

IN ARBITRATION

JOE M. HARRIS, JR., ARBITRATOR

THE CITY OF TAMPA, FLORIDA,)
)
)
EMPLOYER,) FMCS File No. 05 – 52253
)
)
and) Issue: Discharge – Travis E. Maus
)
)
WEST CENTRAL FLORIDA POLICE)
BENEVOLENT ASSOCIATION,)
)
)
UNION.)

OPINION AND AWARD

APPEARANCES

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HEARING

At the request of the parties the undersigned arbitrator was appointed by the Federal Mediation and Conciliation Service to hear and decide the above matter, initiated by a grievance dated October 13, 2004¹, Joint Exhibit 3, in which Police Officer Travis E. Maus, the Grievant, complained of the City's decision to terminate his employment effective October 7, 2004. A hearing was duly convened on December 15, 2005 in a conference room at Tampa City Hall in Tampa, Florida, where sworn testimony was taken and transcribed.

A transcript of the testimony was provided to the Arbitrator, and four joint exhibits were tendered: the parties' collective bargaining agreement as Joint Exhibit 1 ("Joint Exhibit 1" or "the CBA"), the "Notice of Disciplinary Action" dated August 16, 2004 and approved by the Chief of Police on October 7, 2004, as Joint Exhibit 2, the "P.B.A. Grievance" form dated October 13, 2004, with the City's responses thereto as Joint Exhibit 3, and a videotape of the incident in question as Joint Exhibit 4.

In addition, both parties separately submitted a number of documents in evidence, and both called several witnesses. At the conclusion of the hearing, the parties elected to submit post-hearing briefs, and both parties submitted written briefs in a timely manner. The briefs were received on March 22, 2006, and the hearing was declared closed on that date.

BACKGROUND

The City of Tampa, Florida ("the City") provides police services through the "Tampa Police Department" (sometimes referred to herein as the "TPD"), where the

¹ The grievance, Joint Exhibit 3, bears the date "10/13/04" under "Date Filed" on page 1, but the signature line on page 2, bears the date "10/19/04."

Grievant Travis E. Maus (“the Grievant” or “Officer Maus”) was employed as a police officer from the date he was sworn in on May 1, 2000 to the date of his discharge on October 7, 2004. As a sworn police officer for the City, Officer Maus was a member of a bargaining unit represented by the “West Central Florida Police Benevolent Association” (“the Union”), who represented him in this matter.

On February 20, 2004, Officer Maus was involved in the pursuit of a stolen vehicle in the City, part of which was recorded on videotape taken from a police helicopter.² The chase ended when driver of the stolen vehicle lost control and crashed into a light pole with a concrete base in the parking lot of a convenience store.³ Almost immediately after the stolen vehicle came to a stop, the driver (“the First Suspect” or sometimes for ease of reference, “the Suspect”) climbed over his companion, scrambled out of the vehicle through the passenger door, and began to run across the parking lot, away from the officers.

Several officers arrived on the scene at about the same time as the stolen vehicle. Hillsborough County Deputy Sheriff Gary Hermann was already in the area on foot, and was the first officer to reach the Suspect. Holding his dog on a leash with his left hand, Deputy Herman reached the Suspect from behind and struck him in the upper back and shoulders, with his right forearm⁴, causing the Suspect to lose his balance and fall to his hands and knees to his right, while Deputy Hermann stumbled to his left, away from the falling Suspect.

² The videotape of the chase and the ensuing arrest lasted two minutes and forty seconds.

³ The chase, and the events which ensued thereafter, were recorded on video tape taken from a police helicopter which appeared to be about two or three hundred feet in the air.

⁴ Deputy Hermann had drawn his service weapon and was holding it in his right hand at the time he struck the First Suspect with his right forearm.

As the Suspect fell, Hillsborough County Deputy Sheriff Danny Johnson tackled him from behind, landing on his back and rolling over, then crawling on the Suspect's upper back to pin him down. At this point the Suspect was still struggling and apparently trying to get up and get away; Deputy Johnson testified that he was still "resisting arrest."

Almost as soon as Deputy Johnson and the Suspect hit the ground, two City police officers (Charles George and Thomas Jammes) converged on them. The Suspect was lying prone on the ground, but still struggling and moving around, with Deputy Johnson holding him down. Officer George straddled the Suspect's legs to help hold him down, while Deputy Johnson and Officer Jammes each grabbed an arm and attempted to pull his arms out from under him. In an effort to assist the officers pull the Suspect's arms out, Officer George struck the Suspect in the small of his back with his fist. When asked how hard he hit the man in the back, Officer George said, "pretty hard."

The Grievant arrived at the melee at about this same time, and almost as soon as he arrived, delivered two swift kicks at the Suspect with his left foot; the kicks were in the direction of the Suspect's upper body near the right upper arm area. However, the evidence did not establish whether either of the kicks struck the Suspect, and apparently at least one kick hit Deputy Johnson, who turned to the Grievant and said, "Hey bro, you're kicking me."

In any event, almost immediately after the punch in the back and the two kicks, the Suspect either complied or his arms were forcibly removed by the officers. Officer George testified that the Suspect's left arm was pulled out first, and handcuffed, and then

the right arm was handcuffed.⁵ At about this same time, the Grievant stepped back briefly, stood for a moment, and then ran over to the stolen vehicle, where the passenger (“the Second Suspect”) was being pulled from the stolen vehicle to the ground. As the Grievant arrived, he placed his right foot on the back of the Second Suspect (to either hold him down or ensure he didn’t try to get up).

Following an internal investigation, the City issued a “Notice of Disciplinary Action” proposing to terminate the Grievant’s employment for using “unreasonable” and “unnecessary” force, a “violation of Manual Of Regulations # 1602 – Use of Force.” Joint Exhibit 2. On October 7, 2004, Chief of Police Steve Hogue signed the dismissal document, thereby terminating Officer Maus’s employment effective that day. The instant grievance followed, and was not resolved through the parties’ internal grievance procedure, so it has now been presented to this Arbitrator for review and resolution. The issue is whether the City had just cause to terminate the Grievant’s employment, and if not, what shall the remedy be?

DISCUSSION

Although the incident at issue here was captured on video tape, the tape was taken at night,⁶ from a police helicopter which, judging from the tape, appeared to be about two or three hundred feet in the air, and although the tape was certainly helpful, it did not yield a very clear or definitive depiction of the events on the ground. Although the general picture of what happened is clear and not in dispute, there remains quite a lot of

⁵ The City’s Brief states that “immediately after Officer George delivered the punch, the [First Suspect] complied and he was handcuffed.” City Brief, p. 6.

⁶ As Sergeant Diaz commented, you couldn’t really identify the participants from the videotape: “I knew they were officers, but – you can see, in the dark, it was hard to even see the green uniforms or the dark uniforms.” T-159.

dispute over many of the details of what exactly happened. Even more importantly, in my view of the evidence in this case, there is still a significant, even heated, dispute within the Police Department as to what *should* have happened, i.e., whether Officer Maus was wrong in his actions, and whether he violated Police Department policy concerning the use of force. It was clear to me from the testimony and the demeanor of the witnesses at the hearing that some peoples' emotions ran high over this incident, and still do, to the point that even at the arbitration hearing, convened over fourteen months later, tempers and emotions occasionally flared and passionately held convictions were revealed.

1. The Burden Of Proof And Weighing The Evidence

The City argues that many arbitrators adhere to the principle that “once proof of the offense has been established, the determination as to the appropriate penalty lies within the discretion of the employer”, City Brief, p. 21, and that management’s decision to fix a penalty should not be disturbed unless “discrimination, unfairness, or capricious and arbitrary action are proved – in other words, where there has been an abuse of discretion.” City Brief, p. 21. Although this is not a universally accepted view (*see* the lengthy discussion in *Elkouri and Elkouri, How Arbitration Works* (6th Ed.), Chapter 15, “Discipline and Discharge”, Part 2E: “Review of Penalties Imposed By Management”), I am willing to accept the City’s position that in this case I must defer to management’s judgment concerning the “appropriate penalty” once “proof of the offense has been established.”

But as the *Elkouri* text also recognizes, an arbitrator owes no such deference to management’s assessment of the underlying *facts* leading to discipline, i.e., the

evaluation and assessment of the testimony and evidence in the case. In fact, it is my own view that at the bottom of the entire process lies the most fundamental of all principles in labor arbitration, that arbitrators should enter an arbitration hearing as completely neutral as possible, with no preconceived notions as to who is right or wrong, and no deference or bias toward either side of the dispute.

Many collective bargaining agreements require this, the parties rightfully expect it, and the entire arbitrator selection process found in the parties' CBA and the FMCS Rules is designed to produce it.⁷ As the well known labor arbitrator Harry Shulman noted, an arbitrator "should be employed only so long as he renders decisions on the basis of his best and honest judgment on the merits of the controversies presented, and only so long as both parties believe that he does so." *Elkouri and Elkouri, How Arbitration Works* (6th Ed.), pp. 150-151.

In this regard, one of the most important functions served by an arbitrator is "to determine the weight, relevancy, and authenticity of [the] evidence." *Elkouri and Elkouri, How Arbitration Works* (6th Ed.), pp. 414-415. Moreover, "widely differing versions of the facts are too frequently presented by the parties", and "where the testimony is highly contradictory, ... it becomes incumbent upon the arbitrator to sift and evaluate the testimony to the best of his ability and reach the best conclusion he can as to the actual fact situation." *Elkouri and Elkouri, How Arbitration Works* (6th Ed.), p. 415. Of course "it is also recognized that testimony may often conflict even where all witnesses have testified honestly and in good faith", and in this case I believe that principle is particularly apt; so none of the discussion which follows is intended "to cast

⁷ Article 4, Par. 4.4.2 of the CBA provides for striking names of arbitrators from a list provided by FMCS, like trial lawyers strike an impartial jury.

the slightest doubt on the veracity or good faith of any witness” in this case. *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 415-416.

Finally, I humbly agree with the statement that “arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops”, *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), p. 416; “[t]hey can only do what the courts have done in similar circumstances for centuries: a judgment must finally be made, ...”. *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), p. 416. And that judgment is what now follows in this case.

In discipline and discharge cases, “the burden of proof is generally held to be on the employer to prove guilt of wrongdoing” and “probably always so where the agreement [as in this case] requires just cause for discipline.” *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), p. 949. Here, the parties disagree as to the standard to be applied – the City says the burden is the “preponderance of the evidence” and the Union says it is “clear and convincing evidence.”

The “quantum of proof required to support a decision to discipline or discharge an employee is unsettled”, although “most arbitrators apply the ‘preponderance of the evidence’ standard to ordinary discipline and discharge cases”, *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 949-951, while “in cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a ‘clear and convincing evidence’ standard, with some arbitrators imposing the ‘beyond a reasonable doubt’ standard.” *Elkouri and Elkouri*, How Arbitration Works (6th Ed.), pp. 950-951. But even in “cases involving potential criminal conduct, the greater weight of authority favors ‘clear and convincing evidence’ or ‘preponderance of the evidence’ as

opposed to ‘beyond a reasonable doubt.’” *Elkouri and Elkouri, How Arbitration Works* (6th Ed.), pp. 951-952.

Here the conduct of which the Grievant stands accused would certainly be “stigmatizing” for a police officer, and technically could also be termed “potentially criminal”, so the standard of “clear and convincing” evidence could be applied.

However, in my view of the evidence in this case, I think the City’s evidence failed to carry the preponderance of the evidence and therefore that standard can be applied.

With this backdrop, the evidence in this case, which is in sharp dispute in some instances, must be weighed and evaluated, and “a judgment must finally be made.” This particular assessment begins with the acknowledgement that the City undertook an unusually difficult burden, because in large part its case rests on establishing the Grievant’s “intent”, or state of mind, at the time of the events in question. Chief Hogue, the ultimate decision maker, and Sergeant Eric Diaz, TPD’s “subject matter expert” whose report seemed to carry significant weight in the disciplinary process, both testified that in their opinion the Grievant had a “predetermined” mindset as he approached the scuffle on the ground that night, that he had already made up his mind to “do something”, to “get involved” in the melee, and in fact to vent his emotions, fueled by adrenaline, to take them out on somebody.

But a person’s “mindset”, his motivation, what he was thinking, in an incident is notoriously hard to prove, in court, in arbitrations, and elsewhere, because we cannot look inside people’s minds and see what they are thinking at any given time. This problem was really well explained by Sergeant Joseph Caravella, who testified that he is an instructor on “motivation” for the Tampa Police Department, T-230, and stated (in my

opinion accurately), that “you can never, ever know somebody’s motive; you can only speculate”, T-189, and “[y]ou can’t get inside someone’s head and know what they’re doing [or thinking].” T-224.

Certainly this does not suggest that there was no evidence to support the opinion that the Grievant was motivated by adrenaline or an unthinking impulse to strike out or inflict harm; there was some evidence to support that view, though it was all circumstantial; and all of this will be discussed in detail in the following opinion. But it is *not* true, as Chief Hogue adamantly testified, that “[y]ou can see clearly from the video” that Officer Maus “ran out, ran right over”, and “just had a predetermination that I’m going to do something, that’s what I’m going to do, kick him”, T-175, or that he had “absolutely” had made up his mind to “inflict harm” without reason. T-175. To the contrary, this very claim is the central dispute in this case, it is the subject of a heated disagreement, and it is not absolute or clear to me at all.

Sure, the explanations given by the Grievant could have been after the fact rationalizations, decided on by him in an effort to protect his job. Chief Hogue and Sergeant Diaz obviously came to that very conclusion. But in my view the evidence does not necessarily support that conclusion, and I must respectfully disagree with Chief Hogue that “the kick administered by Officer Maus ... was absolutely an inappropriate use of force”, T-174, or that “there was absolutely no need for it.” T-175. In fact the evidence and opinions given at the arbitration hearing as to the propriety of, and the need for, the kicks, were the subject of a sharp and heated debate, and in my opinion these issues cannot be fairly described as “absolute” or “clear” one way or another.

2. The Grievant's State Of Mind

The primary disputed issue, described by the City in "absolute" terms, was whether Officer Maus gave any thought to his actions before delivering the kicks. Sergeant Eric Diaz, the subject matter expert who reviewed the case, testified that in his opinion, judging from the "totality of the circumstances" and "the actual approach itself", Officer Maus's kicks were "not a conscious decision", but "just more of an attempt at doing something", T-140, and "you can see, just by the video, and again it goes back to that adrenaline again, he just ran up there with the intent of doing something." T-146. In Sergeant Diaz's opinion, "you can see the way the video rolls, there's no thought of target acquisition; there's no thought of looking at anything", it was "just a kick." T-147.

As noted above, that is certainly one view of the tape; but the problem with these observations and conclusions is that they are based on a much less than conclusive videotape and seriously conflicting evidence, and in the end they are only opinions, which are strongly held, but flatly disputed by contrary opinions equally strong. And as already mentioned, nobody can really ever know for sure what was in the Grievant's mind in those few seconds. Though Sergeant Diaz decided that there was "no thought of target acquisition" and "no thought of looking at anything", the videotape is anything but conclusive on that issue.

In fact none of the evidence is all that strong on this point on way or the other. Officer Maus testified in his Internal Affairs statement that "at the time I stopped my patrol car and exited, I was already evaluating the suspect's resistance levels and preparing my response level." City Exhibit 3, p. 11. It is Sergeant Diaz's opinion that this statement is not true, and Diaz says that the Grievant's "complete misrepresentation

of what the actual use of force was” actually caused him “the most concern.” But after viewing the video tape many times, and reflecting on all of the evidence, I am not at all convinced that Officer Maus was not telling the truth, exactly as he saw it; whether his evaluation was a good one or not is another matter entirely, and was not the basis for the discipline. The City’s case rests on the premise that the Grievant kicked at the Suspect because of adrenaline, excitement or loss of control, and without a legitimate reason or defensive tactic in mind. But the evidence failed to establish that.

3. The Suspect Was Not “Under Control” When The Grievant Kicked At Him

Another major point of heated dispute, having significant bearing on the reasonableness of the Grievant’s actions, is whether the First Suspect was “under control” when he was kicked. Once again the witnesses’ opinions are sharply divided on this point, and once again, the City has taken an absolute and unequivocal position. But I do not think the evidence supports that position, and indeed I think it rather strongly supports the position that the Suspect was *not* under control, and was still a threat, when he was kicked at by the Grievant.

Explaining his thinking in reaching the decision to terminate the Grievant, Chief Hogue testified emphatically that “three people had him [the Suspect] under control”, T-176-177, that “there was absolutely no need for it; there were three officers on top, you’ve heard plenty of testimony today that he was under control.” T-175. But actually nearly all of the evidence that I have before me was that the First Suspect was not under control, because his hands were hidden from view, he was clutching them underneath his body, tensing and bracing, and he was resisting the officers’ strenuous efforts to pull his arms and hands out from under his body to handcuff him.

Equally important, there was clear and uncontradicted evidence that one or more officers were “yelling” and “screaming” at the Suspect, “give me your hands, show us your hands, stop resisting”, and the Grievant testified consistently throughout all of the proceedings regarding this matter, and without contradiction, that he heard these shouts and commands. The Grievant testified without contradiction that Officer George always gave such commands in a very loud voice, and that the commands were clear and unmistakable. The evidence is equally clear that the Suspect was not complying with these commands, that in fact he was “actively resisting” the officers’ efforts to pull his hands out from under his body before he was kicked.

Both Officer George and the Grievant testified that the thought uppermost in their minds was that “there is a reason” when a suspect hides or holds his hands and refuses to release them; both of them testified emphatically that their first thought was “a weapon.” To me this testimony should be frightening enough to give anyone pause and concern. It clearly describes a potentially life threatening scene: a suspect, though on the ground, still struggling and resisting the commands and physical efforts of the officers to pull his hands out, his hands held tightly under his body, hidden from view and near his waistband area.

An officer seeing all this, and hearing shouts of “quit resisting” and “give us your hands, show us your hands”, could reasonably, *should* reasonably, believe that there might be a weapon under such a man. And if that were so, then everybody in the area was in mortal danger; all that needed to happen was for the Suspect to pull one hand free and begin flailing about with a gun, pulling the trigger. Of course that was not the case, but no one knew that at the time, and if it had happened, one shudders at the possible

consequences. The scene could have been disastrous and even fatal, to more than one person.

Whatever the consequences of such a scenario, they would have been irreversible. Surely under these circumstances the Suspect could be fairly described as not “under control” until his hands were pulled out and he was handcuffed, and that did not happen until after the Grievant kicked at him. In fact *every single officer on the scene*, except one, so testified, and did not equivocate about it. Moreover, the only officer who did equivocate on the point (Deputy Sheriff Gary Hermann) did not really confirm the City’s position that the Suspect was under control when he was kicked; he essentially just said he didn’t know, and wouldn’t testify about something he didn’t see.⁸

Deputy Danny Johnson’s testimony on these points uniformly corroborated the Grievant’s in every respect. Deputy Johnson testified that he “tackled” the Suspect, who then “put his hands under him”, and “we were giving him commands to get it [i.e., his hands] out”, T-22, but the Suspect “was bracing and tensing”, and “we couldn’t get his arms out from underneath him right away.” T-22-23. Deputy Johnson also said that he was holding the Suspect down, and that “he may have tried to” get away, but that “he wasn’t going anywhere in my personal opinion”, T-23, that there was really no way for the Suspect to break away and run.⁹

But none of that precluded his hands from being a threat, and Deputy Johnson also testified that “by not giving us his hands, yes sir, he was resisting”, T-22, that “it was

⁸ Deputy Hermann’s testimony is discussed in detail on pages 15 and 16, *infra*.

⁹ Deputy Johnson testified that while he was holding him down, the Suspect was “fidgeting around”, T-22, 23, while the other officers said he was “struggling” and “actively resisting.” I do not understand what Deputy Johnson meant by this; and I must say that his testimony was the strangest use of the word “fidgeting” that I have ever heard.

after the kicks” that the officers “gained control” of the Suspect, and agreed that “by gaining control, you mean you actually got his hands out from underneath him.” T-25.

Deputy Johnson also testified that so long as a suspect’s hands are “concealed underneath him”, he would not “consider that suspect under control”, that he would “consider him to be a potential danger” so long as his hands were free and concealed, and that “your main concern is his hands, yes sir.” T-25-26.

On the same subject, Sergeant Joseph Caravella, who served on the Complaint Review Board in this case, testified that a suspect is “certainly” not under control until handcuffed, and that “even when handcuffed, sometimes they are not under control even then.” T-189. And Sergeant Thomas J. Miller, who also served on the Complaint Review Board, said when the Suspect “was laying on the ground with his hands hidden, he was not under control” and “even though there were officers on top of him”, the Suspect “was still a threat in my opinion.” T-233. In addition, Officer George, who was straddling the Suspect and actually handcuffed him, said that “absolutely” he considered him a threat until he was handcuffed, because “his hands were concealed”, that “he’s tightening them up for a reason”, and “my concern was definitely a weapon of some sort.” T- 254.

And finally, Sergeant Jim Diamond, who was the “lead defensive tactics and subject matter expert for use of force for the [Tampa] Police Department from 1978 until 2001”, T-264, and actually recruited and trained Eric Diaz, testified that “concealed hands of a suspect in any encounter have always and will always be a concern to law enforcement officers”, T-274, and the “constant message” that he taught Tampa police officers has “always” been “watch the hands, watch the hands, the hands will kill you, watch the hands.” T-274. According to Sergeant Diamond, any person “who is

concealing their (sic) hands, particularly around their waistline where we've found statistically the majority of concealed weapons are kept, is certainly a threat to the officer." T-274-275. To Sergeant Diamond, the idea of disengaging because a certain number of officers are already engaged with a suspect, is "patently absurd" because "you don't disengage or release the individual until they're handcuffed and they're in control and custody; sometimes, the more, the merrier." T-274-275.

Even Lieutenant Lightholt, the Grievant's supervisor, agreed on cross examination that the Suspect's "hands [were] not under control" in this case, although he added that "his body was" under control.¹⁰ T-122. Yet even he agreed that "if he wasn't showing his hands when he was being told to, he's still resisting." T-122.

In fact, as noted above, only one officer who was on the scene equivocated at all on this point, and that was Deputy Sheriff Gary Hermann. But Deputy Hermann's testimony was neither helpful nor harmful to either party; at best it was inconclusive, and at worse it was useless. Deputy Hermann testified that "it appeared" to him that the officers "had the situation under control" when he turned around after striking the Suspect with his forearm, T-36-37, but when asked specifically (and repeatedly) about the Suspect holding his hands under his body and resisting attempts to remove them, Deputy Hermann testified "no, I really couldn't tell" about that, and "as far as I could tell, they had the subject under control", since "he wasn't attempting to flee, ... at that point in time he is under some control" T-40-41. (arbitrator's note: under *some* control? Does that have any meaning at all in this context?).

¹⁰ In this context, that distinction begs the question.

When asked directly and specifically whether he would agree that the Suspect would not be “totally under control ... until his hands were removed from underneath his body”, Deputy Herman could not bring himself to disagree with that statement; yet he wouldn’t agree either, instead replying, “again, I didn’t see that part, so I can’t testify to something I didn’t see; I don’t know....”. T-41. Actually, he didn’t have to “see” what happened in order to give his opinion, as a defensive tactics instructor, on the abstract question he had been asked, i.e., if a suspect’s hands are free and hidden from view, is he “totally under control” or not? Of course he is not, and it would have been more credible for the deputy to simply concede the obvious.

The upshot of Deputy Hermann’s testimony on this issue was that it was so equivocating and disingenuous that it was not helpful at all. At bottom, he just said he “didn’t see that part” and “I don’t know.” In fact his testimony was not very helpful in any respect, since for reasons known only to him, he was defensive and evasive throughout his entire appearance. He rarely gave a direct answer to any question, and even implied at one point, incredibly, that he did not know that the incident had been videotaped, though clearly he did know it: when asked about where he struck the Suspect, he stated, “I believe if you play the tape back, *if there’s any tape or recording*, I struck him across the back of the shoulders.” T-39 (emphasis supplied). This statement is just so disingenuous and unforthcoming that it undermined his credibility in general. Such obfuscating, equivocating testimony was not only unhelpful, it was exasperating, and added no weight to the City’s claim that the Suspect was “under control”. I think all of the evidence, taken as a whole, is very clear that he was not.

Finally, it is on this point of the Suspect's hands being free and hidden from view that the testimony of Sergeant Eric Diaz became confusing, and for the only time in his presentation, somewhat inarticulate and unclear: he just simply refused to directly address this issue. First, while explaining defensive "techniques" taught by him, when he was asked whether there "is a difference [in] the kinds of things [i.e., techniques?] an officer should be using if the suspect is on the ground being at least partially held by officers as opposed to [being] up and able to come at the officer", Sergeant Diaz replied that it depended on "the totality of the circumstances", T-134, and added the comment that "[i]t's the same thing with this; there may be some cases where it may be appropriate, but if you have somebody down on the ground and you have multiple officers – that's one of the officer's subject [subjective?] factors that says, there should be some other techniques or tools that you should be able to use based on the position of the bad guy and the multiple officers there." T-132-133.

Although this is not at all clear, I interpret this somewhat cryptic testimony to mean that "there may be some cases" where two swift kicks at a suspect's arm "may be appropriate", but that in his opinion this case was not one of them. However, I'm not completely sure that Sergeant Diaz meant to concede that point, and in any event the issue of the Suspect's hands being concealed was not even mentioned at this point.

Sergeant Diaz also submitted that "usually" the weight of officer(s) on top of a suspect can make it difficult for him to comply with a directive to pull his hands out", T-143, and added that in general, that is a good thing, "something we would always teach", that " ... if they do have a weapon, I don't want them to have the freedom of movement to be able to pull their arms out when they want to", only when the officer wants them

out.” T-143-144. Sergeant Diaz said that the officer should be pulling the suspect’s arms out from under his body “because now I have control and I want to pull them out”, not the suspect. T-143-144. All of which makes perfect sense; and it is noted that the gist of it is that a suspect’s hands are indeed a threat, so the officer should be controlling the suspect’s hands, not the other way around. Yet here again the Sergeant did not directly address the issue of the hands of the Suspect in this case being a threat until they were handcuffed.

Later, when Sergeant Diaz was asked point blank if a suspect whose hands are underneath his body would be a threat, he avoided a direct answer, stating, “they’re all a threat, sir”, T-154-155, and then the following puzzling exchange took place:

Q. “And that’s what you teach, right, at the academy, hands, threat?”

A. “Correct. But what we teach in holdover is, in a situation like that, if I feel that a person is armed or has a weapon, I don’t want his arms out [from?] underneath him. They can’t hurt me as long as they’re tucked under him or tucked in his waistband. As soon as I would try to pull – someone with a knife or a pistol – to pull those arms out, that’s when more people are vulnerable. And that’s actually a specific drill that we do in our holdover training.”

T-154-155.

I don’t know what that means in response to the question, in this context. It sounds like Sergeant Diaz is saying that all of the officers in this case who were trying to pull the Suspect’s arms out from underneath him were acting contrary to their training and making other officers “more vulnerable” to danger; yet of course I know he did not

mean that; there had to be closure and the arrest had to be effected sooner or later, which meant that the Suspect's hands had to be removed from underneath his body and placed behind his back for handcuffing. No one testified that the officers' efforts to do just that were in violation of any policy or training; indeed the Sergeant's testimony just quoted above appears to be in conflict with his earlier testimony that he wants the officer to be "in control" by pulling the suspect's hands out from underneath him. At best, this particular answer was incomplete, and at worse it was evasive and inconclusive.

A final and unsuccessful attempt was made by the Union's counsel to get Sergeant Diaz to commit on this question, when he asked a hypothetical question "assuming" a suspect was "on the ground", was "noncompliant", and "wouldn't show his hands", then "wouldn't that [a kick to the upper arm] be acceptable based on what he perceived as the level of threat?" T-153. Yet again, Sergeant Diaz would not directly answer the question, describing a kick as "again, not recommended, a less than acceptable technique", T-153, and changing the subject to the Grievant's lack of "follow through", asserting that if the Grievant's kicks had truly been intended as a defensive tactic, then there should have been "some attempt to try and pull the arm out after, or there would have been some attempt to get down there." T-153.

Once again, this is not responsive, does not directly answer the question, and does not address the issue of whether the kicks might have been appropriate under the assumptions given, or whether in this case the Suspect might have remained a threat while his hands were hidden from view, despite the number of officers. Therefore it does not address the issue of whether the Suspect was "under control" when he was kicked.

As shown by the foregoing summary, Sergeant Diaz just would not directly address the specific issue now under discussion: whether a suspect is “under control” or remains a threat, when his hands are free and hidden from view. I suspect that if push came to shove and he were eventually forced to provide a direct answer to that question, as a general proposition he would have agreed with all those who so unequivocally stated that a suspect whose hands are free and hidden is in fact a real threat, and remains a threat until his hands are handcuffed. Depending on your point of view, he was either a good witness or a bad witness on this point, and just never provided a direct answer to the issue at hand.

But the sum and substance of all of the testimony just recited, considered with all of the other evidence and testimony on this point, leads me to the conclusion that on the night in question, the First Suspect was not “under control” and was still properly considered a threat, until his hands were placed behind his back and handcuffed. This means that he was still a potential threat when the Grievant kicked at him. Therefore, as a factor relied on by Chief Hogue and other decision makers, the claim that the Suspect was “under control” when the Grievant kicked at him, is rejected, and does not support the decision made.

4. When Did The Grievant Disengage?

Another issue that is extremely important and a major point of contention between the parties is the question of when the Grievant actually ‘disengaged’ and walked away from the First Suspect. If the First Suspect was still not under control and still a threat when the Grievant left him, then his whole rationale for kicking him, indeed his entire case, fails. On the other hand, if the Suspect was under control and no longer a threat

when the Grievant disengaged and left him, then his version of events, and the reasons he gave for his actions, garner added credibility and weight, while a major premise underlying the City's case collapses: for one of the biggest criticisms leveled by Sergeant Diaz at the Grievant's actions that night was that after he kicked and missed, he just "walked away", leaving an allegedly dangerous situation behind him. If that premise is true, then Sergeant Diaz is correct. And Sergeant Diaz uses that premise to conclude that there was no purpose or intent to motivate the Grievant's kicks, other than an emotional release. This is an important issue, and again the evidence and arguments are in conflict.

The Grievant testified that "very shortly after" Deputy Johnson said "hey, bro, you're kicking me", the other officers "were pulling his [the Suspect's] arms behind his back." T-79. The Grievant said that "[a]lmost in the same time that [Johnson] and I had the conversation, [the Suspect's] arms were being brought behind his back and he was handcuffed", T-79, and "[o]nce he was handcuffed, yes sir, that's when I walked away." T-79-80. When pressed on cross-examination, the Grievant repeated essentially the same thing:

Q. You don't think you immediately backed away as soon as he [Deputy Johnson] told you [that] you kicked him?

A. No sir; no sir; Again, like I said, in the short conversation I had with Deputy Johnson and the time he and I conversed, Officer George and Officer Jammes were bringing his arms around his back and he was being handcuffed."

Q. "What did you do then?

A. "That's when this individual was no longer a threat. His hands were out; he was handcuffed. They were yelling at the passenger to get out of the vehicle and that's when I helped them."

T-79-80.

This is crucial evidence. It undercuts one of the essential underpinnings for Sergeant Diaz's conclusions and Chief Hogue's decision. One of the major premises relied on by Sergeant Diaz for finding the kicks without reason and inappropriate was his conclusion that the Grievant "didn't follow through" after his kicks missed, that if he had really intended for his kicks to accomplish an end result, i.e., the removal of the Suspect's hands from under his body, then "there would have been some attempt [by the Grievant] to try and pull the arm out after or there would have been some attempt to get down there." T-153.

But obviously there wouldn't have been a need for "follow through" if immediately after the kicks, the Suspect's arms had been pulled out and he was taken under control. Sergeant Diaz addresses this problem by saying that "... you can see Travis after this [the kicks] was attempted, if he was worried about his hands being tucked under and all the bad things that could happen, the bad guy's arms are still are not secure when he walks away to go to the other prisoner." T-153-154. In reality, you cannot see that at all on the videotape, or at least I can't, and so the Union's counsel followed up with the right question, which Sergeant Diaz did not answer:

Q. And you can see that on the video?

A. When I'm looking at the video, I notice that the arms – because one of the deputies, I guess Deputy Johnson, it seems like he's still on top of the bad guy. It would almost be impossible to have the arms there. Now again, you said you have to assume some things. I know from my vision, if I can tell for positive that the arms are out or underneath, from his position, standing in front, it would have been very difficult to see also.

T-154.

This answer is evasive and unresponsive, and it is wrong on two counts. First, it is one thing to say that “you can *see* Travis, ... the bad guy's arms still are not secured when he walks away”, and an entirely different thing to say “it would almost be impossible to have the arms there” because a deputy is “still on top” of him. T-153-154. Those are two different statements, based on two different premises: one that you can see what happened, and the other that you cannot.

Furthermore, it is one thing to see whether someone is lying on his arms and hands if you are standing over him, and quite a different thing to observe that same thing by looking at a videotape recording taken from a helicopter two or three hundred feet in the air, at night, with a man (the Grievant) standing between the video camera and the person on the ground you are trying to see. In other words, if it “would have been very difficult” for the Grievant to see the Suspect's arms, which is really beside the point, then how much more difficult would it have been to see them from the vantage point of a helicopter through the lens of a video camera?

The reason that all of this is important is that the Grievant, who is the only one who really knows what he saw and didn't see that night, says that he didn't disengage until the Suspect's arms were at least brought out from under his body and were being controlled by two fellow police officers, if not handcuffed;¹¹ and neither Sergeant Diaz nor anyone else looking at the videotape could dispute his word on that one way or the other. Finally, when pressed, Sergeant Diaz admitted that if "[h]e would have no longer felt there was a threat and if that's why he walked away, then it would have been more reasonable." T-153-154.

In my opinion, far beyond being "more reasonable", if it is true that the Grievant only disengaged because the Suspect was under control and no longer a threat, then a major premise underlying the City's entire case collapses: he didn't need to "follow through" after his kicks, one of the City's primary arguments fails, and the Union's claim that the kicks were struck for good reason and within Police Department policy picks up substantial weight and credibility.

5. Officer George's Punch

As noted before, most testimony, indeed nearly all cases, suffer from inconsistencies. In fact the City's position in this case suffers from some inconsistencies,

¹¹ As noted above, the Grievant did testify to this at the arbitration hearing, several times, consistently and unequivocally. T-79-80. But once again, there is a possible inconsistency: when asked in the IA interview when the Suspect "show[ed] his hands, when did he comply?", the Grievant replied, "[a]fter I had left; I didn't see them actually physically handcuff him." City Exhibit 3, p. 5. It is possible that he meant he didn't see the handcuffs applied, but did see his arms being removed from under his body, which would still support his contention that when he left, the Suspect was no longer a threat. Though this is still a possible conflict, the Grievant's remark in the IA interview is unclear and not detailed, whereas his testimony at the arbitration hearing was clear, detailed, consistent, and emphatic. As noted earlier, this is a very important issue, and as with some of the other issues, the evidence is not crystal clear, but "a judgment must be made"; that is what arbitrations are for.

as mentioned above. And one of the most glaring and critical of these is how City management attempted to contend with Officer George's punch to the small of the Suspect's back. This punch presented a problem to the City on many levels . Like the Grievant's kicks, George's punch is not a "taught technique"; like the kicks, the punch was said to be an attempt to gain compliance; and most importantly, it is obvious from watching the video tape in slow motion that the Grievant's first kick was delivered at exactly the same moment in time that Officer George's punch was delivered.

The Union has rightfully made quite an issue of this, and it gave City management a very difficult issue to contend with. Sergeant Diaz even refused to agree that the first kick and the punch were inflicted at the same, stating "I can't say they were at the same time", but that "it would have been close; it would have been close", T-159, whereas Deputy Chief Cunningham conceded the point, noting in his "Grievance Response" that "[a]t the time [the] grievant delivered the first kick, an HCSO deputy ... delivers a punch to another area of the body [indicating] ... that the Suspect was not under control and the resistance was still active. This is observed by the undersigned in the tape."¹² Joint Exhibit 3, p. 4. (The "undersigned" party who "observed" this "in the tape" is Deputy Chief Cunningham, *see* Joint Exhibit 3, p. 5). I agree with Deputy Chief Cunningham and the Union, to the obvious: the first kick landed at almost exactly the same time as the punch.

This problem was only addressed indirectly if at all by City management; some City witnesses even attempted to distinguish the kick from the punch because, as Chief

¹² As noted earlier, Chief Cunningham is mistaken in writing that it was "an HSCO deputy" who punched the Suspect in the back; it is undisputed that it was Officer Charles George.

Hogue said, Officer George “was there before Officer Maus was”, T-177, that “he actually got there before Officer Maus, even though it was just within a matter of seconds.” T-177-178. It is not clear what difference that makes; presumably, this gave Officer George a few more seconds to “assess” and “evaluate” the situation. But if that is the rationale, it wasn’t much time, and not much difference.

In its Brief, the City embellishes on the Chief’s point, by arguing that as the driver, the Grievant had to “run around” the patrol car to reach the scene, and “[w]hile running around the police vehicle, Maus could not have known the status of the other officers’ efforts to handcuff the Suspect, nor could he actually have observed their efforts.” City Brief, p. 8. That is true, but it is also incomplete and misleading: after the Grievant rounded his car, he says had an open view of the events on the ground, and no one has said otherwise; indeed the Grievant has said without contradiction that “I ran over to him, I could see that he was laying on his arms.” T-74. And he added that “at the time I stopped my patrol car and exited, I was already evaluating the suspects’ resistance levels and preparing my response level.” City Exhibit 3, p. 11.

I don’t see why the Grievant could not have been assessing, seeing, and thinking while he was running. With this in mind, it is just not necessarily true, and once again an attempt to divine what was in the Grievant’s mind, to say that he “did not engage in any sort of police-type decision making when he kicked at the Suspect”, or that “[h]e did not engage in that type of decision making before he ran at the Suspect to kick him.” City Brief, pp. 7, 8.

Actually the Grievant had about the same amount of time to make his decision that Officer George had – a few seconds. The City admits that “it took Maus only two

seconds to reach the pile of officers”, and it is also clear that only “seconds” elapsed before Officer George arrived at the struggling Suspect and punched him. I don’t see how the fact that Officer George arrived at the Suspect “seconds” before the Grievant did would make his punch more a product of deliberate decision making, or more acceptable, than the kicks. At best, it is an exaggeration to say that “Officer George did not make the decision to punch the Suspect until *after* his visual and ‘feel’ sensors allowed him to fully assess the situation and make a sound decision”, City Brief, p. 7 (emphasis in original), while the Grievant was not thinking, assessing, or making “any sort of police-type decision making when he kicked at the First Suspect.” City Brief, p. 7.

As a matter of fact, Chief Hogue says the punch was a “taught technique” and Sergeant Diaz says that since Officer George was on top of the Suspect “trying to manipulate [his] arms”, so “that’s where a stunning technique is more appropriate.” T-160. Not only did City management decline to discipline Officer George, Chief Hogue complimented his actions, saying “[t]hat use of force was definitely within the realm of what I would expect somebody to do.” T-177-178.

But just as no one could look inside the Grievant’s mind to see what he was thinking or what motivated him, no one could do that with Officer George, either. I do not mean to imply in any way that Officer George did anything wrong, no one has made such an assertion, including the Union and Officer Maus. But the fact remains that his blow was struck at the same time as the Grievant’s, and the timing provides tangible evidence that at that moment force was necessary and advisable, as much force as necessary to bring the Suspect into compliance. And that includes the kicks made by the

Grievant. The City's attempts to distinguish the punch, which was acceptable, from the kicks, which it says were not, failed.

6. The Second Suspect

The incident involving the Second Suspect is almost a throw away by the City, and adds very little to its case. Although Lt. Lightholt testified that the Second Suspect "was cooperative" and "did not resist", he also said that he and Officer Trigo used some force on him to gain, or ensure, compliance ("I believe we grabbed his hands and pulled him down to the ground", T-119), which is also noted in the City's Brief: "the Second Suspect stayed in the passenger seat until he was removed from the car ...". City Brief, p. 11. This is quite consistent with the testimony of the Grievant, who said that "they were yelling at him to get out of the vehicle, and he wasn't getting out of the vehicle", T-80, "[s]o they pulled him out of the vehicle and put him on the ground." T-80. In fact, when asked where the Second Suspect's arms were, the Grievant replied, "[a]gain, his arms were taken out by the officers; there was an officer on each arm, pretty much, and they threw him to the ground." T-81-82.

According to the Grievant, he thought the Second Suspect "wanted to get up", so he says, "I placed my foot in the square of his back; I didn't step on him; I didn't kick him; I didn't hurt him. I put my foot on the square of his back to keep him down on the ground." T-80-81. As the City says, the Second Suspect was apparently compliant once he was on the ground, but he was apparently not 100% compliant before then, and he had not yet been handcuffed when the Grievant placed his foot on his back, so what the Grievant did was not all that severe: he said "I didn't apply any hard pressure; I put my foot there, ... just to let him know that he's under control, and once he was handcuffed,

[the] foot came off, [we] picked him up and that was the end of that.” T-81-82. This coincided with Lt. Lightholt’s observation that “as we were putting the cuffs on him, [the Grievant] had come up to my left side and had placed his foot on the subject’s upper back/neck area; he didn’t mash down or anything, he just placed it there while we completed the handcuffing, and that was it.” T-119.

Lt. Lightholt agreed on cross examination that this was “an unremarkable occurrence” and “at the time I didn’t see anything that concerned me about that”, T-119, while Sergeant Diaz conceded that the Grievant did not place his weight on the man and said that the incident was “not excessive, just inappropriate.” T-161. One reason, again, that Sergeant Diaz found the move inappropriate was that using your foot to hold someone down is not a “taught technique.” T-161.

Finally, no one has denied that the two officers were yelling at the Second Suspect to “get out of the car” before they pulled him out, evidencing at least some hesitation on his part, for whatever reason, and as just mentioned, the two officers used some degree of force to get him out of the car and on the ground. If he was completely cooperative and compliant, then why did they do that? And was that force unnecessary and unreasonable?

As a matter of fact, the way the incident was described, the Grievant’s placement of his foot on the Second Suspect hardly qualifies as “force” at all, and it was certainly less force than was used to “grab his arms” and “put him on the ground”, or “throw him to the ground.” In my opinion this aspect of the case was, just as others said, a pretty minor incident, and did not add much to the City’s case for terminating the Grievant’s employment. If it is important at all, it is considered as circumstantial evidence that the

Grievant was acting on adrenaline that night, which he may well have been, but that issue has been discussed at length in other portions of this opinion.

7. The Grievant's Credibility

Perhaps the most important consideration in this case, from the City's point of view, is management's adamant position that the Grievant damaged his own credibility by trying to explain and justify his actions instead of simply admitting he "made a mistake." Even the City's subject matter expert, Sergeant Diaz, who was not involved in the decision making itself, expressed as his "primary concern" his belief that the Grievant's written statement to Internal Affairs was "a complete misrepresentation of what the actual use of force was", causing him concern about the Grievant's "future use of force." T-151-152. And Chief Hogue testified that he "determined that really Officer Maus thought he acted appropriately, when he clearly didn't act appropriately", T-175, that "he didn't think he had done anything wrong." T-175, and "gave me the impression, particularly in the interview in IA, that he would do this again." T-175-176.

The City's Brief emphasizes this point vehemently, and elaborates on what it describes as "contradictory statements" made by the Grievant during this process, arguing that he "has made a habit of making contradictory, if not false testimony about his actions and the reasons for his actions in an attempt to justify what he did." City Brief, pp. 8-9, 20-21.

The first such inconsistency advanced by the City is the Grievant's Internal Affairs statement that he "walked" to the First Suspect "before he decided to kick him", when it is clear from the videotape, of course, that he ran. City Brief, p. 8. The Grievant does use the term "walked" in his IA statement, City Exhibit 3, p. 3, in describing how

he approached the First Suspect, and I recognize that his use of this term could have been an effort, as the City says, to demonstrate that he “was under control” and “exercising sound police judgment” at the time.

But it also may be that the City is attempting to make much more out of this word usage than it deserves; I am certainly not convinced that the Grievant’s use of the word “walk” was some sort of premeditated subterfuge. I think it is much more likely that it was instead a simple misuse of terms.

In the first place, it could be expected that in this context, in an Internal Affairs interview, knowing his job was at least in question if not in jeopardy, in preparing a written statement for that interview, with the help of his attorney, an officer could be expected to shade his wording to his advantage; yet in the Grievant’s written statement, also recorded on City Exhibit 3, nowhere does he use the work “walk” in describing how he arrived at the scene of the struggle.

In addition, as shown in the very same IA interview, Detective Stefan questioned the Grievant by using the term “running”, more than once, to describe how the videotape depicted him moving from his car to the First Suspect. Although Detective Stefan used the term “running” while directly addressing the Grievant, the Grievant never stopped to correct his questioner or to disagree with the use of the word “running.” Instead, the Grievant simply responded to each question without comment on the use of the word “running.”

Furthermore, it is clear from the interview transcript that the Grievant knew perfectly well that all of his actions that night, including his running, were recorded on tape – both he and Detective Stefan referred to the tape and what it showed, several

times. So the Grievant had to know that using the word “walked” would not fool or persuade anyone otherwise. Indeed, in one question, Detective Stefan asked him “[a]s you were running between the two vehicles, you looked to the left and took a half step towards the left as if you were going to go toward the [Second Suspect]; do you remember that?”, and the Grievant replied, forthrightly enough, “I don’t particularly recall that; I may have; if it’s on the video, then I probably did.” City Exhibit 3, p. 2. Notably, he did not challenge the use of the word “running”; in fact he agreed with the detective’s statement of his movement, that he “probably did” what the video tape showed.

Moreover, the context in which the Grievant used the term “walk” shows that he was not necessarily describing how he traversed the entire distance from his patrol car to the Second Suspect; as he described that movement, his initial choice of words was “ ... I went to the gentleman on the ground ...”. City Exhibit 3, p. 2. And when he was asked, “then what happened” (presumably, what happened after he got there, after he arrived at the men on the ground), it was only at that point in his description of the sequence of events that he said, “I walked up to him; they were screaming at him, stop resisting.” City Exhibit 3, p. 2.

This context really changes the meaning of the term “walked” from the way it has been used by the City, and reinforces the notion that the Grievant made a simple misstatement, not a premeditated, deliberate decision to try to mislead the investigator. He could have meant that he “ran” to the Suspect, then slowed to a walk just as he arrived, before kicking him – that is more plausible than believing he was trying to mislead the investigator about something that was so plainly evident on videotape. He

knew he was on tape, and had to know he could not really convince the detective that he “walked” from his car to the First Suspect, since Detective Stefan had just told him that the tape “captured you running” toward the First Suspect.

Moreover, the Grievant did not use the term “walk” at the arbitration hearing. He said he “ran” to the First Suspect, though he was not even asked that specific question; he simply stated, in describing what he had done, that “I ran over to him [the First Suspect, and] I could see he was lying on his arms; I mean I could see just this part of his right arm and that’s what I attempted to kick, his arm.” T-74.

And finally, as noted earlier, the Grievant never used the term “walk” in his prepared statement read to Detective Stefan in the IA interview; he stated that he “approached” the First Suspect, and neither used the word “walk” or “run.” In sum, it is my view of this evidence that if he had been specifically asked in the IA interview, or elsewhere, whether he walked or ran toward the First Suspect, he would have readily answered that he ran. In other words, the issue was not one of great importance, either to the IA investigator or to the Grievant; it was not a big deal. And it does not serve to undermine the Grievant’s credibility in any significant way.

A second statement advanced by the City as contradictory and inconsistent is the Grievant’s comment that he “couldn’t say ... whether they were actually physically grabbing him”, but “they were saying give us your hands, so I would assume they were, but I didn’t physically see it.” City Exhibit 3, p. 4. This is certainly inconsistent with other statements made by the Grievant. But once again I think it is an exaggeration to characterize it as “false”, and it is certainly hyperbolic to claim that “by admitting that he did not actually see the officers physically grabbing at the suspect to get his arms

handcuffed, Maus has admitted that his after-the-fact created reasons for kicking the bicep/shoulder area are false.” City Brief, pp. 8-9.

Actually the Grievant contradicted himself on this point during the same IA interview; in fact his first contradictory statement appears on the very same page of the transcribed interview, where he says he didn’t “observe any” pain compliance techniques, but “I saw that they were trying to grab his hands out and trying to pull his arms out from underneath him, but as far as any particular techniques, I didn’t see any.” City Exhibit 3, p. 4, lines 2-4. Furthermore, in his prepared statement which appears in the same IA transcribed interview, the Grievant again made it plain that he did see the officers trying to pull the Suspect’s arms out: on pages 9 and 10 of City Exhibit 3, the Grievant states, “I observed officers on the ground with the subject attempting to pull his arms out from underneath his body and wasn’t (sic) successful in doing so”, City Exhibit 3, p. 10, and “as I approached I could clearly see the [Suspect] was further resisting by laying on his stomach with his hands and arms braced underneath his body in an attempt to defeat the officers’ control and resist from being handcuffed.” City Exhibit 3, pp. 9-10.

What are we to make of all this? Yes, there is one inconsistent statement, but there are three quite consistent statements, and they are all in the same interview. City Exhibit 3. Apparently the Grievant was nervous and made a mistake, which he contradicted (or corrected, depending on your point of view) in almost the same breath. He made three statements in a single interview that he did see the officers pulling on the Suspect’s arms, and one that he did not. All of the statements were made to the same detective, who did not point out the inconsistency and did not follow up with more questions as to what he really saw or didn’t see.

Although one of the statements is inconsistent with three other statements, that does not demonstrate an intent to lie or be untruthful; one is just simply inconsistent with the other three, which actually tends to prove an inadvertent misstatement, which if caught and if followed up on, could have been corrected. I certainly don't think his "admitting" something that he just contradicted a bare minute before in the same interview, and then contradicted twice more in a written prepared statement read at the same interview, serves as an "admission" that his "after-the-fact created reasons [for the kicks] are false." City Brief, pp. 8-9.

The third set of statements raised by the City I do not even find to be inconsistent. The City asserts that the Grievant said he kicked at the Suspect "to help free his arm to be handcuffed", but "subsequently testified" that he kicked at the Suspect "in case he had a weapon and to immobilize [his] arm." City Brief, p. 9. The City urges that he added "the fear of a weapon" only in his prepared statement, though he "had already admitted that there was never any mention of a weapon." City Brief, p. 9. In my opinion, in this instance the Grievant's statements are not contradictions, they are not even inconsistent; and the City's characterization of them is misleading and incomplete.

The City says that the Grievant only mentioned "the fear of a weapon" in his prepared statement, but that is not true: in the question and answer session, he said, "I thought that there's a chance, you know, that he could have a weapon", that he's on his hands for a reason" and "I could see his hands were down by his waist area, which is, you know, guys who are known to have weapons, carry weapons there." City Exhibit 3, p.4. So clearly, he did express his concern and "fear of a weapon" in his initial interview, and

that topic was *not* “added only when [he] read a prepared statement.” City Exhibit 3, pp. 4 and 10.

Furthermore, the City’s argument that the Grievant “had already admitted that there was never any mention of a weapon” adds nothing to its claim, because the question of whether there had been any “mention of a weapon” was asked by Detective Stefan *in response to* the Grievant’s expression of concern that there *was* a weapon, as just noted above. Though the Grievant did agree that “there was no mention of it”, he promptly added, “but it was on my mind.” City Exhibit 3, p. 4. In short there are just no contradictions in any of this, and the City’s attempt to make it so falls considerably short of the mark.

And finally, the reasons given by the Grievant for the kicks are not contradictory or even inconsistent; they are consistent and believable. On page 3, City Exhibit 3, the Grievant describes the scene of the officers trying to “get his hands” out and “screaming at him, stop resisting” and “give us your hands”, and then he says “I thought, well, I’ll kick his shoulder out; maybe that will get him to move his arm out.” City Exhibit 3, p. 3. On page 10, he says he kicked at the Suspect’s arm “for two reasons”: to “disarm him in the event he was carrying a weapon and to immobilize [his] arm so the officers could handcuff him.” City Exhibit 3, p. 10.

If these are inconsistent or contradictory, I am unable to see it. A kick delivered to “immobilize” a suspect’s arm is not necessarily different from an attempt to “kick his shoulder out” so that “maybe that will get him to move his arm out.” The purpose would be the same; the attempt is the same; it is true that the Grievant may not have expressed his intent as well in his verbal interview as he did in his prepared written statement, but

he clearly meant the same thing: he was trying to “stun” the Suspect’s arm so as to help the officers on the ground get him handcuffed.

And I don’t see any serious difference in getting a suspect handcuffed and getting him “disarmed”; the Grievant had quite clearly expressed his concern about a hidden weapon throughout his interview, in both his prepared statement and in his verbal responses to questions. Even though he did tell his interviewer that “there was no mention” of a weapon, he added that “I still had it on my mind”, and had just said a minute earlier, “I thought that there’s a chance, you know, he could have a weapon; he’s on his hands for a reason.” City Exhibit 3, p. 4. In short, I just don’t see any of these statements as inconsistent, much less contradictory.

The last issue on this aspect of the case is described by the City as the “most critical contradiction” in the Grievant’s testimony, but in making this argument the City misstates the Grievant’s testimony by arguing that “Maus testified that he was taught to do everything he did on February 20, 2004, including kicking at a suspect who was lying on the ground with three law enforcement officers on his back.” City Brief, p. 9. No, the Grievant did not testify that he “was taught to do everything he did” on the night in question, and he never said he was “trained” to kick a suspect lying on the ground, or to kick a suspect with an officer on top of him. In fact he admitted at the hearing more than once that he was “never trained” to “kick a suspect who is lying on the ground”, T-75, and when asked “when” he was “taught to kick a suspect when there was [an officer] already on top of him”, he simply replied, truthfully and accurately, “I was never trained in that particular scenario, sir.” T-75.

Actually, despite having apparently caused much consternation to his supervisors, Chief of Police Hogue, Sergeant Diaz, and his questioners at the arbitration hearing, the Grievant's position in this matter has really been quite consistent and straightforward. The Grievant's position is much more narrow than the City claims, and it is not dissimilar to what Sergeant Diaz said he teaches: the Grievant just says he was not trained in "this particular scenario", that he was "going with the totality of the circumstances", T-95, and that he didn't think he "could get down on my knees and punch his arm or try to pull his arm out", T-95, in "a timely manner." T-95.

He says (actually without contradiction) that he "was trained that a kick is the same as a punch as long as it is to an authorized striking area", T-96, and that he was not trained "not to use a kick to gain control of the suspect." T-96. Since he didn't feel that he "could get down on my knees and punch his arm or try to pull his arm out", T-95, in "a timely manner", he thought that "it seemed the fastest, most effective technique I should employ is the kick." T-95. In short, he felt that he was justified in what he did; and while others obviously disagree, it is not accurate to say that he has claimed that "he was trained in everything he did that night."

Furthermore, saying that Sergeant Diaz's letter had "shed light on the situation" did not contradict what he had said previously; it may have been an attempt to appease the command staff, but to his credit, the Grievant has adamantly denied that he ever *agreed* with them or anybody that he was wrong; even at the arbitration hearing, after already having lost his job, and with the last possible chance to do what he knew the City had been wanting him to do, he refused, emphatically stating "at no time did I ever admit to making a mistake." T-109.

At Chief Cunningham's hearing, knowing he was being handed a "Hobson's choice" and recalling he was "on the verge of losing my job", he admitted to "saying, you know, if you guys say I'm wrong, then so be it; I just want to put this behind me and move on with my life and my career here at TPD." T-110. Because of these and similar statements, the City says that he "has consistently failed to give a truthful accounting of his actions" and "has no credibility" because "he has been a moving target in terms of admitting he was wrong and then denying he was wrong." City Brief, p. 3.

But the Grievant really never did exactly "admit that he was wrong", to Chief Cunningham or anyone else; he emphatically says he didn't, and if he truly believed that he was right, then why would he admit that he was wrong? This is similar to the notion of his "lack of remorse." I think Sergeant Diamond summed that up well when he said "what's remorse got to do with it? He acted based on what he saw and what he believed." T-298. I agree, and I think his refusal to "admit" he was "wrong" when he didn't think he was, could even be construed as evidence of integrity instead of deceitfulness. Either way, it didn't look like what he had to say was going to get him his job back or change any minds in the Police Department chain of command. He did make a sort of hedged attempt to mollify Chief Cunningham, but saying the Sergeant Diaz's letter had "shed light on the situation" is not a confession of wrong doing, or a *mea culpa*, and is not evidence of "flip flopping" or untruthfulness; it is evidence of a carefully phrased attempt to try to save his job without admitting he was wrong.

Furthermore, Mr. Franxman's notes of the "pre-disciplinary hearing before Deputy Chief Cunningham do not indicate, as the City asserts, that the Grievant "conceded he made a mistake and promised Chief Cunningham that it would never

happen again.” City Brief, p. 9. All Mr. Franxman’s notes indicate is that the Grievant said “at the time of the incident” he “did what [he was] trained and thought it was justified”, City Exhibit 1, p. 3, that “he felt bad” he had hit the deputy, that “Sergeant Diaz’s letter brought light to [the] situation” and that it “will never happen again” and he “understands what [he] should have done.” City Exhibit 1, p. 3. Once again, these notes reflect to me nothing more than carefully chosen words, an attempt by the Grievant (and his attorney) to tell management what he thought they wanted him to say, without admitting he was wrong.

I realize that he was trying to walk a tightrope, and maybe he didn’t do it as well as he could have; but the tightrope was put there by the City. I cannot escape the impression that in some way the Grievant got the message that he was supposed to admit he was wrong, but he also sensed, rightly or wrongly, that if he did admit he was wrong, he would be terminated anyway. In other words, this was a sort of “heads you win, tails I lose” scenario to him, and right or wrong, that perception colored his dealings with management and internal affairs. It is true that his attorney said that “he realizes that he made a mistake”, but even then the attorney added that “he implemented the correct procedures but did it in [the] wrong circumstances.” City Exhibit 1, p. 1.

The short answer to this particular aspect of the dispute is that all the Grievant really said was that he was sorry and it wouldn’t happen again; and he only did that because he was trying to save his job or get it back. That is not surprising or unusual and it doesn’t mean he can’t be believed under oath on anything he says, or that, as the City claims, that “all those statements” he made to Chief Cunningham “were false”, and “he has no credibility.” City Brief, pp. 3, 17, 21.

Parenthetically, it is noted that the City's own case was not without its own inconsistencies. I ran across two, and I was not looking for them. In the "Notice of Disciplinary Action", Joint Exhibit 3, the City states that "one of" the Grievant's two kicks "struck Deputy Johnson and the other Mr. Dollins [the Second Suspect]", Joint Exhibit 3, while the City now contends that the both kicks missed the Suspect and were "useless", that the Grievant "did nothing to assist the [other] officers." City Brief, p. 7. Furthermore, in his "Grievance Response", Deputy Chief Cunningham makes the mistaken statement that an "HCSO deputy" struck the Suspect in the back, when the evidence is clear that it was Officer Charles George, a Tampa police officer. Joint Exhibit 2, p. 4.

In summary concerning contradictions and inconsistencies, I have observed and participated in many adversarial hearings, trials and arbitrations, and it is my firm conviction that it is always much easier to ask a lot of questions than to answer them, sometimes again and again, with complete accuracy and without misstatements. Indeed it has been my experience that only a very few rare individuals can testify to or describe the same event over and over again with perfect consistency, without making a few misstatements and mistakes or missing a few details. Those things do not always mean that people who make mistakes, inconsistent remarks and misstatements are lying or hiding the truth; sometimes a mistake is just a mistake: the witness regrets it; his attorney tries to pretend it didn't hurt; and the other side makes as much as it can out of it – that is the nature of trials and arbitrations.

But my job is to weigh and assess all of the evidence taken as a whole and in its entirety, to try to resolve inconsistencies if possible, and if that can't be done, then, as

noted above, "a judgment must be made." In my opinion, judging all of the evidence and evaluating Officer Maus's testimony, given in several different venues and under trying circumstances, as an overall matter is found believable, credible, and convincing. I think he was motivated by a desire to assist the officers and not by malice, just as he says he was. And I think as an overall matter he tried to tell the truth as much as he could humanly achieve, which is always and forever will be imperfect, for all of us on this earth are imperfect. But despite the imperfections, which I found in both parties' cases, I believed his testimony and his version of the events on the night in question, which hung together really quite well, under some real stress. And so I think that the evidence in this case has failed to establish that the City had just cause for terminating his employment.

AWARD

The grievance is sustained. The evidence failed to establish that the City of Tampa, Florida ("the City") had just cause to discharge Police Officer Travis E. Maus ("the Grievant"), and it therefore violated the collective bargaining agreement ("the CBA"). The City shall reinstate the Grievant to his former position as a sworn police officer, with full seniority and benefits, and shall make payment to him for wages lost, if any, as a result of the violation of the CBA, calculated as set forth below.

The payment of back pay shall be calculated as follows: using the same pay rate which would have been earned by the Grievant under the CBA had he not been discharged, calculate the income which he would have earned during the time period beginning on the effective date of his discharge and extending to the date that he is reinstated to employment with the City; subtract from that amount the total income actually received by the Grievant during that same time period from any source. The difference between these two numbers shall constitute the amount of wages lost by the Grievant, if any, and this number shall be the amount awarded to the Grievant.

The Arbitrator will retain jurisdiction over this case to the extent necessary to resolve any disputes as to the remedy applied, should such a dispute arise.

This 2nd day of June, 2006.



Joe M. Harris
Arbitrator

Atlanta, Georgia

