

IN RE: VETERANS PREFERENCE HEARING BETWEEN

PETER BRAZEAU

BMS Case No. 19-VP-0740

and the

Hearing Held: July 23 & 24, 2019

Briefs filed: August 30, 2019

Record Closed: August 30, 2019

**CITY OF MINNEAPOLIS
POLICE DEPARTMENT**

Award Issued: October 17, 2019

Appearances:

Trina Chernos, Assistant City Attorney, for the City of Minneapolis.

Joseph A. Kelly, Kelly & Lemmons, P.A., for the Veteran.

INTRODUCTION

Pursuant to Minnesota Statute 197.46, the Veterans Preference Act, Veteran, Peter Brazeau, and the City of Minneapolis selected Sherwood Malamud from a list provided by the Minnesota Bureau of Mediation Services to serve as the Arbitrator to hear and determine whether the Notice of the Chief of the Minneapolis Police Department to discharge Veteran Peter Brazeau for alleged misconduct or incompetency should be sustained, modified or reversed. Hearing was held on July 23 and 24, 2019 in the Minneapolis City Hall. The hearing was transcribed. The parties filed briefs by August 30, 2019. The Arbitrator has fully considered the evidence presented at the hearing, and the written arguments of the Veteran and the City in issuing the following:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT

1. Peter Brazeau, hereinafter Brazeau or the Veteran, enlisted in the United States Marine Corps (USMC). He was deployed on two occasions to Iraq.
2. The City of Minneapolis and its Police Department, hereinafter the City or the Employer, is a governmental subdivision of the State of Minnesota.

3. After receiving an honorable discharge from the USMC, Peter Brazeau attended the University of Wisconsin-Stout, from which he graduated Summa Cum Laude in 2012.

4. The Employer hired Brazeau as a Community Service Officer in 2013. Then, it hired him as a Police Officer. He attended the Employer's Police Academy. He became a fully licensed law enforcement Officer in the City of Minneapolis Police Department in 2014. Eventually, he was permanently assigned as a Patrol Officer in the 1st Precinct.

5. On April 27, 2016 Officer Brazeau was awarded a Life Saving Award for his successful effort, together with Officer Courtois, in preventing a female from jumping from an overpass. On October 31, 2016, the then Chief of Police Janee Harteau notified the Veteran of his selection as the July 2016 First Precinct Officer of the Month.

6. Officer Brazeau and Officer Alexander Brown were assigned to and worked the power shift, from 8:00 P.M. to 4:00 A.M. on December 28-29, 2016.

The Incident

7. At approximately 2:00 A.M., Officers Brazeau and Brown were dispatched to the Gay 90s bar on Hennepin Avenue in downtown Minneapolis. Upon their arrival, they encountered an individual, BD. In the report that Officer Brazeau completed on December 29, 2016 at the 1st Precinct toward the end of his shift, he describes his two encounters with BD, as follows:

I saw A1(BD) standing in the patio of the Gay 90's yelling "south side" repeatedly. I saw that A1 had blood on his face and hands. A1 was asked for his ID, and attempted to give my partner cash. A1 threw the cash on the ground and I saw my partner pick it up and hand it back to A1. Staff at the Gay 90's said he was not drinking at their bar. I gave A1 a black hat and pair of glasses I found on the patio, which he said belonged to him. I saw a black jacket on the sidewalk in front of the patio, and asked A1 if it was his. A1 said it was his, jumped over

the patio railing and walked north on Hennepin Avenue S towards 4th Street S I saw A1 begin walking east on 4th st S from Hennepin Ave S. My BWC [body worn camera] was activated. . . During [this encounter] A1 said he did not want EMS or police assistance. [The description of this encounter is corroborated by the Body Warn Camera, the BWC, footage, Disc 1294.]

8. The Officers asked BD where he was going. They encouraged him to go in a direction, where he would not encounter other members of the public.

9. Approximately 5 minutes later, while on patrol in their vehicle, they heard yelling coming from the Nicollett Mall in front of the Xcel Energy Office Building. Officer Brown drove the squad car. It was approximately 2:10 A.M. Two pedestrians passed BD. It appeared to the Officers from their vehicle that BD shoulder checked one and attempted to spit on the other. When Officer Brazeau exited the vehicle, he informed BD “You are going to the hospital now, you are in **protective custody.**” (Emphasis added)

10. BD turned to face Officer Brazeau. The video from his camera (bwc) indicates that BD’s hands were not clenched in a fist. BD stopped to take-in what he was told. Officer Brazeau ordered BD “to turn around; put your hands behind your back.” Without any further statement or command from either Officers Brazeau or Brown, BD went face down, spread eagle, on the ground. Officer Brown directed BD to put his hands behind his back. BD allowed both officers to proceed to handcuff him, while he was lying face down on the pavement.

11. Officer Brazeau and then Brown thanked BD for his cooperation. Then, Officer Brown added, “Honestly, you’re kind of boring.” Officer Brazeau agreed.

12. Then, the officers turned BD from face down to his back. They directed him to get up. While being turned on his back, BD restated how the officers had characterized his behavior, “boring.” Then he called the officers “pussy assed ni--ers.” They did not put their hands on BD to assist or continue control over him.

13. Officer Brown in a voice viewed by police supervision as taunting and

ridiculing of BD stated, "OK Get up, get up, can you get up? Ahh, no you can't get up," then--

14. After approximately 10 seconds, when it appeared that BD could not get to his feet without assistance, the officers bent down to assist BD to his feet.

15. As they bent down, BD up-kicked his left foot to approximately a 90 degree angle to his body hitting Officer Brazeau in the chest and knocking off his body worn camera (bwc).

16. As BD's left foot was lowering to the ground, he up-kicked with his right foot. Officer Brazeau was able to deflect BD's right foot.

17. Officer Brazeau then placed his knee on BD's chest and with a closed fist struck BD with 3 to 4 strikes to BD's left cheek and jaw.

18. While Officer Brazeau struck BD, Officer Brown struck BD once on the right side of his jaw. Officer Brown then shifted his position to place his weight on BD's legs.

19. As Officer Brazeau reacted to the kick with strikes, he said in anger, "Get on the fucking ground mother fucker." A few seconds later Officer Brown said, "it was the wrong move, pal." BD gave a brief grunt/ laugh in response.

20. The officers turned BD face down on the pavement, while he bled profusely. Officer Brown took control of BD's head. Officer Brazeau called for EMS for medical assistance and a supervisor due to the use of force.

21. While waiting for other officers and supervision to arrive, Officer Brazeau went to the squad car to retrieve a spit hood to place over BD's head. Officer Brown placed the spit hood over BD's head. BD continued to struggle and yelled "I'll fuck you up-South side" what BD had repeated previously during the interaction with the officers on the terrace of the Gay 90s bar.

22. Within 2-minutes, two other officers arrived to assist. BD continued to struggle grunt and yell.

23. During the period of time the officers waited for the arrival of medical assistance, the Officers rotated BD from face down to his side. An ambulance arrived approximately 6-minutes after this encounter on the Nicollett Mall began. Upon the arrival of the ambulance, one officer told BD he would secure his legs, if BD did not stop kicking.

24. After EMS arrived, BD continued to struggle. The medical responders administered Ketamine to calm BD down. After it took effect, the officers assisted the medical responders to lift and transport BD into the ambulance.

25. When Sgt. Schmid arrived at the scene, Officer Brazeau advised him of the amount of force he used.

26. Officer Brazeau rode with BD in the ambulance to HCMC. Officer Brown reviewed with the security officers of the building footage of the incident taken by the camera on the Excel Office Building.

27. Since Ketamine was administered to calm BD, he was intubated at the hospital. Medical staff at HCMC diagnosed BD's medical condition on arrival.¹

28. BD's medical records reflect that when he "eloped" checked himself out and left the facility without being medically discharged, many of the conditions detected on his arrival were resolved.²

29. The following medical issues were not resolved: 1. Lactic acidemia;

¹BD's medical condition as documented upon his arrival at the HCMC was: 1. Acute toxic encephalopathy; 2. Agitated delirium. 3. Intubated for airway protection; 4. Lactic Acidemia; 5. Hypokalemia.

²When he checked himself out a number of his conditions were resolved including: 1. Acute toxic encephalopathy; 2. Agitated delirium; 3. Hypokalemia.

2. Traumatic Brain injury; 3. Facial trauma with Nasal bone fracture. The medical diagnoses upon arrival and self-discharge (elopement) did not determine or suggest how BD suffered these medical conditions.

The Complaint and its Processing

30. On December 30, 2016, the day after the incident described in paragraphs 6 through 29, Police Department supervision filed a complaint against both Officers Brazeau and Brown. The complaint finds fault with their use of excessive force towards BD on December 29, 2016 in violation of Minneapolis Policy and Procedure 5-303. The complaint alleges that the Officers failed to de-escalate the situation in violation of policy 5-304(B). Officer Brown was charged with an additional violation unrelated to the conduct of Officer Brazeau. It is not pertinent to the determination of this Veterans Preference matter.

31. In January 2017, coinciding with his next scheduled shift after the incident, the Minneapolis Police Department (MPD) placed the Veteran on work status - Relieved of Duty. He had to remain available at home between 8 a.m. and 4 p.m Monday through Friday. He remained in that status until October 12, 2017.

32. The complaint was first referred to the City of Minneapolis City Attorney for review to determine whether Officer Brazeau should be charged criminally for his assault on BD. The City of Minneapolis City Attorney cited a possible conflict of interest and referred the matter to the City Attorney of the City of St. Paul to conduct this criminal review.

33. On **May 19, 2017**, St. Paul Assistant City Attorney Clifford Berg wrote to the Office of the Minneapolis City Attorney with his determination, to decline to charge either officer **criminally** for their actions toward BD on December 29, 2016. He declined to bring charges on the basis of the following analysis:

The statutes of Minnesota provide that anyone who intentionally inflicts or attempts to inflict bodily harm upon another is guilty of assault in the fifth degree. Minn. Sta t. §609.224 subd1(2).

Reasonable force, however, may be used upon or toward the person of another without the other's consent when the actor, in this case a public officer, reasonably believes that it is necessary to effect a lawful arrest or in executing any other duty imposed upon the officer by law. Minn. Stat. §609.96 subd 1(1)(a) and (d). In determining the reasonableness of the use of force a reviewing court must judge a particular use of force from the perspective of a reasonable officer on the scene. Ward v. Olson, 939 F. Supp.2d 956 at 962 (US Dist. Ct. Minn. 2013). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. . . .

Although the officers caused bodily harm to BD, it is my assessment that they should not be prosecuted for assault because it is not clear beyond a reasonable doubt that they exceeded a reasonable use of force while conducting a lawful arrest or other duty imposed upon them by law. When Officers Brazeau and Brown encountered BD on Nicollett Ave they did so with prior knowledge that he had been fighting at another location. BD appeared to be highly intoxicated and had impaired judgment. The officers further observed that BD appeared to cooperate by laying down on the ground and allowing the officers to cuff him, his demeanor shifted quickly and unexpectedly. Although BD was handcuffed while he kicked Officer Brazeau, he was not sufficiently secured that he presented no safety risk to the officers or himself. The officers were not able to safely grab BD's legs because he was kicking them. Given all these factors it is my opinion that at a trial, the officers would likely have a reasonable claim that their actions were necessary to gain control of BD before he injured them or himself. While the blows to BD's face are difficult to observe, it is my opinion that there is a reasonable doubt as to whether the officers exceeded the reasonable use of force afforded them as officers of the law. For those reasons, it is my recommendation that charges be declined as to both officers.

34. On **May 23, 2017**, Sgt Sand of the Internal Affairs Unit of the Minneapolis Police Department (MPD) notified Officer Brazeau, the Veteran in this proceeding, to prepare and report on June 1, 2017 to provide a Garrity statement, to an Internal Affairs inquiry concerning his alleged violation of the Department's Use of Force policy 5-303 and the De-escalation policy 5-304(B).

35. On **June 1, 2017**, Officer Brazeau reported as directed. At the outset of the questioning, he signed a Tennessean Warning that the information he provides will be used in the fact-finding process to determine if he engaged in any misconduct. Any admissions he makes may be used for the purpose of imposing discipline. The notice informed the Veteran who may have access to the information he provides.

36. Officer Brazeau was interrogated by Sgt. Sand on June 1, 2017. Sgt Sand inquired and Officer Brazeau reported what occurred at approximately 2:00 a.m. on December 29, 2016 during the two encounters with BD. Officer Brazeau indicates why he did not place BD in protective custody at the end of the first encounter, and then he describes the second encounter, as follows:

A. Because he was intoxicated, he was able to care for himself. But, now, he's being a danger to other people cause he's trying to start fights, he's assaulting and spitting on them, um. Committing disorderly conduct and at least 5th degree assault. Due to his level of intoxication, I . . . we got out of the car. I told him immediately-just like we are trained in Procedural Justice, it helps to deescalate the situation to explain to him- what's going on, where he's going, what's happening. So, I got out of the squad and said you're in protective custody, you're too intoxicated, starting fights with people, you're gonna go to the hospital. (City Exhibit #9, p.3 lines 29-36)

. . .

After describing how BD just went to the ground, face down and allowed the two officers to cuff him, Sgt. Sand asked:

Q: Were you expecting like him to fight at this point?

A: I was. Like I said, when I told him he was in protective custody, he turned around and clenched up, and he was in a fight earlier. I just watched him assault two other people as he was walking down the street. I fully expected him to fight. (Id p. 4, lines 14-17)

. . .

Q: And then, you give up. . . you guys decide to-, backup, ...give up control of BD. Why did you do that?

A: Uh, in the Procedural Justice training, they told us to ... we wanna have... give each person their voice. We want to allow them to have some buy in and helps them buy in to the decision. Id lines 31-35.

Officer Brazeau then describes how at the Gay 90s bar BD demonstrated his agility by hopping over the crowd control metal barrier. Officer Brazeau determined that by giving BD that opportunity it calmed him down at the first encounter. He continued to answer the last question:

I figured if he was gonna be able at least standup or stand part of the way up and I could assist him that maybe he'd calm down a little bit and buy into our decision. I could try and keep explaining to him, like I had already been, that we were going to the hospital and he wasn't under arrest. (Id lines 37-41)

Officer Brazeau describes how BD kicked him with his left foot in the chest, knocking the wind out of him and knocking off his BWC.

Q: And then, take me through what-, what you did next.

A: Then, I placed my knee on his chest and delivered three to four strikes to his face.

Q: Why did you think that was the appropriate force to use?

A: Um, according to our training and response guide, he was committing an active aggression because he did assault me. It's behavior that constitutes an assault. I am able to respond with anything up to the baton according to our Use of Force Matrix. Um, I chose stunning strikes because I didn't have the opportunity to pull my baton out and use it. I also didn't have the opportunity because he was still kicking at that time. And he was continuing to try to assault me after he already did once. I couldn't grab his legs without being kicked again. I've seen numerous articles in the paper where officers have been kicked in the face and lost their eyesight. I didn't wanna risk that to myself or my partner. Delivering three to four punches to his face, which is less force than the kick he used against me, was the best option I had at the time.

Q: So, he was lying on his back handcuffed. What kind of a threat was he at that time?

A: He was obviously a great threat-, threat. Like I said he kicked me, knocked the wind out of me, tried to kick me again. If he would have kicked me in the face or my partner in the face, we could lost our eye, could have broke our jaw. I did mention before I've seen numerous articles where officers have been injured. Just because someone is in handcuffs doesn't mean that they're unable to assault you. (Id lines 20-41)

Q: So, you didn't, uh ... so uh, backing away from him was not an option?

A: No, Once we... you know, I took a step back to allow him the opportunity to try and get up to deescalate. He said he could get up on his own. At that time, it didn't appear that he could, but maybe he could have. If we backed up a way and gave him enough time, then he could have ran away. We were right next to the light rail. He could have been run over by a train. I can't allow that to happen. We're responsible for him once he is in our custody.

Q: And then, you said... how many punches did you deliver?

A: I believe three or four. I did not count.

Q: Why was three to four necessary instead of one.

A: Because he was continuing to kick. As soon as I felt that he was not kicking anymore, I ceased my strikes immediately. You could hear me on the video I aired for a supervisor for use of force per policy and I also aired for an ambulance per policy.

Q: And the, uh, you tell him to get on the ground, but he was already on the ground?

A: That's an... it was an instinctive response to our... Like the way we've been trained is if someone strikes, you try and block or move out of the way of the kick if you can, deliver strikes, and yell at them to get back or get on the ground. That was just my instinctive response from the training that I have received. (Id p. 6 lines 1-25)

37. Chief Arradondo became the interim chief in September 2017. He officially began a three year term as Chief in January 2019.

38. On **October 12, 2017**, Assistant Chief Kjos, the Departments' second in command, changed the Veteran's work status from Relieved of Duty

to Non-Enforcement Duty. He continued his assignment at the 1st Precinct, where he was assigned to monitor the camera input from various locations in Downtown Minneapolis. He had no contact with the public in that assignment.

39. On **December 12, 2017**, the Police Conduct Review Panel, comprised of 2 civilians and 2 MPD Lieutenants, met to review Sgt. Sands report, from the Internal Affairs Unit, City Exhibit 3. The report is undated and un-signed. The Panel determined there was merit to the allegation that Officer Brazeau violated MPD Policy 5-303. The Panel was unanimous in its judgment that there was merit to the allegation that “Officer Brazeau had used unauthorized force on BD by punching BD in the face multiple times while handcuffed behind his back lying on the ground” the Veteran violated the Use of Force Policy. It remanded the charge that Officer Brazeau failed to comply with the de-escalation policy 5-304(B). The determination of this Panel is advisory to the Department.

40. On **December 13, 2017**, the day following the decision of the Police Conduct Review Panel’s finding that Officer Brazeau violated the Department’s Use of Force Policy 5-303 (paragraph 39 herein), Assistant Chief Kjos changed the Veteran’s work status from Non Duty-Enforcement Duty to Full Enforcement Duty assigned to the power shift, his shift assignment when the above described incident occurred.

41. On **August 14, 2018**, in his Loudermill meeting with supervision, the Veteran presented his side of what occurred and defended his actions on December 29, 2016 against the allegations that he violated MPD policies 5-303-Use of Force, 5-304(B)-De-escalation and 5-306 Use of Force Reporting and Post Incident Requirements.

42. At the beginning of 2019, Deputy Chief Halverson and Assistant Chief Kjos met several times as a Departmental Discipline Panel. On **February 14, 2019** Deputy Chief Halverson authored a recommendation that Officer Brazeau’s employment be terminated for his excessive use of force on

December 29, 2016 against BD. The two high ranking officers, Assistant Chief Kjos and Deputy Chief Halverson, reasoned, in part:

“Why would it be necessary to use force (stunning strikes or even the baton Officer Brazeau had planned to use) on a subject that: 1) was on the ground 2) on his back 3) showed he could not get up and 4) was handcuffed? . . . We again ask if BD was a flight risk [for the above stated reasons]

In his memo Deputy Chief Halverson engaged in the analysis set forth in the Use of Force Policy, 5-303:

**-Application of Graham vs. Connor:
From MPD Policy 5-303 The Graham vs Connor case references that:**

“Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including:

- The severity of the crime at issue,
- Whether the suspect poses an immediate threat to the safety of the officers or others, and;
- Whether he is actively resisting arrest or attempting to evade arrest by flight.

The “reasonableness” of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain and rapidly evolving-about the amount of force that is necessary in a particular situation.” Authorized use of force requires careful attention to the facts and circumstances of each case. . . .

If we look at the three points of the Graham vs Connor in this case: (City Exhibit H p. 6)

-Severity of the crime at issue in this case:

Initially the officers were not going to arrest BD for a crime. They were placing him in ‘protective custody’. The incident

did move to a crime when BD kicked Officer Brazeau and it became a 4th degree assault with a kick to the chest, which is a gross misdemeanor.

-Whether the suspect poses an immediate threat to the safety of the officers or other, and BD did kick Officer Brazeau. But BD is handcuffed behind his back, lying on the ground and lying on his back. Given these three points BD does not appear to be able to do any harm to either officer. They could have disengaged with BD as he did not appear to get up on his own and flee.

-Whether he is actively resisting arrest or attempting to evade arrest by flight.

BD is initially compliant to be taken into protective custody. But became uncooperative and kicked Officer Brazeau. These officers had other options to control a handcuffed subject who was on his back and on the ground.

Deputy Chief Halverson then reflected on Officer Brazeau's lack of thoughtfulness, when given the opportunity to indicate in hindsight if he would do anything differently. It indicated to the authors of the recommendation a lack of critical thinking by Officer Brazeau. The Veteran's negative answer weighed heavily in the decision to recommend termination.

43. On February 15, 2019, Chief of Police Medaria Arradondo recommended the termination of Peter Brazeau from the Minneapolis Police Department. Chief Arradondo based his decision on the statements of Officer Brazeau that he made in the investigative process, Departmental records and the recommendation of Assistant Chief Kjos and Deputy Chief Halverson. Chief Arradondo reasoned:

We must first do no harm.

On December 29th, 2016 at approximately 0200 hours, Officer Brazeau you identified an adult male named BD in downtown Minneapolis who you believed was intoxicated, belligerent and needed to be taken into *protective custody*. This particular incident's outcome involving yourself and Officer Brown neither provided protection to BD and custody was handled by paramedics as a result of the injuries BD sustained from the force used against

him by you and your partner while he lay handcuffed on his back.

. . .

As Chief I am proud of the fact that the MPD engages with our community through Procedural Justice. Giving others Voice, being Neutral in our engagements, treating everyone with Respect and building Trust. I expect every officer to treat our public in this manner.

. . .

Officer Brazeau after the actions of BD that involved a kick that did not cause any significant injury to you or your partner you proceeded to use profanity towards BD then punch him in the face four times which medical records noted he suffered a broken nose along with other facial injuries. Your actions were unwarranted and unacceptable.

. . .

You intentionally inflicted unreasonable physical force on a vulnerable member of our community causing injury and yet you felt justified in your conduct. For those reasons stated you have forfeited your right to be a member of the Minneapolis Police Department. I have made the decision to terminate your employment effective immediately. (Italics added)

The Arbitrator makes the following:

CONCLUSIONS OF LAW

1. Officer Peter Brazeau is a veteran within the meaning of Minn. Stat. Sec. 197.46, the Veterans Preference Act, and subject to its protection.
2. The City of Minneapolis Police Department is a municipal employer subject to the mandates of the Veterans Preference Act.
3. The City of Minneapolis Police Department fully complied with Sec. 626.89, the Peace Officer Discipline Procedures Act in that the Police Conduct Review Panel, in an advisory capacity, in accordance with Sec. 626.89 (17,) determined there was merit to the charge that Officer Brazeau used excessive force on December 29, 2016 towards BD, and
4. The Police Conduct Review Panel continued to advise: "The allegation stated does not violate the wording used in the De-Escalation Policy 5-

304(B), however, there appears to be antagonistic behavior by Officer Brazeau which could violate the code of conduct or other policies.” City Exhibit “C” p.5

5. By his conduct on December 29, 2016 as depicted in videos 1293, 1294, 1295, 1296 and 1297 and on the basis of Internal Affair Unit Report of Sgt. Sand, the Garrity interview conducted on June 1, 2017 and Officer Brazeau’s Loudermill statement on August 14, 2018, Officer Peter Brazeau violated the Minneapolis Police Department’s Use of Force Policy 5-303.

6. The City of Minneapolis did not follow through and continue to allege that Officer Brazeau violated the Minneapolis Police Department’s De-Escalation Policy. That allegation is hereby dismissed.

7. Officer Brazeau’s Life Saving Award and Officer of the Month Award for July 2016 from the Minneapolis Police Department together with his job performance as an Officer and Field Training Officer in the 1st Precinct from December 13, 2017 to the date of the termination of his employment on February 15, 2019, at a job performance level of *Exceeds Expectations*, serves as mitigating factors which make the imposition of the discharge penalty inappropriate. The City of Minneapolis Police Department does not have just cause to discharge Officer Peter Brazeau. It does have just cause to impose the most severe penalty contemplated by the Departmental Discipline Matrix, an 80-hour suspension without pay. The discharge penalty shall be reduced to an 80-hour suspension without pay.

8. The Veteran, Peter Brazeau is the prevailing party, within the meaning of Sec. 197.46 (e), since in this Award, “. . . an arbitrator and the hearing reverses the level of the alleged incompetency or misconduct requiring discharge. . .” The Arbitrator set aside the discharge penalty, but the Veteran was subject to substantial discipline for his conduct on December 29, 2016. (Emphasis added)

Based upon the above Findings of Fact and Conclusions of Law, the Arbitrator issues the following:

AWARD

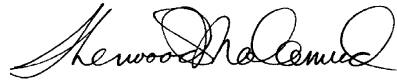
1. The City of Minneapolis does not have just cause to discharge, Veteran Peter Brazeau. It does have just cause to discipline Veteran Peter

Brazeau with an 80-hour suspension without pay.

2. Within 14-days of the issuance of this Award, the City of Minneapolis Police Department shall reinstate Peter Brazeau to a position as a Police Officer in the Minneapolis Police Department, but subject that reinstatement to an 80-hour suspension without pay.

3. Prior to placing the Veteran in Full-Enforcement work status and no later than 90-days of Peter Brazeau's reinstatement, the Minneapolis Police Department shall provide the Veteran with the following training either on an individual basis or in Departmental training with other officers and demonstrate: 1. How to safely handcuff an individual from the perspective of the person handcuffed and the officer; 2. How to maintain control of an individual who is handcuffed; 3. How to address continued resistance by a handcuffed individual, due to their level of intoxication or mental impairment, i.e., flailing of hands and/or feet in the variety of settings in which taking custody of an individual may occur.

Dated: October 17, 2019

A handwritten signature in black ink, appearing to read "Sherwood Malamud". The signature is fluid and cursive, with the first name "Sherwood" written in a larger, more prominent script than the last name "Malamud".

Sherwood Malamud, Arbitrator

DISCUSSION

Introduction

Under Minn. Stat. Sec. 197.46 (d), the Veterans Preference Act, the decision of the Arbitrator is appealable to District Court within 15-days of the issuance of the Arbitrator's Award/Decision. For that reason the Arbitrator structured this Award with Findings of Fact, Conclusions of Law and Award to facilitate judicial review. In this section of the Award, the Arbitrator explains the basis for his Findings, Conclusions and Award.

The context of this Award is subject to at least two assumptions. However, to better understand the Award, those assumptions are expressly set forth. First and foremost, when a police officer leaves his home to assume his duties, he has every right to expect that he will return at the end of his shift alive and uninjured. Departmental policies and training should provide the tools to meet that expectation.

Unlike most employment settings, a police officer is frequently placed in factual circumstances and settings in which he must meet the challenge of force used against him or he must use force on another. Thus, the use of force, how much and under what circumstances, is central to the exercise of a police officer's authority. It is a hard job. It requires the exercise of judgment. Such judgment is obtained through training and experience. Members of the public are the beneficiaries or the victims of an officer's judgments.

ISSUE

Did the City of Minneapolis Police Department have just cause to discharge Officer Peter Brazeau on February 15, 2019? If not, what is the appropriate remedy?

The parties suggest other versions of this statement of the issue in their arguments. However, the above statement sets out the question that must be answered by this decision.

Findings and Conclusions

The parties do not dispute any procedural matters. Peter Brazeau is a Veteran. He is employed by the municipal employer the City of Minneapolis Police Department. The Chief of Police notified the Veteran of the Chief's intention to terminate his employment. The Veteran timely filed a request for a hearing. The parties selected Sherwood Malamud to conduct this Veterans Preference Hearing and issue this Award pursuant to Minn. Stat. Sec. 197.46, the Veterans Preference Act.

Use of Force

The central factual dispute in this case is whether the amount of force employed by Officer Brazeau on December 29, 2016 was excessive. And, the conclusion of law that follows is whether that amount of force violates the Department's Use of Force Policy, 5-303.

The City, which under the Veterans Preference Act bears the burden of proof, presented its case-in-chief through the testimony of Deputy Chief Halverson and Chief of Police Arradondo. The great weight of that burden was met through City exhibits, particularly, the five videos of both encounters of Officer Brazeau with BD; the Internal Affairs Unit report of Sgt. Sand; the transcript of Officer Brazeau's Garrity questioning and his Loudermill statement. Extensive quotes from the above documents appear above in the Findings of Fact.

The City argues that Officer Brazeau employed a brutal level of force that clearly violates the Department's use of force policy. Chief Arradondo concludes in his memo terminating the Veteran's employment that Officer Brazeau's strikes broke his nose and caused other medical injuries to BD.

While it is difficult to view the swift and decisive closed fist strikes delivered by Officer Brazeau to BD's left cheek and jaw, the Arbitrator's multiple reviews of the videos suggest that Brazeau's strikes may not have hit BD's nose. Further, BD was engaged in a fight prior to the arrival of the officers at the Gay 90s terrace at 2:00 a.m. His face was bloodied, when they first encountered him. He may well

have suffered a broken nose in that fight that preceded BD's contact with Officers Brazeau and Brown. The record evidence supports a finding that BD suffered a broken nose. It does not establish how BD sustained that injury.

In the word of the medical report of BD's stay at the HCMC on December 29, 2016, BD "eloped." He left the facility without being discharged by medical staff. Subsequently, Deputy Chief Halverson searched for BD, but he was unable to find him. BD did not testify at the Veteran's Preference hearing in July 2019. The 5-videos depict BD's treatment on December 29, 2016 by Officers Brazeau and Brown.

The parties hotly contested whether the Department's policy and training provided an officer with a range of discretion in which the use of strikes as used by Officer Brazeau was contemplated and appropriate. The Use of Force Matrix, as it was formerly known or under the Department's current name for the use of force continuum, the Defense and Control Response Training Guide, (City Exhibit #20) charts the range of responses an officer may take to the range of actions that individuals subject to arrest may present to an officer. There is no dispute what the color coded shading communicates to an officer. He may respond within a broad range of responses up to and including use of a baton to an individual whose actions are actively aggressive toward the officer.

The Veteran's witnesses, particularly Lt. Kroll, the Minneapolis Police Federation President and Scott Bechtold, the consultant employed by the Union to testify in this case, and the Veteran himself testified to the range of responses authorized under the circumstances present on December 29, 2016. They testified to the **objective reasonableness standard** included in the Department's policy 5-303 through reference to the 1989 decision of the U.S., Supreme Court decision, Graham v. Connor, which measures the level of force appropriate to a particular set of circumstances.

Mr. Bechtold testified that the objective reasonableness standard is vague. Its application is dependent on careful attention to the facts and circumstances in which an officer employs force. The Supreme Court and the Department's policy highlight the following three factors: 1. The severity of the crime at issue; 2.

Whether the suspect poses an immediate threat to the safety of the officers or others; 3. Whether he (the suspect) is actively resisting arrest or attempting to evade arrest by flight.

The Veteran's expert testified that the officers had 1. the lawful authority to seize BD and take him into protective custody. 2. BD posed a threat to the officers, when he kicked Officer Brazeau. The Veteran's expert opined that: 3. BD resisted arrest:

"The resistance that I observed was when the officer told him that he was being taken into custody and to turn around and put his hands behind his back and he did not comply. That's not active resistance, that's more passive resistance." Transcript, P. 469

The expert characterized BD's kick as active aggression. He testified that the range of responses contemplated by the Department's Use of Force Policy, 5-303 to an act of active aggression falls within:

The reasonable range that's defined in the diagonal line with the—based upon the Minneapolis Police Department's different options. And at that time, they could use anything from chemical aerosol, Taser, restraint, stunning strikes, which are unarmed strikes, and baton. (Transcript p. 470)

The expert continued his testimony that it was reasonable to begin immediately with strikes to the face to conform to training to immediately get the situation under control. Officer Brazeau successfully did bring the situation under control.

The expert stated that an officer need not begin his response at a lower level of force than the force employed by the suspect on the officer. The expert testified that the longer the situation continues the likelihood of further injury to the suspect or the officer and further harm increases. The expert observed that when the threat ceased, a total of not more than 3 seconds from the kick to the cessation of strikes, the strikes ended.

The expert opined that Deputy Chief Halverson's memo recommending Officer Brazeau's termination manifested 20/20 hindsight contrary to the

Supreme Court's warning in Graham v. Connor to refrain from viewing an officer's actions with 20/20 hindsight. The Veteran's defense is premised on the expert's approach to the events of December 29.

The City's justification for terminating the Veteran's employment is based on Officer Brazeau's failure to exercise judgement when applying the use of force continuum. He failed to take in and react to all the facts extant when Officer Brazeau and Brown took BD into protective custody.

Deputy Chief Halverson and Assistant Chief Kjos sought and relied on a memo prepared by the Department's Training Officer Lt. Johnny Mercil. Deputy Chief Halverson and Assistant Chief Kjos asked Lt. Mercil to review Officer Brazeau's conduct in light of the training he received on the use of force. In his February 2019 memo, Lt. Mercil characterized BD's kicking of Officer Brazeau, in the same way as the Veteran's expert Bechtold, as "active aggression."

Lt. Mercil offered advice to the officers.³ Officer Brazeau only saw the memo at the arbitration hearing. The Department did not provide the memo to the Veteran for review, when it was written or when it was relied on in the termination recommendation of February 14 of Deputy Chief Halverson and Assistant Chief Kjos. The Veteran was not provided with a copy of the Lt. Mercil memo before or after Chief Arradondo relied on the memo in reaching his decision to terminate the Veteran's employment with the MPD.

Lt. Mercil stated in his memo to Deputy Chief Halverson:

Head strikes- Officers are taught how and when to use strikes. De-emphasizing the use of strikes when multiple officers are on the scene is one of the key points of our DT training, and has been for years. Using body weight to control is one of the main concepts of our ground defense training program, which these officers have been

³The City presented the testimony of Lt. Mercil and his memo in its rebuttal to the Veteran's case-in-chief. The Veteran vigorously objected to the receipt of this evidence. The memo was not shared in advance nor did Lt. Mercil appear on the City's witness list. The Arbitrator received the memo and allowed the training officer to testify under the procedural rules that normally govern arbitration proceedings.

trained in.

Handcuffing-Officers have been taught to assist handcuffed prisoners back to their feet when they are on the ground, by instructing the person to get up to a knee and then guiding them to their feet (one hand on the back of the neck and another under their arm as they rock forward and up)

Proportionality of force- The officers need to consider the following: If it's reasonable to believe a situation can safely be controlled at a lower level of force, an Officer should start there. Officers need to be able to articulate at least one of the following when force is used:

Lower force was ineffective (did not work)

Lower force would likely be ineffective (would not work)

Lower force was unsafe to try (too dangerous to try)

Lt. Mercil advised in his memo that if it is reasonable to believe that a situation may be safely controlled with a lower level of force, the officer should start there. There is no evidence that Officer Brazeau's training was geared toward this advice.

Under the memo, since there were two officers present, strikes should have been de-emphasized. The memo suggests an analytical framework for the use of force that would meet the proportionality requirement articulated in the memo. Nonetheless, the Department's training officer did not provide Deputy Chief Halverson and Assistant Chief Kjos an opinion as to whether Officer Brazeau's actions violated training guidelines or was unreasonable. The absence of an opinion on this point materially weakens the City's case.

In addition to the Veteran's failure to exercise good judgment, Deputy Chief Halverson and Chief Arradondo based the discharge decision on Officer Brazeau's failure to self-evaluate his conduct. This failure plays a significant role in the termination decision. Both Deputy Chief Halverson and Chief Arradondo reference and rely on the absence of self-reflection by the Veteran over his conduct towards BD in December 2016.

The Veteran argues that since his actions fall within the Use of Force Continuum his actions are authorized and therefore, reasonable. The premise of

this argument bears closer scrutiny. The Veteran argues that he acted within the range of discretion accorded officers under the Department's Use of Force Continuum/Defense and Control Response Training Guide.

This argument does not allow for or require an officer to exercise judgment. Under the Veteran's interpretation of the Department's policy, if an individual uses an act of aggression towards an officer, the officer need not control or measure his response. There is no limit as to how much force or how long the officer may use force on that individual.

Officer Brazeau stated in his Garrity interview and in his testimony that he used closed fist strikes, because he could not retrieve his baton with sufficient speed. If he had used the baton, the highest use of force contemplated under the continuum, it could not be subject to supervisory criticism, because the Department's policy contemplates resort to that level of force, the Veteran argues. The Veteran concludes his argument, to criticize the officer acting within the range of force on the continuum is to engage in 20/20 hindsight in violation of Graham v. Connor.

The Arbitrator concludes that Officer Brazeau violated the Department's use of force policy. Here is the basis for that conclusion. The Veteran's argument downplays the exercise of judgment by the officer who is attacked with an "act of aggression" by an individual. The Veteran, Lt Kroll and expert Bechtold articulate a mechanical approach to the issue of the level of force an officer may use. They argue that the policy authorizes the use of force at the level employed by the individual or a level above. That is the message the continuum transmits. If the force falls within the continuum, then it is authorized, and therefore it should be approved.

Here, Brazeau continued his strikes for approximately 2 seconds. He successfully hit BD with no more than 4 strikes. The application of the Veteran's analysis would justify Officer Brazeau's use of a Baton for 2 or 3 minutes. Without the interjection of judgement, the beating may continue so long as it is precipitated by an individual's "act of aggression." Officer Brazeau stopped his strikes, when he felt BD's resistance stopped. However, BD continued to move his

feet and yell until he was medicated with Ketamine by the responding ambulance personnel. At some point an officer must exercise judgment when using force.

The need for the exercise of judgment by an officer forces the Arbitrator to take into account the professional opinion of the supervisors who immediately reviewed the Veteran's conduct on December 29-30, 2016 and who filed the complaint that alleged the Veteran's use of force violated Policy 5-303. Similarly, the Arbitrator must take into account the opinions of upper level Departmental management that concluded that Officer Brazeau used excessive force.

The Veteran's expert Bechtold testified that Graham v. Connor dictates that the Arbitrator follow very carefully the facts extant on December 29, 2016 while avoiding use of 20/20 hindsight in evaluating Officer Brazeau's decisions and actions. The expert describes a process that must follow a fine line of analysis. The Arbitrator finds that the expert's admonition is grounded in Graham v. Connor, the Supreme Court's decision.

The Officer Brazeau's strikes that are the basis of this analysis occurred at the second encounter between BD and the officers, at approximately 2:00 a.m. on December 29. From the time the Officers exited their squad car, the handcuffing of BD and the arrival of other officers and an ambulance no other pedestrians were present in any proximity to the scene of the incident. No other persons were present that might introduce external pressure to the situation.

Both Officer Brazeau and the expert Bechtold describe BD as assuming a hostile stance, one which indicates an intent to resist arrest. When Officer Brazeau exited the squad car, he informed BD that the officers were taking BD into protective custody. The Arbitrator viewed the scene depicted in the videos. When Officer Brazeau exited the squad car and informed BD that he is being placed in protective custody, the Arbitrator did not view BD clenching his fists. Rather, he delayed several seconds and then he went spread eagle face down on the sidewalk. The expert omitted BD's going spread eagle on the sidewalk from his judgment of BD's stance toward Officer Brazeau. Yet, BD's action allowed the two officers to easily handcuff BD, so much so that Officer Brown characterized the handcuffing process as "boring," a characterization in which Officer Brazeau

concurrent.

As the officers turned BD from face down to his back, BD called the officers, “pussy assed ni--ers.” Officer Brazeau states that BD indicated that he wanted to get up on his own.⁴ Then, Officer Brown, employing a taunting tone said, “Ahh you can’t get up.” The officers each on a side of BD bent down to help BD up. Then, BD kicked officer Brazeau.

Officer Brazeau explained in his Garrity interview that by relinquishing control over BD, he was implementing a technique of procedural justice. The training for assisting a handcuffed individual to stand up is described in Lt. Mercil’s memo. The officer should encourage the individual to get to a knee, however, the officer should continue contact by holding the back of the neck of the individual and by using his other hand to grasp the individual under the arm to assist him up. None of these actions preclude the use of procedural justice technique on the individual. Neither Officer Brazeau nor Officer Brown implemented the technique described by the training officer.

Instead, the officers gave up control. When it became clear that BD could not get up, they had to bend down to help him up. BD demonstrated remarkable agility during the first encounter with the Officers, when he was able to jump over the crowd control barrier on the terrace by the Gay 90s bar. BD, again demonstrated remarkable agility by kicking almost at a 90 degree angle while lying on his back in handcuffs to kick Officer Brazeau in the chest with sufficient strength as to knock off his body worn camera (bwc). Throughout both encounters with the Officers BD acted erratically.

The reason the Officers were taking BD into custody was not to effectuate an arrest for a crime that may have occurred prior to BD kicking Officer Brazeau, but to take him into protective custody and transport him a short distance to the hospital. At the end of the second encounter, Officer Brazeau “protected” BD by administering strikes that left a pool of blood, when the officers and medical first

⁴In reviewing the videos, the Arbitrator did not hear or discern that BD made any comment or request to get up on his own.

responders transported BD into an ambulance.

Police Department supervision initiated the complaint against Officer Brazeau for use of excessive force, in part, because the officers were taking BD into protective custody. The videos and both his Garrity interview and his Loudermill statement reflect that Officer Brazeau did not attempt nor did he use judgment, when he struck a handcuffed BD, still intoxicated and manifesting erratic behavior.

Police supervision testified that Officer Brazeau should have backed away from BD in response to his kicking Officer Brazeau with his left foot, while BD continued to deliver another kick, which Officer Brazeau was able to parry. Instead of backing away, he delivered the 3 to 4 strikes at issue, here.

Officer Brazeau justified his rejection of backing away. He believed that BD would get up, flee and be injured by the light rail that operated a short distance from the spot of the second encounter. BD could not get up, which is the reason the officers reached down to assist him. If he did manage to get up, he would flee with his hands handcuffed behind his back. The officers would have caught him after a short distance. Officer Brazeau's explanation makes no sense. It is an afterthought stated to excuse his conduct.

The application of Graham v. Connor analysis on the basis of the above facts results in the following. 1. The severity of the crime: prior to the kick the officers detained BD to place him in protective custody. There was no crime. After the kick, BD could further harm the officers and himself. BD's agitation continued. But the setting afforded the officers time to leave BD alone and attempt to calm him down verbally. Except for BD and the two officers, no one else was present. Other officers arrived in approximately an additional 2 minutes and an ambulance arrived 5-minutes later. Without Brazeau's strikes, BD would not have left a pool of blood after he was removed from the area.

2. If the officers walked away a short distance, BD would have been unable to reach the officers and harm them. 3. BD would not have a target for his resistance. Either he would have calmed down or medical personnel would have

administered Ketamine, as they did.

The Veteran argues that stepping away extends the duration of this incident. However, at 2:00 a.m. in the absence of any passers-by, there was time to let the incident play out.

Is the above 20/20 hindsight? The absolute quiet and isolation of the scene was not going to change. The fear of BD getting up and fleeing without getting caught is not 20/20 hindsight. The possibility of flight under these circumstances was very unlikely.

Officer Brazeau's actions resulted in BD suffering extensive bleeding as a result of the blows. The videos establish that before the blows there was either little or no blood in the area BD went spread eagle. After the blows, there was a pool of blood. Officer Brazeau injured rather than protect an intoxicated BD who was acting erratically. However, Officer Brazeau in his Garrity interview, Loudermill statement and testimony at the hearing failed to recognize that his intervention was counter-productive. From his point of view, he responded within the Department's use of force continuum.

The Arbitrator does not weigh the lack of self-criticism by the Veteran as heavily as Police supervision and upper management. Since Brazeau was Relieved of Duty, he had every reason to be wary of admitting he made a mistake that would subject him to discipline.

The Arbitrator concludes that Officer Brazeau was not free to respond to BD's kick without the exercise of judgment. After he was kicked, Officer Brazeau yelled for BD to "get on the ground, you mother-fucker." BD was already on the ground. Understandably Officer Brazeau acted reflexively out of anger at the kick. Only training and experience would have changed Officer Brazeau's action. At the time of the incident in 2016, Brazeau had about 2-years experience in the Department. His inexperience as an officer contributed to his use of 3-4 closed fist strikes to BD's "act of aggression."

Furthermore, it is undisputed that the Department does not provide its

officers with specific training on how an officer should respond to an intoxicated or mentally impaired handcuffed individual who does not calm down and continues to flail and kick at the arresting officers. Training informs the exercise of judgment.

The Department's supervisors and upper management concluded that Officer Brazeau used excessive force. The record supports that conclusion. Officer Brazeau's actions violated the Department's Use of Force Policy 5-303.

Appropriate Disciplinary Penalty

Deputy Chief Halverson recommended and Chief Arradondo accepted the recommendation to terminate Officer Brazeau for his actions toward BD on December 29, 2016. The Arbitrator is reluctant to upset the disciplinary decision of the Police Department. The complaint against the Veteran was initiated by Departmental supervision. Two Lieutenants on the Police Conduct Review Panel agreed with the citizen members of the Panel who concluded that Officer Brazeau's actions on December 29, 2016 violated the Department's Use of Force Policy. If the termination decision had been made by the end of 2017, the Veteran would have had only the two years of experience/seniority from 2014-2106 to mitigate the termination decision. The Chief considered the life-saving award Officer Brazeau received in 2016. He did not find that the award should result in the imposition of a lesser penalty. At this point, there is little indication that Officer Brazeau would employ judgment to inform the manner in which he carries out his duties.

Deputy Chief Halverson, Assistant Chief Kjos and Chief Arradondo did not make the decision to discharge the Veteran in December 2017. In December 2017, the Department restored the Veteran to duty with full enforcement responsibilities. During the period of December 2017 through November 2018, Officer Brazeau acquitted himself according to the evaluation of his supervisor at a level of *exceeds expectations*.

Chief Arradondo chose to diminish the importance of this evaluation. For whatever reason, when Officer Brazeau was assigned to full enforcement duty, he was assigned Training Officer responsibilities at the 1st Precinct. This pre-

discharge experience cannot be ignored. It does indicate that the Veteran has the ability to handle a police officer's duties and responsibilities.

Officer Brazeau's lack of seniority provides little weight to mitigate the penalty. The Veteran's pre-discharge performance during the 14-month period from December 2017 through February 2019 and the lack of specific training as to how to deal with a handcuffed individual who continues to kick, flail and resist does serve to mitigate the imposition of the discharge penalty.

Officer Brazeau failed to recognize that his actions on December 29, 2016 violated the Department's Use of Force Policy. Therefore, the Arbitrator rejects the Veteran's plea that the year of his removal from service and the loss of income he suffered as a result of his inability to take advantage of extra earning opportunities amounting to approximately \$20,000 are sufficient punishment for his action on December 29, 2016.

There is a Departmental need that Officer Brazeau understand that his conduct violated the Department's Use of Force Policy. To accomplish that goal, the Arbitrator relies on the Department's Discipline matrix to impose the most severe disciplinary penalty short of discharge, an 80-hour suspension. The Arbitrator awards that the recommendation to terminate the Veteran's employment with the Minneapolis Police Department be set aside and reduced to an 80-hour suspension.

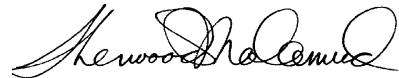
In addition, the Arbitrator directs in this award that prior to the assignment of Officer Brazeau to full enforcement duties, the Department provide him with training either individually or in the context of departmental training on how to control handcuffed individuals who continue to fail and kick at the arresting officers in the variety of factual circumstances that an officer may face. In the Award, the Arbitrator directs that his training occur no later than 90 calendar days from the issuance of this Award.

The Arbitrator agrees with the Department's insistence that officers employ judgment in carrying out their duties. In this case, the absence of the use of judgment by Brazeau, is not a matter of second-guessing or 20/20 hindsight.

Prevailing Party Status

The Arbitrator concludes that the Veteran is the prevailing party. In the above analysis, the Arbitrator concludes that the City did not have just cause to discharge the Veteran. It does have just cause to discipline the Veteran with an 80-hour suspension. The statute specifies that the Veteran prevails if the discharge decision is set aside.

Dated: October 17, 2019.

A handwritten signature in cursive script, appearing to read "Sherwood Malamud".

Sherwood Malamud, Arbitrator