IN THE MATTER OF ARBITRATION BETWEEN

Police Officers Federation of Minneapolis,
Union,

and

City of Minneapolis, Minnesota,
Employer.

OPINION AND AWARD

Grievance of [redacted]

Grievance No. 10-21

ARBITRATOR:	Gerald E. Wallin, Esq.
DATE OF AWARD:	November 16, 2010
HEARING SITE:	City Hall, Minneapolis, Minnesota
HEARING DATES:	August 25-26 and September 22, 2010
RECORD CLOSED:	October 15, 2010
REPRESENTING THE UNION: and GRIEVANT	James P. Michels, Esq. Rice, Michels & Walther LLP 206 East Bridge-Riverplace 10 Second Street NE Minneapolis, MN 55413
REPRESENTING THE EMPLOYER:	Trina R. Chernos, Esq. Michael Bloom, Esq. (on the brief) Assistant City Attorneys Room 210, City Hall 350 South Fifth Street Minneapolis, MN 55415

JURISDICTION

The hearing in this matter was held over three days in August and September, 2010. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement"). The parties submitted a discipline grievance to arbitration. The provision of their Agreement calling for Award issuance in thirty days was waived to allow for a sixty-day period. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs that were duly received on or before October 15, 2010, which closed the record, and the matter was taken under advisement.

ISSUES

Section 4.1 of the parties' Agreement provides that the Employer "... will discipline employees who have completed the required probationary period only for just cause." Accordingly, the issues for arbitration are as follows:

1. Did the Employer have just cause to terminate the employment of the Grievant?

2. If not, what is the appropriate remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

Grievant's employment as a street patrol officer with the Minneapolis Police Department was terminated on January 25, 2010 following the investigation of an incident involving his use of force while making an arrest on April 30, 2009. The arrest was made for a felony property damage crime. Although the arrest was made almost nine months prior to his termination, certain details of the arrest did not come to light until early the following November when the incident was reported in local television media.

The applicable Civil Service Rule provides for discharge from employment for "... severe initial misconduct." After an investigation was conducted by the police department's Internal Affairs Unit, a discipline panel of three deputy chiefs of police determined that Grievant's use of his Taser to arrest the 18-year old male perpetrator was not only unreasonable and outside of departmental policy but also constituted retribution, or the administration of "street justice," and was malicious in nature. The perpetrator had been observed by Grievant to have hurled a landscaping block onto

a vehicle parked at the 2d Precinct Headquarters in North Minneapolis. The vehicle was owned by another police officer who worked out of that headquarters.

At the time of his termination, Grievant had more than sixteen years of service as a police officer with the Employer. His work record up to that point in time was free of any related disciplinary entries. His performance evaluations for the several years before his termination rated him as either Outstanding or Satisfactory in all measured areas except attendance in 2009, which, it is undisputed, related to the serious medical condition of his girlfriend that afflicted her in that time frame. Nonetheless, Grievant's eligibility for performance pay was approved. His personnel file contained several commendations for exemplary performance including an award for Officer of the Month as well as recommendations for other awards.

Some additional preliminary comments establish the setting leading up to the arrest in question. Grievant was issued a Taser in June of 2006. The device itself as well as the written reports of its use that officers are required to file provide a record of the number of times the device is triggered. The reports did not show Grievant to have had an excessive dependence on the use of his Taser nor did they identify him as an excessive user prior to the arrest in controversy. Moreover, during the six months from the date of the arrest until the incident came to light in the media, there were no complaints about Grievant's continued performance as a street patrol officer.

The Taser use records did show that Grievant triggered his Taser twice while making the arrest. When triggered, the Taser conducts electricity in 5-second intervals. The records show that Grievant triggered the device a second time just one second after the first 5-second interval had ended. Thus, the total time span from the start of the first interval until the end of the second interval was eleven seconds.

The Taser model used by Grievant has a bright yellow plastic exterior that is roughly configured like a handgun and operates in two distinctly different modes. Probe Mode is the mode most commonly known by the general public that has awareness of the device. In Probe Mode, the Taser actually fires two harpoon-like probes at the target subject. The probes are designed to embed themselves in the skin of the subject, although they can also have some effectiveness if they only embed in the clothing of the subject. The probes remain attached to the Taser by means of very thin wires that conduct electricity from the device. Once embedded, the probes conduct high voltage electricity at low amperage. The electrical charge interrupts the normal signals of the nervous system of the subject. The interruption produces neuromuscular incapacitation, which essentially causes

the subject to lose control of his or her skeletal muscles which, in turn, causes a collapse-type fall to the ground. Because the subject cannot effectively control his collapse to the ground, the fall can result in serious injuries. Injuries are particularly problematic if the fall is down onto hard street pavement.

The cartridge that holds the unfired probes on the front of the Taster can be easily removed by the police officer to enable the second mode of use. This second mode is known as Drive/Stun Mode and is also often referred to as "Touch" Mode. The removal of the cartridge exposes two metal electrodes that conduct electricity directly into a subject's body when placed in contact with the skin or light clothing. Because the electrodes are only somewhat more than one inch apart, they do not produce the kind of neuromuscular incapacitation caused by Probe Mode. Instead, this Drive/Stun Mode produces significant localized pain. The pain is used by the police officer to gain control over the subject in order to drive him to the ground to enable the officer to apply handcuffs and effectuate an arrest. Although the pain ceases at the end of each 5-second interval of electricity, this mode can leave reddened marks on the skin that have the appearance of burn marks.

Grievant and the perpetrator were the only live witnesses to the arrest. The perpetrator did not testify at arbitration. However, he did not claim to have been injured by the Taser during interviews after his arrest in connection with his booking. While the perpetrator initially denied damaging the vehicle and tried to blame it on some Somalis who were dressed like him, he eventually admitted his culpability.

The only other witness to the arrest was the video and audio recording equipment located in Grievant's squad car. That equipment captured two minutes and twenty seconds of the arrest at the rate of 30 frames per second on a VHS-type of recording tape. The evidentiary value of the recording was the subject of sharply competing interpretations about the propriety of Grievant's use of his Taser in light of all of the relevant circumstances, which, themselves, are in dispute. The recording was played several times during the arbitration hearing both in real time and frame-by-frame stop action.

On the evening in question, Grievant worked a shift from 1700 on April 30th until 0300 on May 1st.[1] After he came on duty, Grievant learned that the perpetrator had already been arrested on

[1]The time noted is from 5:00 p.m. on April 30th until 3:00 a.m. on May 1st. The 24-hour clock format is used herein because that is the format of the time stamp supplied by the recording equipment. It is also the time format used on many of the police reports.

a drug charge that same day by other officers. Because the perpetrator was on probation in an adjoining county for a gun charge, he let it be known that he would assist those officers in setting up a drug buy if they would let him go so he could avoid going to jail. The perpetrator offered to set up his cousin, who he also claimed was his best friend, to sell drugs to an undercover officer in return for his own drug arrest being dropped. That plan was developed and implemented that evening.

Grievant participated in enough of the planning to learn about the perpetrator's probation status for the gun charge but no details of the charge were discussed. He also observed the perpetrator's demeanor in the precinct building during the planning and preparation. Grievant and one of the undercover officers testified at arbitration about the perpetrator's behavior at various times during that evening. The thrust of their testimony ranged from behavior that was not quite right, to bizarre, to agitated at times, and the like. Grievant could also see that the perpetrator was younger, bigger, and likely stronger than Grievant. Nonetheless, the perpetrator was allowed to move about within the precinct building without being handcuffed. Grievant had also given a pat-down to the perpetrator to check for weapons. No weapon was found.

After the drug bust went according to plan, all of the participants returned to the precinct building using separate vehicles. As Grievant drove his squad past the visitor parking area, he noticed the perpetrator having a verbal altercation with some of the undercover officers who had conducted the bust. Grievant stopped to offer assistance but was waived off by one of the officers, which suggested to Grievant that they had the situation under control.

As it turned out, $421 was seized as part of the perpetrator's earlier drug arrest. He became angry to learn that none of the money would be returned to him although the charge against him would not be prosecuted. The seizure of that money is what sparked the verbal altercation in the visitor's parking area that Grievant observed.

After being waived off, Grievant drove his squad around back of the precinct building and into his assigned parking space. The perpetrator walked off and the other officers went into the precinct building. After parking, Grievant gathered up his materials to go into the precinct and prepare his reports and other paper work. The time was approximately ten minutes before midnight.

According to the evidence, the perpetrator now found himself in North Minneapolis shortly before midnight with no money to use to travel to his home in the Prior Lake, Minnesota area. For

whatever reason, he worked a landscaping block loose from the wall surrounding the visitor parking area and threw it onto one of the vehicles parked there. It is not entirely clear whether the perpetrator threw a second block onto the vehicle.

Grievant happened to see the perpetrator damage the vehicle. He re-entered his squad car and drove back around the building to make the arrest. Grievant also radioed in with the location, a description of the perpetrator and a brief explanation of what he had observed. Because of his proximity to the precinct building, he expected that backup squads would also be in the area and would respond to the location.

As Grievant drove out onto 19th Avenue NE westbound toward Central Avenue NE he saw the perpetrator walking south away from the visitor parking area. According to his testimony, Grievant's squad car blocked the perpetrator from continuing south. Grievant turned on his overhead flashing light bar. Turning on the flashing squad lights automatically turned on the recording equipment in his car. Grievant was not required by policy to turn on his flashing lights, but he did so because he was parked in the middle of a neighborhood street.

The recording equipment has two microphones to pick up verbal statements. One microphone is inside the squad car and is best suited to capture conversation occurring inside the squad. The second microphone is wireless and is designed to be worn by the officer when outside of the squad car to pick up statements made there. Contrary to policy, Grievant did not wear the wireless microphone during the arrest. He left it on the visor of his squad car. Thus, the audio portion of the arrest comes only from the interior microphone with some contribution that may have been picked up by the wireless microphone above the driver's side visor. Although considerably attenuated by the positions of the two microphones, the audio portion can be discerned with careful listening using headphones during playback. The audio is also in synchroneity with the lip movement seen on the video portion of the recording.

When started, the recording equipment takes approximately seven seconds for the mechanical transport mechanism to load the tape around the recording head and begin recording.

According to his testimony, after turning on his squad lights, Grievant opened his door and prepared to make the arrest. As he exited the squad, Grievant gave one command for the perpetrator to get down on the ground as the perpetrator was moving toward him from the right front fender area to the front-center of the squad.

The recording starts with a time stamp shown of 22:52:15.[2] The perpetrator is first seen standing still in the center of the hood area with the front of his body facing directly toward the rear of the squad. His head is turned toward his right toward Grievant's position as Grievant approached him. The recording just barely captures the last split second during which the perpetrator's right hand is placed on the hood of the squad. Then the sound of Grievant closing the squad door is heard. The perpetrator remained standing in that fixed position for the next few seconds, with both of his hands essentially flat and splayed out on the hood of the squad. His head and eyes continued to follow Grievant's approach.

According to his testimony and the reports he completed about the arrest, Grievant believed it was reasonably necessary for him to use the Taser in the Drive/Stun mode to gain control of the perpetrator and handcuff him. Grievant believed the perpetrator was preparing to assault him. As the video continues, Grievant made his approach toward the perpetrator by moving around the left front fender of his squad. He walked behind the perpetrator and applied the Taser with his right hand to the upper back-lower neck area of the perpetrator. The perpetrator immediately began loudly screaming and spun to his right, away from the direction of the Taser held against his back, and moved toward the ground. The perpetrator quickly ended up out of sight of the camera but the recording followed Grievant's pursuit motion downward and to the left front area of the hood of the squad. Grievant was trying to maintain effective contact with the Taser on the perpetrator's back. Grievant also went mostly out of the camera's view, but his left hand remained in sight on the hood of the squad. The left hand is seen to still be holding the probe cartridge that Grievant removed from the Taser as he initially moved around behind the perpetrator. Grievant remained with his left shoulder, left arm, and left hand in the camera's view for the next several seconds. At 15 seconds into the recording, the shadow of the first backup officer to arrive can be seen on the video. The right shoulder of the backup officer comes into view in the next second. Because the Grievant's left hand remained in view on the hood of the squad car throughout, it appears as though the backup officer actually accomplished the handcuffing. By 19 seconds into the video the handcuffing appears to have been well underway because Grievant is seen to ease backward and move back into the

[2] It is undisputed that the time stamp information was in error by one hour. Perhaps the equipment clock had not been adjusted one hour later for daylight saving time going into effect. The recording actually began at 11:52 p.m. and 15 seconds, just shy of 8 minutes before midnight.

camera's view. His head and both of his shoulders are fully in view although he is still probably down on his knees or squatting.

Thereafter, the video shows two more backup squads arrive on the scene. In addition, a number of other officers walk into view. They had apparently heard Grievant's radio call while they were inside the precinct building and came out to assist. The perpetrator is eventually placed in the back of Grievant's squad and it is driven into the visitor parking area where the video ends.

Grievant completed his initial report of the arrest at 01:22 the following morning. He completed a supplement at 01:56 to document and justify his use of force as required by policy. His report used the following descriptors to portray the perpetrator's appearance: Violent, Disturbed, and Mad/Angry. The report lists the type of resistance Grievant encountered from the perpetrator as "Tensed." The perpetrator's speech was described as "Foul."

The supplement to Grievant's report contained the following narrative:

* * *

> I was in the back fenced-in lot of the precinct when I heard a loud banging noise coming from the front lot of the precinct. I looked in that direction and I observed [the perpetrator], who I was acquainted with from an earlier police call, standing on top of one of the planters on the corner of the precinct parking lot. As I looked I observed [the perpetrator] to take a large landscaping brick and throw it towards a white Sports Utility Vehicle that was parked in the lot. I observed this vehicle to belong to OFFICER [name withheld] who works the dogwatch shift. I immediately radioed that there was a lone Black male, wearing all dark clothing in the front of the precinct damaging Officers' private vehicles.
>
> After airing my location I was able to get to the front of the precinct and take [the perpetrator] into custody. [The perpetrator] did not comply with my commands to get on the ground and place his hands behind his back. I assisted him in placing his hands behind his back by touch tasing him between the shoulderblades. It should be noted that this was a "touch" only and barbs were not deployed. I immediately gained control of [the perpetrator] with this level of force. [The perpetrator] was then handcuffed and placed in the rear seat of my Squad Car.

* * *

Grievant also verbally reported his use of force to his supervisor. Based on the lack of the

perpetrator's cooperation during the arrest that Grievant described to him, the supervisor deemed the use of force to be reasonable. The supervisor removed the VHS cassette from Grievant's squad car and had it inventoried. In accordance with applicable policy at the time, the supervisor was prohibited from viewing or rewinding the tape. Thus, the recording was not viewed by anyone at the time of the arrest.

The perpetrator apparently hired an attorney several months later to sue the Employer for a variety of claims emerging from the arrest. The lawsuit included claims of assault, battery, excessive use of force and denial of the perpetrator's Constitutional rights. The attorney obtained a copy of the recording and apparently provided it to the local television media.

As previously noted, upon viewing the recording of the arrest, the Employer initiated an internal investigation and the discipline panel procedure was invoked, both of which determined that Grievant's use of force in the manner he did was wrongful. During the investigation, Grievant declined to give a voluntary statement to supply his account of the circumstances surrounding the arrest beyond what he wrote in his police reports on May 1, 2009. This was done on the advice of the Union as well as his attorney. Although it could have done so, the Employer did not seek to compel Grievant to provide a so-called "Garrity" statement. Because the potential existed for criminal charges being filed against Grievant, the Employer did not want to do anything that might adversely affect that process. This is because any information obtained via a compelled Garrity statement cannot be used against the person in a criminal proceeding. Nor can any information that is derived from information obtained in the Garrity statement be used. Accordingly, the Employer's disciplinary decision was made without a statement from Grievant.

The perpetrator's lawsuit named Grievant as one of the defendants. Because of the employment relationship, Grievant requested the Employer to defend him in the lawsuit. The Employer refused on the ground that Grievant had acted outside of the scope of his duties and, as such, was guilty of malfeasance, willful neglect, or bad faith. The Employer's refusal to defend Grievant was appealed in a hearing before an administrative law judge ("ALJ") from the State of Minnesota Office of Administrative Hearings held on January 28, 2010. This was three days after Grievant was terminated and the instant grievance was filed. The issues involved in the appeal hearing closely paralleled the issues involved in the instant arbitration. Grievant testified under

oath. The transcript of the testimony was made part of the evidentiary record at arbitration.

The recommendation of the ALJ upheld the Employer's position. In so doing, the ALJ made several findings of fact about the arrest after viewing the recording and reviewing the testimony. Among his findings, in brief summary, the ALJ determined that the perpetrator placed his hands in plain view on the hood of Grievant's squad car and that he was calm and relaxed without any evidence that he was tense. In addition, the ALJ found that Grievant gave no verbal commands while the perpetrator maintained his fixed position with his hands on the hood, made no attempt to flee, made no aggressive gestures toward Grievant, did not swear at Grievant, and did not offer any resistance. The findings and recommendation of the ALJ are also part of the arbitration record.

As of the arbitration hearing, according to Grievant's testimony, no criminal charges were being pursued against him.

The presentations of the parties at arbitration also included evidence about several related matters. For example, there was a question whether Grievant knew the damaged vehicle belonged to a fellow officer at the time he made the arrest. Grievant claimed he did not. Although the contents of his police report suggests he did have such knowledge, because it describes how he radioed that the perpetrator was "... damaging Officers' private vehicles ...," a recording of his radio call does not actually include the reference to officers' private vehicles.

Additional matters in the record include the initial and recurrent training Grievant received on the use of a Taser, positive witness testimony about Grievant's character and performance, and the discipline assessed to other officers for use of force that did not result in termination of their employment.

The record also contains the report of a fellow officer with significant tactical training experience. This officer analyzed the recording as well as the pertinent records available to him. The conclusions reached by this officer supported the Grievant's use of force.

One of the three deputy chiefs of police who comprised the discipline panel provided testimony about applicable policies and the rationale for the panel recommendation.

Both parties also presented expert witnesses to provide their opinions about Grievant's use of force. This testimony included a discussion about the Force Continuum that applies to police officers. The Force Continuum was also described graphically to illustrate the correlation between

the type of resistance portrayed by the suspect and the levels of force the arresting officer may use to make the arrest. The Continuum has six levels. The lowest level of force recognized is the mere presence of the officer. Use of verbal commands is the second level. The use of a Taser is depicted as the fourth level. The use of a firearm is the sixth, or highest, level of force because it represents deadly force. The Union's expert also explained his opinion by stepping through the recording of the arrest one frame at a time during the early seconds of the arrest.

The Union's expert witness opined that Grievant had a reasonable basis for using the force he did. To the contrary, the opinion of the Employer's expert was that no force was necessary to make the arrest; thus no use of force was appropriate.

OPINION AND FINDINGS

At issue in this dispute is the question of whether Grievant's use of force was reasonable or unreasonable. The Union maintains that Grievant's action was reasonable but to the extent his use of force may be found to have been excessive, discipline significantly less than termination should be imposed. To the contrary, the Employer contends that Grievant's use of force was entirely unreasonable and represented the administration of "street justice" by Grievant to punish the perpetrator. Accordingly, the penalty of termination is warranted.

The overall reasonableness issue includes a number of facets that were addressed by the findings of the ALJ noted earlier. However, the Employer has not contended that the instant arbitration is bound to accept any of those findings of fact pursuant to the doctrine of collateral estoppel. Accordingly, the undersigned is free to make entirely independent findings based on the weight of the evidence developed in the arbitration record.

The Fourth Amendment to the United States Constitution protects persons from unreasonable seizures. The general standards for reviewing the reasonableness of any force used by a police officer during an arrest were established by the United States Supreme Court in its decision in the case of *Graham vs. Connor.*[3] Minnesota law also imposes a "... reasonable force ..." requirement

[3] 490 U.S. 386 (1989)

upon the actions of a police officer when making a lawful arrest.[4]

The *Graham vs. Connor* criteria have been incorporated into Police Department Policy Section 5-303 as follows:

* * *

> 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. Sworn MPD employees shall write a detailed, comprehensive report for each instance in which force was used.

* * *

From the Force Continuum diagram, Grievant's use of his Taser corresponded with

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[4]Minn. Stat. § 609.06 subd. 1.

Aggressive Resistance by the perpetrator. This is the fourth highest level of resistance shown on the diagram.

Before providing a detailed examination of the considerations bearing on the reasonableness of Grievant's use of force, certain comments are in order. The undersigned was an infantry officer who received the Purple Heart for wounds received during a firefight with a force of NVA Regulars in Vietnam. The firefight required the undersigned to simultaneously deploy the ground forces under his command effectively as well as call for and direct close air supporting fires. Because of that experience and his overall combat training, the undersigned is loathe to second-guess the actions of those who are forced to make judgments in highly stressful and rapidly changing situations filled with uncertainty. Accordingly, the undersigned is strongly inclined to grant Grievant the benefit of the doubt and reconcile any considerations susceptible of dual interpretations in Grievant's favor. That said, however, it is axiomatic that granting the benefit of the doubt requires the presence of objectively ascertainable considerations to provide a proper foundation for it. It is clear from the evidence in this arbitration that the actions and judgments of Grievant were reasonable only if they were legitimately in response to objectively present factors that justified his actions. Grievant's actions cannot be justified by factors that are purely subjective or wholly imaginary without a proper basis in reality or are contrivances assembled after the fact.

It is undisputed that Grievant was entitled to make a lawful arrest of the perpetrator after witnessing the perpetrator damaging the vehicle. Therefore, he was also entitled to use the force reasonably necessary to make that arrest.

Grievant's testimony at arbitration and at the ALJ hearing as well as other exhibits in the arbitration record describe the various considerations Grievant took into account to justify his use of force. A point-by-point comparison between that evidence and the audio-video recording is illuminating.

According to the Union's evidence, Grievant's squad car blocked the perpetrator from leaving the area by walking to the south away from the visitor parking area. Grievant gave the perpetrator one command as he exited his squad car. The command was for the perpetrator to get on the ground. Instead, the perpetrator moved around the front of the squad toward Grievant, slammed his hands on the hood of the car and continued to direct profanity at Grievant.

The recording, however, begins with the perpetrator standing stopped in front of the squad car with his body facing toward the windshield and his head turned to look in the direction of Grievant exiting the squad. The time stamp is 22:52:15. Only the sound of the car door shutting is heard for several seconds. No commands from Grievant are heard at all. No profanity is heard from the perpetrator. As Grievant comes into view a little over 2 seconds into the recording, the perpetrator is heard to say only, "You happy?" or "Are you happy?" Those are the only words spoken by either person before the Tasing begins at just 3 seconds into the recording.

It is possible that Grievant gave his command during the 7-second delay before the recording began while he was exiting the squad car. That would explain why it could not be heard. However, the weight of the evidence in this dispute clearly establishes that officers who contemplate the use of force are required to give multiple commands, if time permits, to achieve compliance by the subject. Repeated commands are necessary to assure that the suspect hears the commands, understands them, and has the opportunity to comply before physical force may be used.

The arrest situation that confronted Grievant did not require him to hurry. The perpetrator had stopped and was standing still. Grievant had ample time to give multiple commands for the perpetrator to get down on the ground. Moreover, if Grievant was concerned by the perpetrator watching his approach, Grievant gave no command to direct the perpetrator to look away from him.

The point-by-point comparison continues. According to the Union's evidence, the perpetrator slammed his hands down on the hood of the squad car. The perpetrators hands were not splayed out but were tented. Grievant believed the perpetrator was waiting to push off the hood and assault him as he came closer.

The recording does not provide any objective evidence to corroborate Grievant's account. The first few frames of the recording show that the perpetrator was in the process of placing his right hand on the hood with the fingertips touching ahead of the palm. He did not slam the hand down. The right hand ends up splayed out flat. The left hand was already splayed out on the hood. Neither hand is tented as if the perpetrator was poised to push back off the hood to assault Grievant. Moreover, the perpetrator's hands remain fixed. They do not even twitch while Grievant approached. The same is true of the perpetrator's arms. They are extended and remain fixed. They are not bent at the elbow to enable him to quickly push back to commence an assault against

Grievant.

As previously noted, Grievant said he believed the perpetrator was going to assault him as he came closer. The video, however, does not portray any objective evidence to corroborate this belief. If Grievant truly feared a surprise assault, he would be expected to make his approach with objective signs of caution. For example, he would have kept his distance and swung wide behind the perpetrator while being poised to counteract any moves by the perpetrator. The video, however, shows that Grievant first removed the probe cartridge from his Taser. Rather than put it in his jacket pocket, he continued to hold it in his left hand throughout the arrest. By keeping the cartridge in his hand, Grievant effectively diminished his ability to use his left hand for any defensive purpose that might arise by surprise. Of more significance is the fact that Grievant walked deliberately and quite closely behind the perpetrator while the perpetrator continued to watch him. As Grievant approached the perpetrator, the Taser was in his right hand. Grievant raised his hand high with his arm extended as he came close to the perpetrator. By raising his arm as he did, Grievant completely exposed his pistol that has holstered on his right hip. He also exposed his entire right side and rib cage to a sudden blow by the perpetrator. Grievant's pistol and/or rib cage were well within reach of the perpetrator as Grievant walked behind him.

Unfortunately, Grievant's objective conduct is entirely inconsistent with fearing an assault by the perpetrator. As a result, his objective conduct totally undercuts the credibility of his professed belief that he would be assaulted by the perpetrator.

The video also shows Grievant first triggered his Taser on the perpetrator's upper back at approximately 3 seconds after the recording began and the door of the squad car closed. The perpetrator offered no discernable resistance. Indeed, the perpetrator moved down onto the pavement so quickly that Grievant was not able to keep his Taser in effective contact with the perpetrator's back. At no time did the perpetrator appear to resist. Rather, he moved completely out of camera view within less than one-half of a second. Nonetheless, the video shows Grievant aggressively moving downward after the perpetrator in an attempt to keep his Taser firmly applied to the perpetrator's back. Grievant did this one-handed because his left hand continued to remain in sight holding the probe cartridge.

The evidence shows that Grievant triggered his Taser a second time one second after the first

5-second cycle ended. Accordingly, the perpetrator was effectively tased almost continuously for 11 seconds. Although the perpetrator was screaming in pain throughout, Grievant is not heard to give any handcuffing commands until the end of the second cycle. In this same timeframe, the shadow of the first backup officer can be seen as that officer arrived to assist. Grievant gave two quick commands of "Put your hands behind your back." The backup officer added a third command for the perpetrator to put his hands behind his back. As previously noted, the video suggests that the actual handcuffing is accomplished by the backup officer.

The foregoing paragraph establishes that Grievant essentially waited until two full Taser cycles were administered to the perpetrator before he gave any instructions for the perpetrator to put his hands behind his back.

As the recording showed other officers coming into view, Grievant is heard to refer to the perpetrator as a "... dumb ass ..." while explaining the reason for the arrest to them.

In addition to the foregoing, another anomaly in Grievant's testimony warrants comment. The video shows that the second 5-second Taser cycle was just completing as the first backup officer came into view. Nonetheless, Grievant's testimony at the ALJ hearing claimed that the backup officer had no knowledge that Grievant had used his Taser on the perpetrator.

Given the timing of the Taser use and the arrival of the backup officer, it would appear that the Taser would have had to have still been in plain sight in Grievant's right hand for the backup officer to see. To confirm this inference, no movement is seen on the video by which Grievant could have re-attached the unfired probe cartridge that continued to be held in his left hand and re-holstered the Taser to have it out of sight of the first backup officer. Grievant's contention about the knowledge of the first backup officer simply must be found to be incredible.

The Employer's policy requires that officer's document in detail all of the reasons upon which they justify their use of any force. Although Grievant's testimony described several reasons why he felt justified in having used the force he did, the only consideration written in the narrative portion of his official report is that the perpetrator "... did not comply with my command to get on the ground and place his hands behind his back." For the type of resistance encountered, Grievant listed only that the perpetrator was "Tensed." His report also noted the perpetrator's appearance as "Violent, Disturbed, and Mad/Angry" and his speech as "Foul."

While Grievant's report and his testimony provided several reasons to justify his use of force, the recording does not provide objective corroboration for any of them. Not even one. At no time does the video objectively show the perpetrator's demeanor to have been violent, disturbed, mad/angry, or tensed. At no time does the recording show the perpetrator to have directed profanity at Grievant prior to the tasing. At no time does the recording, or even Grievant's testimony, for that matter, establish that the perpetrator was directed to place his hands behind his back prior to force being used against him. Moreover, at no time does the testimony surrounding the perpetrator's earlier drug arrest show him to have had any tendency to be physically violent toward any of the arresting officers.

When the *Graham vs. Connor* factors are applied to the evidence in the arbitration record, it is seen that the severity of the crime was only for property damage, albeit at a felony level, and was not a crime of violence against any person. As previously discussed, the objective evidence does not establish that the perpetrator posed an immediate threat to Grievant's safety. Similarly, the objective evidence does not show that the perpetrator was actively resisting arrest or attempting to flee. Finally, the situation was not uncertain or rapidly evolving. Grievant did not have to deal with anyone but the perpetrator. There was no reason to expect any external threats to his safety. In addition, there was no time constraint; Grievant did not have to rush. Indeed, as the Employer's expert testified, the only reason there was anything rapidly-evolving about the situation was because of the speed with which Grievant approached the perpetrator to use his Taser.

While it is true that the perpetrator was younger, larger, and likely stronger than Grievant, those factors are not sufficient, by themselves, to justify the use of any force against him. *Graham vs. Connor* requires that any force used be objectively reasonable. That means there must be reasons supported by objective considerations to justify its use. The weight of the evidence in this dispute does not provide those objective considerations.

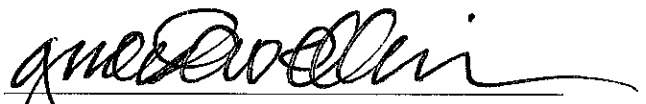
Given the unique nature of Grievant's conduct, it is not comparable to the discipline assessed other officers in the other situations that were depicted in detail. In the other situations, some physical force was warranted and the situations were rapidly-evolving. The instant dispute did not warrant any use of physical force. Accordingly, the evidence does not show that Grievant's situation was sufficiently similar to the other situations to constitute disparate discipline.

As previously noted, the Employer's 3-person discipline panel concluded that Grievant's use of force was so unreasonable in light of all of the relevant circumstances that it constituted severe initial misconduct within the meaning of the applicable Civil Service Rule. The panel determined that Grievant's conduct was malicious and, as such, called for termination of Grievant's employment for that single incident. The findings of the ALJ essentially reached the same conclusions. After careful analysis of the arbitration record, the undersigned must independently concur with those prior determinations. The weight of the evidence compels the finding that Grievant's use of any physical force was without justification and was, therefore, wholly unreasonable.

For the foregoing reasons, the Employer's termination of Grievant's employment was for just cause.

AWARD

The Employer's termination of Grievant's employment was for just cause. As a result, the grievance must be denied in its entirety.



Gerald E. Wallin, Esq.
Arbitrator

November 16, 2010