO Huot, within seconds, grabbed his cuff's chain and "took off." There were two (2) other officers there, they could have conferred, but PO Huot's hasty act negated that option. Mr. Montgomery commented that the Grievant's action was not what he "... would expect from an officer with the Duluth Police Department." (Id., pp. 209-215)

The Duluth Police Department is struggling to retain and build community trust. If the Houle incident became known to the public, it would reflect poorly on the department, and it could invite a lawsuit. The severity of the **Houle Incident**, the Grievant's use of force training, coaching, prior

discipline and the odds of repeat offense led Mr. Montgomery to conclude that the department had just cause to terminate the Grievant's employment. (Tr., pp. 216-218)

While being cross examined, Mr. Montgomery agreed that to date the **Houle Incident** had not been covered by the mass media and, regarding the prospect of a law suit, he was not versed in the governing statute of limitations. Finally, in the recent past, the department had terminated PO Jouppi for his excessive use of force. Concerning same, Mr. Montgomery acknowledged that PO Jouppi was on a "last chance agreement" ("LCA") at the time of his termination. (Tr., pp. 219-222)

CHIEF MICHAEL TUSKEN: With nearly 26-years on the Duluth Police Department, including nine (9) years as a Deputy Chief, the witness was promoted to Chief in May of 2016. (Tr., Vol.2, pp. 235-236) He maintained that his primary duty is to articulate the department's mission and to win buy-in from the department's personnel. As interim Chief and then Chief, he initiated the so-called "SWOT" process whose aim it is to identify the department's strengths, weaknesses, opportunities and threats. To guide the SWOT process, a consultant was hired: every police officer was interviewed; 30 community-based focus groups were engaged; and surveys were conducted. A great deal was learned, but particularly that the City's communities of color were less trusting of the police than were other demographic groups: They felt marginalized. (Id., pp. 237-230)

Ultimately, a departmental mission statement emerged that emphasized forming "relationships" with the people who "live," "work," "visit" and "play" in Duluth. Relationships rooted in "trust," with POs who work in a "respectful," "caring" and "selfless" manner. The department's mission is achieved when the governed (i.e., the community) can rely on the governing (i.e., the police) to protect their civil liberties and constitutional rights: When there is trust. Chief Tusken labeled this relationship a "social contract." Today, every officer, not just a few, is involved in

“community policing” and police officers, not just the Chief, variously attend community meetings, such as, meetings of the NAACP and of the American Indian Commission. (Id., pp. 239-249) The department’s Civilian Review Boards and the use of body cameras have helped to build relationships based on trust. Yet, Chief Tusken remarked, “We are only as good as our last call for service oftentimes.” (Id., p. 243)

Next, Chief Tusken read paragraph 300.1, Purpose and Scope, from department’s Use of Force Policy. (Joint Exhibit B) The Duluth Police Department, he paraphrased, values and respects every life. This language, newly drafted in February 2017, was not in the department’s June 6, 2016 draft of the Use of Force Policy. (Id., pp. 256-257; City Exhibit 2)

After viewing the recordings of the **Houle Incident**, Chief Tusken described his reaction as having been “very sad.” Given the department’s mission, its emphasis on valuing life and all of the Grievant’s training, in so many words, he rhetorically asked: How could PO Huot do that to one (1) of the City’s marginalized, homeless, and chemically dependent citizens? Our officers should be at their best when dealing with people who are suffering. On point, Chief Tusken stated that a few months earlier he attended the 10-year anniversary of the San Marco House. He testified that half of the house’s residents are recovered or recovering alcoholics and the other half continue to drink. At that gathering, he met Mr. Houle and apologized for the incident. Even though intoxicated at the time, Mr. Houle’s response to his apology was “... he didn’t need to treat me that way.” Mr. Houle felt betrayed by the department, Chief Tusken opined. (Id., pp. 259-263)

Mr. Houle is a Native American. Chief Tusken stated that **Houle Incident** could do as much damage to the department’s relationship with that community as did Officer Jouppi’s use of force case, a few years earlier. In the latter instance, it was a Detox surveillance camera that captured the

incident and its footage was released to the media and seen by the public: It damaged police-community relations. The body camera footage of the **Houle Incident** is now part of the instant arbitration's record. Chief Tusken observed that once an Award is issued, it is hard for him to imagine that media would not make data requests, and that the video recordings will not be widely broadcasted. Hence, rather than to be forced to release the video recordings and in the interest of transparency, he stated that the department is considering their post-Award release to the Native American community at the very least. Transparency aside, when the public sees a police officer's gratuitous use of force, the job of policing will be more difficult and officer safety will be at an elevated level of risk. (Id., pp. 264-268)

While viewing PO Cekalla's body camera footage of Mr. Houle being dragged (i.e., City Exhibit 16.1, 5:07-5:55) Chief Tusken remarked as follows:

- Sad! PO Huot has had verbal judo training and he attended a 40 hour VDIIC. He has been taught that "patience, empathy and compassion" should govern his dealings with subjects who have mental health and chemical dependency issues.
- Intoxicated, handcuffed, and off to Detox or jail, Mr. Houle passively resisted, falling to the floor. In frustration, PO Huot immediately grabs his handcuffs and begins dragging him. As the senior officer at the scene, PO Huot, in this leadership role, should have discussed next steps with POs Cekalla and Hughes.
- PO Huot is "incredibly talented." Yet, he makes use of force decisions that are disproportionate, decisions about which he has been coached and for which he has been disciplined.
- The **Houle Incident** is a manifestation of unacceptable behavior for the Duluth Police Department and for the community. There is just cause for his termination. PO Huot was well qualified to handle the 911 call in question. But he chose to ignore the training, coaching and discipline on point. Also, Chief Tusken testified that he considered and dismissed options such as, giving PO Huot additional training and/or reassigning him. However, the risk of another unacceptable use of force event is too high and, regardless of a police officer's assignment within the department, all are "responders," he remarked.

- Concerning PO Jouppi, Chief Tusken explained that although he was on a LCA, the incident that caused same had nothing to do with the unreasonable use of force. But, he continued, if it had then he too would have been immediately discharged.
- Finally, Chief Tusken testified that none of his remaining 154 officers have required as much use of force education and oversight as had PO Huot: The issue is not systemic. Ultimately, if reinstated, Chief Tusken's fear is that a misstep will reoccur.

(Id., pp. 270-287)

The CBA's Article 34, §34, sub. 1.b. states as follows:

Discipline shall be corrective and progressive. Except for cases of serious offense, any suspensions, demotions or removal action shall be preceded by a written warning.

(Joint Exhibit A) Regarding this language, Chief Tusken agreed to the following, while being cross-examined: The CBA provides that discipline shall be corrective and progressive; the Grievant was a nine (9) year employee; his only discipline involved 12 non-paid hours having been deducted from his vacation bank; and, when Officer Jouppi was terminated, criminal charges were pending at the time and his LCA applied to any subsequent offense. (Tr., Vol. 2, pp. 286-288)

Chief Tusken also agreed that footage of the **Houle Incident** will be made public whether or not PO Huot's termination is sustained; during his nine (9) years with the department, PO Huot has demonstrated a very good work ethic and he has exhibited the winning traits of empathy, care and compassion: He is not a monster. Too, he acknowledged, regardless of departmental assignment, it is his policy that each officer must work three (3) patrol shifts *per* year, and because of it, all officers are "responders." Pertaining to the risk that PO Huot could be a repeat offender, Chief Tusken agreed that, regardless of the case under consideration, such a risk can never be eliminated. He also agreed that his sole objection to PO Huot's conduct centered on the dragging episode. In response to a question about a 2015 performance evaluation, stating that the Grievant was showing improvement, Chief Tusken replied that the Grievant lacked "sustainability." (Id., pp. 291-299)

B. TESTIMONY BY THE UNION'S WITNESSES:

PO ADAM HUOT: PO Huot was hired by the Duluth Police Department on February 4, 2008. (Union Exhibit 40) He worked as a patrol officer until January 2, 2012. On that date, he was assigned to the Domestic Violence Response Team (“DVRT”) and, in September 2014, he was transferred back to patrol, joining Patrol Group C. The witness averred that the DVRT work was rewarding. He learned about physically and emotionally abusive relationships, but it was also an “Old man’s game.” He longed to return to patrol duty; he missed the camaraderie and responding to problems rather than writing reports about them. In 2009, PO Huot became a FTO and, in that role, he trained the new recruits that were assigned to him to be “... functional, safe, professional police officers.” He was a FTO until May 20, 2017: The date of the **Houle Incident**. (Id., pp. 308-315)

PO Huot knew Brandon Houle. He had contact with him on at least four (4) prior occasions. Mr. Houle was always intoxicated, never violent, loud, and more or less “... in your face.” Regarding the events of May 20, 2017, the witness described his first contact with Messrs. Houle and Nevaux, namely, the 911 “welfare check.” He commented on PO Hughes success at awakening and coaxing the subjects to move along. Next, he described the 911 call about trespassers at the Tech Village parking ramp. At the time, he mused, “... are they going to generate 911 calls throughout the night?” Trespassers or not, his initial intent was not to arrest the subjects. Rather, he intended to walk them to his squad car, advise them that he would be mailing trespassing citations, and to move them on their way. (Id., pp. 315-320)

Afterwards, PO Huot stated, Mr. Houle reacted negatively at the thought of being wrongly cited. He became excited, raised his voice, clenched his fists and assumed an aggressive physical stance, and he uttered, “I want to go to jail.” At that point, PO Huot continued, handcuffing was the

safest option, even though he had no intention of charging and arresting the subject. As he and PO Hughes began walking the subject toward the parking ramp, PO Huot told PO Hughes that the subject was going to be taken to Detox. Next, when Mr. Houle fell to the ground. PO Huot's initial thought was "He was no longer cooperating." Then, after the subject uttered, "I'm not going to make this easy for you guys," PO Huot thought that he and PO Hughes would have to pick him up and carry him because "... he's not going to walk anymore." (Id., pp. 321-326)

PO Huot agreed that from the time Mr. Houle fell to the ground to the time he grabbed his cuffs about ten (10) seconds had elapsed. During that time, PO Huot testified, he had considered the options of carrying the subject out, kicking and screaming and calling Emergency Medical Service ("EMS") or the fire department. He had not thought of asking Mr. Houle to "get up" although, he stated, he wished he had. Too, he did not talk to PO Hughes about options because the latter had an "I don't know" expression on his face. Thus, PO Huot concluded that the fastest way to get the subject out of the skywalk was to pull him: A decision he soon regretted. While waiting for the skywalk's elevator and seeing the disapproving look on the faces of POs Cekalla and Hughes, he knew he had made a mistake. Thus, after exiting the elevator, there was no more pulling. PO Huot also stated as follows: the subject's head accidentally and unintentionally hit the door; and he did not complain about arm, shoulder or head injuries. On point, PO Huot did advise EMS of the subject's possible head injury and he asked emergency room personnel to check both his head and his wrists for injuries. (Id., pp. 326-333)

Later that night, PO Huot stated that he contacted PO Cekalla's squad and the three (3) officers briefly conferred. His intent was to talk about the **Houle Incident**, to insure that they were okay, and tell them "I made a quick decision." His intent was not to discourage them from reporting

the incident. However, PO Cekalla's only remark was "I'm fine" and he told me to talk to PO Hughes later. PO Hughes only remark was "Yeah, I was uncomfortable." The next day, May 21, 2017, the witness stated that he and PO Hughes spoke about the incident. The latter said he was uncomfortable with how the situation was handled, but hoped the two (2) could work together going forward. (Id., pp. 333-336)

PO Huot was asked to self-evaluate the **Houle Incident**. He acknowledged that he had made a mistake, that he was not tolerant, and that he should have talked to the subject and given him a chance to get up. If the incident could be replayed, PO Huot listed the following as preferred options: (a) As a field trainee, he would have let PO Hughes take the lead; (b) he would have conversed with his partners; (c) he would have asked the subject to stand up and walk, stating that they needed his cooperation en route to Detox; (d) he would have called the EMS and his supervisor; and (e) he and PO Hughes could have picked up the subject, and walked or carried him out, possibly with PO Cekalla's assistance. Ultimately, he testified, if reinstated, he would never repeat the mistake he made with Mr. Houle: He would seek compliance and cooperation through communications. (Id., pp. 336-341)

Regarding his disciplinary record, PO Huot testified that the 2014 **Zontelli Incident** resulted in a one (1) day suspension that was administered as 12 hours of unpaid time taken from his bank. He did not file a grievance, explaining that he accepted the Chief's and Deputy Chief's opinions that his strikes to the head were unnecessary and excessive and, thereafter, he conferred with Lieutenants Shene and Jazdzewski about the incident. Regarding coaching, on September 6, 2015, Lt. Jazdzewski, Sgt. Zwak and Sgt. Lesar coached the Grievant on his use of force. That discussion pertained to the **Canal Park Incident**. He was advised to be "less confrontational" on his calls.

Moreover, his coaches observed that subsequent to attending the VDIIC his use of force skills had improved and, consequently, they decided not to place him on a Performance Improvement Plan. (Union Exhibit 30) Regarding the VDIIC, PO Hout stated, it was he who asked staff to appoint him as a VDIIC attendee, and he was never told that he was selection for the purpose to improving his own use of force skills. (Tr., Vol. 2, pp. 341-357)

Following the **Dunphy Incident**, Lt. Jazdzewski provided coaching. While not necessarily agreeing with some of the options Lt. Jazdzewski and he discussed, the Grievant stated that he listened to his counsel and, as with all of his coaching sessions, he responded affirmatively by changing behaviors. (Id., pp. 362-364)

Finally, PO Huot disagreed with the command staff's view that the **Houle Incident** demonstrated his discord with the Department's core tenants. He maintained, as a police officer, he acts with compassion and respect: He values and respects every life. He recounted two (2) instances of manifested respect. In the first instance, he spent 15, 20 minutes talking to an intoxicated and suicidal man back from the brink of death. In the other instance, a suicidal man who, after drinking antifreeze, threatened to jump to his death was coaxed back to safety. On point, the Grievant testified, if another **Houle Incident** was ever to arise, he would handle it "With patience, compassion and selflessly." In fact, he observed, he encountered a hostile or disrespectful person on nearly every shift worked during the course of a year, which translates to 180 such persons *per* year. Overall, during his years on the force, almost all of these persons were dealt with professionally and respectfully. Further, if reinstated, he and POs Cekalla and Hughes would have each other's back: He assured there were no hard feeling. Still further, he stated, "Being a police officer is ... number one

in my life.” Duluth is his hometown, he is proud of the Duluth Police department and, acknowledging his mistakes, he testified, he owns his mistakes. He averred:

I am able to look inward and assess what I’ve done, own my mistakes and learn from them and become a better person and a better police officer because of them.

(Id., pp. 370-378)

When cross-examined, PO Huot stated, he is familiar with the department’s use of force and code of conduct policies; he was well trained on same, as well as having received 40 hours of VDIIC training in 2015. Benefits derived from the latter included managing verbal abuse and bullying, defusing confrontations, deescalating violence, building cooperation and collaboration and more. (City Exhibit 13) In summary, he verbalized, the course dealt with winning subject cooperation through verbal techniques and reducing the need to use force. However, Officer Huot also remarked, with the passage of time, he could not recall many of the specific lessons taught in the CIT course he had taken and, as well, he could not recall many of provisions in the Code of Conduct. (Tr., Vol. 2, pp. 379-389)

While viewing PO Cekalla’s body camera recording, City Exhibit 16.1, the witness testified about the **Houle Incident**. Initially, he stated, he did not intend to arrest the subject; rather, his intent was to mail him a citation and to have him leave the skywalk system. Then, Mr. Houle fell to the ground; PO Hughes uttered, “Really;” and, Mr. Houle said, “I’m not gonna to make this easy for you guys.” Next, within a few seconds, PO Huot acknowledged, he decided to reach down, grab the subject’s cuffs and drag him. Further, he admitted: he had never been trained to use such a tactic and that its use could cause injury; he did not stop dragging the subject when he hit his head on the doorframe; and he did not apologize or check the back of the subject’s head. While in the elevator,

the Grievant testified, he did look at the back of the subject's head for blood but saw none. (Id., pp. 390-395)

At the hearing and/or during his Garrity interview, the Grievant stated, knowing Mr. Houle, he knew it would be a struggle to get him up from the floor and out of the skywalk. Thus, he decided, rather than to wait for an assist, "I needed to get him out of there..." which explained why he dragged him. Admittedly, after leaving the elevator, POs Hughes and Huot, holding the subject under his shoulders, were able to carry his otherwise deadweight without dragging him. (Id., pp.396-400; City Exhibit 16.5, Huot's Garrity Interview, 45:45-47:05)

From the body camera's recording, Mr. Houle is heard saying that he respects the police and, in response, PO Huot said: "You never had and never will." (City Exhibit 16.3, Huot's Body Camera, 8:04-8:08) That comment, PO Huot explained, was based on his experiences with the subject, which included his verbal taunting of police. If same was to reoccur, PO Huot testified, he would not "... play into it..." (Tr., Vol. 2, pp. 406-407)

Policy 300, Use of Force, §300.3, states in relevant part:

Officers shall only use 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.

(Joint Exhibit B) Asked whether this quote applied to the **Houle Incident**, the Grievant responded, "Yes," and he acknowledged that the dragging episode exceeded the level of force demanded by the circumstances. (Id., p. 413) Further, he agreed, his actions contravened nearly all of the use of force factors listed in §300.3.2, *supra*. (Id., pp. 413-418) Moreover, the Grievant admitted that he wrongly failed to promptly notify Lt. Jazdzewski of the incident: A violation of §300.5.1(b), *supra*. (Id., pp. 420-423)

PO DANA LETICA RHODES: Her first and only law enforcement job as a patrol officer was with the Duluth City Police Department. She was hired on January 5, 2015. PO Rhodes met PO Huot in 2011. After they first met, he introduced her to police work *via* conversation and *via* an occasional ride-along: PO Huot was her FTO. She testified that he was a professional and effective instructor who, to a great extent, helped her to become a successful officer. Regarding factors on which an officer's performance is evaluated, she stated: She had never witnessed his inappropriate use of force; he made good decisions; he was respectful of others; when in uniform, he was there "... to help people;" he exhibited leadership *via* coaching and mentoring other officers; he was a problem solver; and, he did and does buy into the idea that the department has a social contract with the community, that officers are there to be compassionately protect individual rights, and he considers officer and community safety as paramount. To the present, she stated, she goes to him with questions and she "... would trust Adam with [her] life." Finally, if reinstated, Officer Rhodes believes PO Huot would be welcomed back by the majority of officers, and he would succeed as a PO. She also believes that the **Houle Incident** warrants some level of discipline. (Id., pp. 432-449)

VI. ARGUMENTS

A. THE CITY'S ARGUMENT:

Initially, the City argued, the Grievant's conduct in the **Houle Incident** violated the Duluth Police Department's Policy 300, Use of Force, and Policy 323, Code of Conduct. Regarding the former, PO Huot violated Section 300.1 which states that the department "... values and respects the sanctity of every life and identifies our role as a lifesaving organization ..." and it goes on to state that "... it is the expectation [that] officers will make tactically sound, reasonable use of force decisions which demonstrate our value of every life." (Joint Exhibit B) PO Huot's conduct was also at

odds with the policy's list of specific factors that are used to determine the reasonableness of force (Id., §303.3.2), and the policy's reporting and supervisory notification requirements (Id., §300.5; §300.5.1(s)-(b)).

Vis a vis the Code of Conduct, it is clearly provides that an employee may be discharged for, among other things, "(g) Unreasonable and unwarranted violence to a person encountered or person under arrest." As well as for:

(n) Any ... conduct that any employee knows or reasonably should know is unbecoming a member of the Department or that is contrary to good order, efficiency or morale, disgraceful or that tends to reflect unfavorably upon the Department or its members.

(Joint Exhibit C)

The Grievant acknowledged his familiarity with the policies discussed, *supra*, and that he had been trained on both: Particularly, on Policy 300, Use of Force. Between 2008 and 2017, he had 16 training sessions that variously related to use of force strategies and tactics. (City Exhibit 12) During this timeframe, the department received 12 complaints from members of the public alleging PO Huot's unreasonable use of force, most of which were not sustained. However, six (6) complaints resulted in coaching, the **Zontelli Incident** resulted in his suspension, and the **Houle Incident** resulted in his discharge. (Id.) The quantum of material evidence proving PO Huot's violations of the department's Use of Force and Code of Conduct policies is overwhelming, the City averred.

In fact, PO Huot and the Union agree to the following: The Grievant should not have dragged the Mr. Houle; he could have employed several alternative options; and absent exigent circumstances or other circumstantial factors that would justify the use of force, as listed in Policy 300.3.2, the Grievant's treatment of Mr. Houle constituted the unreasonable use of force.

Based on his history of service with the department, the Union argued that the termination of PO Huot's employment is excessive. However, in reply, the City urged, its decision to terminate the Grievant should be sustained based on the abundance of uncontested evidence supporting the following facts: (1) The Grievant's treatment of Mr. Houle was "severe," as all of the City's witnesses testified; (2) On December 29, 2014, the Grievant was issued a one (1) day – 12 hour – disciplinary suspension for his excessive use of force in the **Zontelli Incident**, and he was placed on progressive discipline for three (3) years, ending December 29, 2017 (City Exhibit 6); (3) Unique among his peers, the Grievant has received substantial training and supervisory coaching specifically designed to prevent a **Houle-type Incident**; and (4) Each of the City's command staff witnesses' opined that, if reinstated, PO Huot may well again violate the Duluth Police Department's Policy 300, Use of Force, and Policy 323, Code of Conduct.

Further, the City pointed out, its decision to terminate the Grievant's employment is CBA compliant. Article 34.1.a. provides that "Any Employee who has completed their initial probationary period *may be ... discharged ... only for just cause*, and Article 34.1.b. states that "Discipline shall be corrective and progressive. ... [and] [*e*]xcept for cases of serious offense, any ... removal action shall be preceded by a written warning." (Joint Exhibit A; Emphasis added)

The City maintained that the **Houle Incident**, considered alone, was ample grounds for PO Huot's termination. It was a conspicuously bad offense that likely will generate negative externalities, given the department's tense relationship with Duluth's communities of color. Moreover, when evaluating the **Houle Incident** in conjunction with the fact that it occurred while PO Huot was serving a three (3) year disciplinary suspension for unreasonable use of force in the **Zontelli Incident**, he was coached following the **Zontelli, Canal Park** and **Dunphy Incidents**, and he

was extensively trained on tactics designed to side-step the need to use force, the decision to terminate his employment must be determined to be just. In addition, the City argued, the department's command staff has lost confidence in the Grievant, and in the prospect that additional training and coaching would prevent the reoccurrence of a kindred incident.

Finally, the City urged, while the Grievant's length of service and otherwise good performance as a police officer are favorable mitigations, they do not outweigh the proven just cause grounds for terminations. Thus, the City respectfully requested that PO Huot's grievance be denied and that his termination be sustained.

B. THE UNION'S ARGUMENT:

Citing arbitral precedent and scholarly research, the Union's argument began with the observation that just cause for imposing discipline requires proof of *wrongdoing*, an inquiry into the *level of discipline*, and consideration of *mitigating factors*.

Regarding *wrongdoing*, the Union observed, neither the City's "Notice of Administrative Investigation and Leave" (City Exhibit 3) letter, its "*Garrity/Tennessee* Warning" (City Exhibit 4) and "*Loudermill* Hearing" (City Exhibit 5) letters nor its termination letter – "Disposition of Administrative Investigation" – letter (Joint Exhibit E) identify the specific section or sections of Policy 300, Use of Force, and Policy 323, Code of Conduct, the Grievant violated. Pursuant to Section 300.1.1 in the Use of Force policy, "force" is defined as the:

Application of physical techniques or tactics, chemical agents or weapons to another person. It is not the use of force when a person allows him/herself to be searched, escorted, handcuffed or restrained.

(Joint Exhibit B) Clearly, the Union argued, Mr. Houle resisted PO Huot's and PO Hughes' escort from the skywalk elevator to the Tech Village parking ramp: An escort that involved the use of force *per*

Section 300.1.1's definition of "force." Similarly, by definition, "force" was applied when Mr. Houle refused to be escorted down the skywalk to the elevator, prompting PO Huot's decision to drag him. Yet, the Union critically observed, the City's witnesses testified that the Huot/Hughes escort did not involve force, while the Huot escort did involve force. This inconsistent understanding of the definition of "force," causes one to question whether the **Houle Incident** actually involved the use of force.

Even if the Grievant's dragging of Mr. Houle is considered to be a "force" under Policy 300, Use of Force, it is not clear, the Union maintained, that his conduct violated said policy. Section 300.2 of the Use of Force policy states, in part:

Officers shall only use the amount of force that reasonably appears necessary ... The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident ...

(Joint Exhibit B) At the time of the incident, PO Huot testified, it was Saturday night in downtown Duluth, the department was short-handed, he was dealing with a chronic inebriate who was becoming combative and, while he and PO Hughes could struggle to carry him out of the skywalk, he concluded, he could "... do it quicker myself ..." (Union Exhibit 9, pp. 31-32) From the Grievant's perspective, the Union argued, his decision to drag the subject was reasonable, justified and not the unreasonable use of force. Too, if the **Houle Incident** constituted the unreasonable use of force then, *per* Section 300.2.1 of Use of Force policy, POs Cekalla and Hughes should have interceded to prevent same and should have promptly reported same to supervision. Neither officer took meaningful preventive steps, nor did they promptly report the incident, and neither was disciplined. Therefore, the Union deduced, since POs Cekalla and Hughes were not disciplined, PO Huot must not have used force, and if he did use force, it was not unreasonable; and, if unreasonable, it was

not a serious Policy 300 violation. Simply put: The City did not meet its burden of proving that there is just cause to terminate PO Huot under Policy 300, Use of Force.

Where proof of *wrongdoing* is concerned, the Union did concede that PO Huot violated Policy 323, Code of Conduct. Specifically, Section 323.3.3(b) of the Code was violated. This subsection, referenced *supra*, prohibits “discourteous,” “disrespectful” and “discriminatory” treatment of citizens and members of the Duluth Police Department. (Joint Exhibit C)

However, with respect to the *level of discipline* meted out in this instance, the Union urged that PO Huot’s misconduct was not that serious: It did not warrant his termination. To discharge an officer for an isolated violation of Section 323.3.3(b) is too harsh. Mr. Houle did not sustain meaningful injury, the matter received no media attention, the Duluth Police Department’s reputation was not damaged, and PO Huot’s misconduct was not motivated by malice or out of racial animus. PO Huot did exercise poor judgment but that does not justify his termination.

Moreover, the Union maintained, if the **Houle Incident** is deemed to be a Policy 300 violation, the Grievant’s termination is too harsh an initial level of discipline. Perspective is important. In this instance, PO Huot did not punch, kick, taser or strike Mr. Houle with his weapon and so forth. He dragged him: An act that was arguably justified if, as PO Huot believed, time was of the essence. Cited arbitral precedent, the Union identified three (3) different Minnesota police officers whose terminations, for more painful and injurious conduct than that involving Mr. Houle, were recently reversed by arbitrators. (Union Exhibit 45) Too, if deemed a Policy 300 violation, the Union reminded that when discussing the need to report the **Houle Incident**, POs Cekalla and Hughes initially decided to “sleep on it.” (Tr., Vol. 1, p. 87) Also, the Union argued, PO Huot’s failure

to write a report does not justify his termination: He planned to do so and there were no adverse consequences from his failure to do so immediately.

Finally, the Union pointed to several *mitigation factors* to demonstrate that Mr. Huot's discharge lacked just cause. First, some arbitrators consider the absence of progressive discipline as a mitigating factor (See, for example, Union Exhibit 45: *City of Waite Park & Teamsters, Local 30*, BMS Case No. 14 PA 0655; Crump (2016)). In fact, the instant CBA requires same. Section 34.1.b. of the CBA provides:

Discipline shall be corrective and progressive. Except for cases of serious offense, any suspensions, demotions or removal action shall be preceded by a written warning.

(Joint Exhibit A) Arising out of the 2014 **Zontelli Incident**, PO Huot was suspended for one (1) day (without the loss of pay). During his nine (9) years of service that was his "only discipline." Critically, the Union argued, coaching is not discipline, nor is it considered to be a factor in progressive discipline. (See, for example, Union Exhibit 45: *Law Enforcement Labor Services, Local 123 & City of Richfield*, BMS Case No. 16 PA 0975; Neigh (2016))⁴ The City's decision to immediately terminate the Grievant's employment denied him his Section 34.1.b. rights and, the Union maintained, his work history demonstrates that he is amenable to corrective action, the City's opposing claim notwithstanding. Begging application of progressive discipline, the Union pointed to the following behaviors: throughout his term of employment, he has sought to improve his policing skills, knowledge and ability (Union Exhibits 18, 19 and 20); he has endeavored to modify his behavior

⁴ The City noted that this arbitration decision was recently vacated by the Minn. Court of Appeals. That Court decided that there is a clear *public policy* favoring transparency and proper reporting of the use of force by police. The police officer at arbitration was discharged for not reporting his use of force and later reinstated by the arbitrator. The employer moved to vacate the arbitration award, which a district court denied. However, subsequently, the court of appeals reversed. See: *City of Richfield v. Law Enforcement Labor Servs.* A17-1275, 218 Minn. App. LEXIS 190 (Minn. App. April 9, 2018)

when asked to do so (Union Exhibit 19 and City Exhibit 10); regarding the **Houle Incident**, PO Huot acknowledged his mistake and expressed remorse for same (Tr., Vol. 2, p. 326, p. 328, p.335, p 337 and pp. 339-340); and the Grievant is open to correct failed behaviors.

PO Huot's stellar work history is mitigating, the Union argued. He has received four (4) commendations, numerous letters of appreciation and a Departmental Award for saving the life of a suicidal person. (Union Exhibits 21 and 22) Further, he is known as a man of good character, a mentor of younger officers, willing to accept new challenges and he volunteers for training opportunities and Departmental activities. (Union Exhibits 18, 19 and 20; Tr., Vol. 1, p. 277 and p. 139; Tr., Vol. 2, p. 339-345)

The Union argued, the City's claim that PO Huot cannot be "trusted to make the right decision" is a "ruse" to create the appearance of just cause. In so many words, the Union maintained, as humans, every police officer risks making a wrong decision. Also, the City claimed that once the instant matter is publicized, the community, especially the Native American community, will lose trust in the police department. This argument, the Union replied, is a matter of speculation. The Grievant ought not to be disciplined on the basis of what *might* happen. To sustain the Grievant's termination in order to, prospectively, "save face" would be a miscarriage of workplace justice. (*Law Enforcement Labor Services, Local 123 & City of Richfield*, BMS Case No. 16 PA 0975; Neigh (2016))

Based on the foregoing facts and argument, the Union requested that the grievance be sustained, the Grievant be reinstated, the Grievant's discipline be reduced to a level more commensurate with his actions, and the Grievant be made whole for all lost wages and benefits in excess of such lesser discipline.

VII. OPINION AND DISCUSSION

The City of Duluth terminated PO Huot's employment for violating Policy 300, Use of Force, and Policy 323, Code of Conduct. The Duluth Police Union demurred and, in due course, the matter was heard at arbitration. At issue are two (2) interrelated questions, namely: (1) Was PO Huot's employment with the City of Duluth terminated for just cause? And, (2) If not, what is an appropriate remedy?

Regarding the first question, Section 34.1 of the CBA provides:

Any Employee who has completed their initial probationary period may be suspended without pay, discharged or disciplined only for *just cause*.

(Joint Exhibit A; Emphasis Added) Tthe CBA does not define the term "just cause." This is not unusual; most CBAs do not define this term. However, since the mid-1960s it has been indirectly defined *via* applications of seven (7) tests or standards, each of which is used in the analysis that follows. Arbitrator Carroll R. Daugherty was the first to delineate these tests or standards, which he originally posed as questions in his well-known decision, *Enterprise Wire Co.*, 46 LA 359 (1966).

1. **Notice:** If PO Huot was not aware of the rules set forth in the policies he allegedly violated and/or if he was unaware of the consequences for violating them then whether he was terminated for just cause is questionable. PO Huot is charged with violating Policy 300, Use of Force, and Policy 323, Code of Conduct. Relevant parts of these policies follow.

- Policy 300, Use of Force, §300.1 – §300.2.1, and §300.3 recognizes that police officers may use force, even deadly force, on a daily basis to enforce the law, safeguard the public and prevent harm from befalling on colleagues and themselves. This policy also recognizes the necessity of using force reasonably and only when necessary where necessity is defined by the facts and circumstances facing the officer at the time of the event. (Joint Exhibit B)

- Policy 300, Use of Force, §300.3.1–§300.3.2 discusses when force may be used to effect an arrest and the factors police officers should consider when determining what amount of force is reasonable. For example, when the confronted subject poses an immediate threat of injury to the public, officer or to himself/herself, then extreme force may be reasonable. Similarly, if the subject has a weapon and is threatening to use it, then use of extreme force may be reasonable. If, however, the subject is on drugs, inebriated or mentally limited, *ceteris paribus*, then even a minuscule application of force may be unreasonable. (Id.)
- Policy 300, Use of Force, §300.5-§300.5.1 requires that any use of force greater than handcuffing shall be promptly documented in the form of a narrative report, and it requires that one’s supervisor shall be notified, as soon as practicable, if the use of force “(a) ... caused a visible injury” and “(b) ... [caused] more than momentary discomfort, ...” (Id.)
- Policy 323, Code of Conduct, *inter alia*, describes the kind of off-duty and on-duty conduct that can result in discipline, including termination. Of relevance is §323.3(g) that states: “Unreasonable and unwarranted violence to a person encountered or person under arrest.” (Joint Exhibit C)

The record evidence is void of credible claims that PO Huot did not know or was unaware of the rules embedded in the above-discussed policies, nor that he did not realize that violating same could result in discipline, including termination. This is to say, PO Huot was on **Notice**.

2. **Reasonableness:** If the policies discussed, *supra*, and the work rules imbedded therein are either unrelated to the department’s operations or unrelated to the duties and responsibilities of a police officer, and if they conflict with controlling past practices, then their violation would not be

considered just cause for termination. Regarding this test or standard of just cause, neither PO Huot nor the Duluth Police Union challenged the reasonableness of the controlling policies.

3 – 4. **Complete & Fair Investigation:** Another test of “just cause” is whether the investigative process that resulted in a finding of wrongdoing was complete and fair. The **Houle Incident** was the event that triggered the City’s deliberations to terminate the Grievant’s employment. Said incident occurred on May 20, 2017. On May 21, 2017, the department placed PO Huot on paid administrative leave, pending its investigation into whether the **Houle Incident** violated Police 300, Use of Force, and Policy 323, Code of Conduct. (City Exhibit 3) On May 23, 2017, PO Huot was given a *Garrity/Tennessee* Warning, advising that he would be asked to supply evidence concerning said incident. (City Exhibit 4; City Exhibit 16.5, Huot’s Garrity Interview) On May 30, 2017, PO Huot was invited to provide additional information about the incident at a *Loudermill* Hearing scheduled for June 1, 2017. (City Exhibit 5) On June 6, 2017, subsequent to his *Loudermill* Hearing, PO Huot was informed that the incident did constitute violation of Policy 300, Use of Force, and 323, Code of Conduct, and, as discipline, his employment was terminated. (Joint Exhibit E; City Exhibit 4, Huot’s *Loudermill* interview)

In addition to interviewing the Grievant, the department interviewed Mr. Houle, PO Cekalla and PO Hughes (City Exhibit 16.8, Houle’s interview; City Exhibit 16.6, Cekalla’s interview; City Exhibit 16.7, Hughes’ interview). The City’s investigation also included a viewing of POs Cekalla’s, Hughes’ and Huot’s body camera recording of the **Houle Incident**. (City Exhibits 16.1 16.2 and 16.3, respectively)

The Arbitrator concludes that the Duluth Police Department’s investigation of the alleged policy violations was comprehensive and that PO Huot’s due process rights were not violated. All

witnesses to the **Houle Incident** were interviewed and, most notably, the department watched/studied the POs body camera recordings of the incident. Finally, the record evidence does not contain allegations that: (1) the department decided PO Huot's discipline *before* it investigating the matter; (2) PO Huot's *Weingarten* or kindred rights were denied; and (3) the investigation was unfair.

5. **Proof:** Clearly, to prove the policy-specific allegations brought against PO Huot, the City had to show that the **Houle Incident** involved the unreasonable use of force. If shown, then the City's disciplinary decision cannot be upset specifically for lack of proof. The undersigned concludes that the City did show that PO Huot used unreasonable force in violation of Policy 300, Use of Force and, thus, that discipline was warranted pursuant to Policy 323, Code of Conduct.

The body camera recordings show that as PO Huot and Hughes were escorting Mr. Houle down a skywalk corridor en route to the Tech Village parking ramp when he collapsed to the skywalk's floor: A sign of passive resistance. Although intoxicated, he uttered, "I ain't gonna make it easy for you guys." Within ten (10) seconds, PO Huot, the 911 call's lead officer, without saying a word, reached down, grabbed the chain linking the handcuffs that were attached to the subject's wrists and began to drag him. Mr. Houle's hands were cuffed behind his back so while being dragged he was on his side, arms behind his back and extended upward toward his shoulders. The risk of injuring the subject's wrists and shoulders was real. PO Huot dragged the subject about 100 feet and, while doing so, the Mr. Houle's head accidentally struck a door frame. The subject sustained more than momentary discomfort to his wrists and there was a bump on the back of his head. Mr. Houle summed up the entire incident, when he told an investigator, "They dragged me like a dog ..."(City Exhibit 1.8, PO McShane's Interview of Mr. Houle, 7:14)

At the time of the **Houle Incident**, the prevailing circumstances were as follows: Mr. Houle was intoxicated; Mr. Houle did not pose a threat to either the officers or to himself; Mr. Houle's size and weight relative to that of the police officers was such that he could have been picked up and walked or drag-walked to the parking ramp; there were no prevailing exigent concerns; the circumstances were not rapidly changing, obviating the need for split-second decision making; and it was not shown, by credible evidence, that PO Huot and his fellow officers needed to immediately respond to or assist with any other officers 911 calls.

Based on this discussion, PO Huot's dragging of Mr. Houle constituted an unreasonable use of force in violation of Policy 300, Use of Force, §300.1-§300.2.1, §300.3 and §300.3.1-§300.3.2. Further, the undersigned accepts PO Huot's testimony that he intended to file a written report on May 21, 2017, the day after the **Houle Incident**.⁵ However, the reason he gave for not reporting the incident to Lt. Jadzewski during his shift, when time permitted, are less convincing.⁶ Thus, it is determined that the Grievant also violated Policy 300, Use of Force, §300.5-§300.5.1. However, arbitral notice is made of the fact that on the night in question PO Cekalla did report the **Houle Incident** to Lt. Jadzewski and, later, he filed a written report.

Finally, regard proof, the Grievant agreed that he was guilty of using unreasonable force in the **Houle Incident**. By extension, he probably would agree that he violated the cited policies.

Consider the following Q and A:

Q: Would you agree as you testify here today that ... the level of force exceeds what was call for under the circumstance at the time?

⁵ Mr. Huot testified that by the time he reported to work the next day the incident had already been reported and, further, he was unable to make an independent report because he had already been placed on paid administrative leave. (Tr., Vol. 2, pp.418-423)

⁶ He was simply too busy. (Tr., Vol. 2, pp.421-422)

A: Yeah, I've acknowledged that.

(Tr., Vol. 2, p. 413)

6. **Equal Treatment:** Is the level of discipline the City allotted to PO Huot different from that which it has issues to other employees for similar offenses and under similar circumstance? If not, then, arguably, the Grievant's termination lacks just cause. With reference to the PO Jouppi case, the Union claims disparate treatment. However, as discussed, *infra*, just cause for terminating the Grievant's employment cannot be reversed based on this test.

PO Jouppi was charged with using unreasonable force in an earlier case that also involved a Native American male Like PO Huot, PO Jouppi was terminated. (Id., p. 248) However, the Union argues, the circumstances underlying the Jouppi and Huot terminations were different. When PO Jouppi was terminated, he was on a LCA and he had been criminally charged as a result of his unreasonable use of force. (Id., pp. 283-284) Nevertheless, these distinctions, the record suggests are insignificant. First, Chief Tusken testified, he would have terminated PO Jouppi's employment even if he had not been on a LCA. (Id.) Second, PO Jouppi's was subsequently acquitted of criminal charges and yet the City did not revoke its termination decision. Interestingly, after his acquittal, the Union chose not to arbitration PO Jouppi's termination. (Id., p. 222)

Based on the foregoing analysis, the undersigned concludes there is scant evidence of disparate treatment. Both POs violated the same Use of Force and Code of Conduct rules and both were terminated. Chief Tusken testified that even if PO Jouppi had not been on a LCA, he would have terminated his employment. While admittedly self-serving, the undersigned accepts his testimony.

7. **Penalty:** Thus far the undersigned has concluded that PO Huot exercised unreasonable force when he dragged Mr. Houle and, therefore, he violated Policy 300, Use of Force. He has also concluded that the City was within its rights to impose discipline pursuant to Policy 323, Code of Conduct, §323.3(g). On June 5, 2017, PO Huot was discharged.

Next, the analysis addresses questions like: How serious was the proven offense? Was this level of discipline too harsh? What weight, if any, was given to Mr. Hout's nine (9) year record of employment in service to the City? A case's "penalty" is Arbitrator Daugherty's final test of just cause, and answers to questions like those posed here are used in determining whether a grievant's termination was for just cause.

In the present matter, the Union acknowledges that PO Huot's misconduct warranted discipline but, it argues, to have terminated his employment is too harsh. The City disagrees and its reasons for disagreeing include the following:

- The Grievant was a nine (9) year employee.
- Over these years, he attended no fewer than 11 "use of force," "defensive tactics," "communication" and "tactical searches and seizures" sessions – seven (7) of which were specifically "use of force" sessions. (Union Exhibit 43)
- Arising out of the 2015 **Zontelli Incident**, 2015 **Canal Park Incident** and 2017 **Dunphy Incident**, the Grievant received CIT-like coaching. He was advised not act rashly and not to act out of frustration and anger but, rather, to slow down, step back, inhale and relax when facing non-compliant subjects. Lt. Jadzewski and Lt. Shene were among his coaches.
- In 2015, PO Huot was given a disciplinary suspension of one (1) day for the unreasonable use of force in the **Zontelli Incident**.

- The Grievant knew Mr. Houle was a loud but harmless inebriate whom he decided to drag down the skywalk, the risk of injury notwithstanding; Mr. Houle posed no threats; circumstances did not demand that PO Huot make such a split-second decision; PO Huot was not under time pressures; alternative strategies for the subject's removal abound, the least of which was for him to have simply asked the subject to stand-up and walk, a tactics taught in CIT and VDIIC.
- The Grievant failed to report the incident to a supervisor.
- Although a talented police officer, Chief Tusken observed that he is prone to make disproportionate use of force decisions. Of concern is whether his good work is "sustainable." (Tr., Vol. 2, p. 299)
- The Duluth Police Department's command staff witnesses' opined that, if reinstated, the odds that another use of force incident will occur are positive; and the provision of corrective measures, such as, more training and coaching will not help because these strategies have been tried and failed.
- Issues involving the unreasonable use of force wreak havoc on the Duluth Police Department's efforts to build bonds of trust and respect with the City's minority communities.

The Union argues that a reduced, more proportionate level of discipline, not termination, is what justice demands in the present instance. The Union's plea for a more lenient level of discipline is based on the following:

- PO Huot was a nine (9) year employee.

- During these years, PO Huot amassed a stellar work history that included letters of commendation, letters of appreciation and a Departmental Award for saving a person's life. PO Huot readily volunteered to work special assignments, and he sought out educational opportunities. On point, Chief Tusken testified:

I think Adam has a very good work ethic. He comes to work, puts in a good day's work. I think that he has – there is a soft side of Adam, all those things you talked about, empathy, care and compassion. I have witnessed all those things as well. This is --- this is not a guy I want to make out as being a monster. Good person. ...

(Tr., Vol. 2, p. 292)

- During these years, PO Huot had only been disciplined once. He received a one (1) day suspension for his unreasonable use of force in the **Zontelli Incident**. That happened in 2015. Thereafter, until the 2017 **Houle Incident**, he was never disciplined for the unreasonable use of force. Although the Grievant received use of force coaching, the latter is not a recognized form of discipline.
- Article 34, §34.1(b) states, in part, "Discipline shall be corrective and progressive." With only a one (1) day suspension on his disciplinary record, progressive discipline is called for. Mr. Houle was not punch, kicked or tasered, he was dragged. Mr. Houle experienced slightly more than momentary discomfort. PO Huot's erred, but his error was not that serious.
- PO Huot's mistreatment of Mr. Houle was not done out of malice or racial animus. He made a mistake; he was not tolerant; it will not happen again.
- PO Huot admitted that he should have asked the subject to "Get up." He knew he made a mistake when, at the elevator, he saw the disapproving looks on the faces of POs Cekalla and Hughes.

- PO Huot stated that being a police officer is ... “... number one in my life.” (Id., p. 377)

After carefully considering the record evidence and the parties’ positions on the “just cause-penalty” question, the Arbitrator concludes that the weight of evidence and arguments favor exacting a level of discipline that is less than termination.

Regarding the **Houle Incident**, the Grievant’s use of force was proven to be unreasonable. In the Arbitrator’s opinion said incident is a serious matter even though the amount of needless discomfort inflicted on Mr. Houle was nominal. Moreover, the undersigned recognizes that in this day and age, such conduct can evoke public tumult, which is a major concern to the public employer and rightly so. However, as the facts of the matter show, PO Huot’s use of force in the **Houle Incident** was *minor* compared to relatively *major* misuses of force, such as, that which was used in the **Zontelli Incident**. In that case, the Grievant hit Mr. Zontelli in the face several times with a clenched fist.

In addition to the extent to which force was misused in the present matter, the Arbitrator also considered that termination was too harsh a penalty because PO Huot was a long-serving police officer. He had been on the police force for nine (9) years and throughout most of that period his comportment was complemented through receipt of accommodation of various kinds, and he was otherwise considered to be a “good” policeman. These are important mitigations. So too is the fact that until the 2105 **Zontelli incident**, the Grievant had never been discipline and, in that case, he was issued only a one (1) day disciplinary suspension.

In reaching the decision that PO Huot was wrongly discharged, the undersigned assigned minimal weight to the much discussed **Canal Park** and **Dunphy Incidents**. These incidences did not rise to the level of discipline, let alone the unreasonable use of force. However, in the undersigned’s

opinion the Grievant's manner, tone of voice and exercise of physical presence that he exhibited in these incidences lacked professionalism and did nothing more than to evoke non-compliant resistance from the involved subjects. The departmental coaching that followed these events was dearly warranted and doubled as a "heads-up," if you will. PO Huot missed this "heads-up" or signal because shortly after the **Dunphy** Incident, he decided to recklessly drag Mr. Houle, and by doing so he crossed the unreasonable use of force demarcation line.

The foregoing "heads up" remarks lead to the answer to the Issue Statement's second question, namely: "If not, what is an appropriate remedy?" The "heads up" signals, an arms-length of training and coaching about the use of force, and the fact that PO Huot cross the use of force demarcation line in 2015 and then again in 2017 combined to cause his command staff to speculate, if reinstated, he will cross the line again and, perhaps, with far more damaging and serious consequence. The Arbitrator cannot find fault with this speculation. PO Huot and his career as a police officer is at a crossroad: Either he takes control of his penchant for misusing vocal and physical force or he will be fired: A *third* use of force violation would be his last.

The undersigned believes PO Huot when he says that police work is the most important thing in his life and, specifically, police work performed in Duluth, MN, his home town. If true, then he must belie the concern that his periods of good work are interrupted by periods of bad work. That is, the concern that his good periods are not "sustainable." Termination revoked, the Arbitrator hopes to rivet in the Grievant's mind the seriousness of the matter and of his need to change. Another undersized suspension will not do the trick. Thus, in this case, progressive discipline, as envisioned by the drafters of Article 24.2.b. in the CBA, is interpreted to mean reinstatement but without back pay and benefits.

VIII. AWARD

PO Huot's termination was not for just cause. As remedy, the City shall to reinstate PO Huot as a Police Officer but without back pay and benefits, including seniority-related benefits. However, PO Huot's return to work as a police officer is made contingent upon the Duluth Police Department's receipt of any medical exam, drug screening and psychological assessments that the Department may require.

The undersigned shall retain jurisdiction over this matter until 5:00 p.m. on August 22, 2018 for the sole and exclusive purpose of addressing and/or determining any issue that may arise pursuant to the administration and enforcement of this Award.

Issued and Ordered on the 22nd day of June,
2018 from Tucson, Arizona.

Mario F. Bognanno,
Labor Arbitrator & Professor Emeritus