

IN THE MATTER OF THE	)	
ARBITRATION BETWEEN	)	CSMCS Case No. ARB-23-0022
	)	
BRANDON NAIL,	)	
	)	
Appellant	)	
	)	
and	)	GRIEVANCE: Discharge
	)	
CITY OF SAN RAFAEL,	)	
SAN RAFAEL POLICE	)	
DEPARTMENT	)	
	)	
Respondent	)	

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**FINAL AND BINDING AWARD**

ARBITRATOR: DANIEL R. SALING, Esq.

AWARD DATE: DECEMBER 16, 2024

**APPEARANCES FOR THE PARTIES**

CITY: Brian M. Affrunti, Esq.  
Allison B. Hernandez, Esq.  
BURKE, WILLIAMS & SORENSEN, LLP  
60 South Market Street, Suite 1000  
San Jose, CA 95113-2336

APPELLANT: Julia D. Fox, Esq.  
RAINS LUCIA STERN ST. PHALLE & SILVER, PC  
2300 Contra Costa Boulevard Suite 500  
Pleasant Hill, CA 94523

**WITNESSES:**

For the City:

Lt. Scott Eberle – San Rafael Police Department  
Lindsay Lara – City Clerk for the City of San Rafael  
Rebecca Delatorre – Record Specialist - San Rafael Police Department  
Chief David Spiller -San Rafael Police Department  
Darin White – Fire Chief for the City of San Rafael & *Skelly* Officer  
Julio Lopez - Complainant

For the Appellant:

Sean McCann – Professor of Criminology and Expert Witness  
Oscar O’Con – Former Officer - San Rafael Police Department

Rebuttal for City:

Paul Henry – Independent Investigator  
Chief David Spiller -San Rafael Police Department

**PROCEDURAL HISTORY**

The San Rafael Police Department is hereinafter referred to as the “Department.” The City of San Rafael is hereinafter referred to as the “City.” Mr. Brandon Nail is hereinafter referred to as the “Appellant.” Chief David Spiller is hereinafter referred to as “Chief Spiller.” The Memorandum of Understanding between the Employer and the Union, from July 1, 2021, to June 30, 2024, is hereinafter referred to as the “Agreement.” (NX 1)

The Appellant had appealed discipline for an alleged incident on July 27, 2022, when Mr. Julio Lopez (“Mr. Lopez”) was arrested for several charges including felony resisting arrest. There were allegations that the Appellant had acted inappropriately toward Mr. Lopez during the July 27, 2022, arrest. Mr. Lopez’s case was given to the Marin County District Attorney for processing.

On August 23, 2022, the Marin County District Attorney requested a continuance of the Lopez case because they had not received and reviewed the body-worn camera footage of the July 27, 2022, incident. Following the preliminary criminal hearing in the case, Captain Roy Leon notified Chief Spiller of the continuance. Chief Spiller immediately requested the body-worn camera footage, police report, and the Use of Force Report for the Lopez incident. After reviewing the body-worn camera footage, police report, and the Use of Force Report, Chief Spiller became concerned with the Appellant's conduct during the arrest on July 27, 2022. Also, after reviewing the body-worn camera footage, the District Attorney dismissed all charges against Mr. Lopez.

In Late August 2022, the City Attorney ordered an internal investigation of the Appellant's conduct by a third-party source. The City contracted with Independent Investigative Consultants, LLC, on September 9, 2022, and the investigator was charged with determining if the Appellant had used excessive force against Mr. Lopez on July 27, 2022, and if he had violated any other City or Department policies, rules, regulations and procedures. (MX 1) The investigator assigned to conduct the investigation was Mr. Paul Henry. ("Investigator")

After an extensive investigation was conducted by the third-party investigator, an Investigative Report was issued on April 5, 2023. The Investigative Report found that the allegation regarding the Appellant's alleged use of excessive force was unfounded. The Investigative Report sustained the charges that the Appellant had by his actions on July 27, 2022, failed to consider alternative tactics that could have de-escalated the situation, and that he had been discourteous and disrespectful to Mr. Lopez during his detention. The Investigative Report alleged that the Appellant's conduct on July 27, 2022, discredited the Department and violated numerous Department and City policies, rules, regulations, and procedures. Further, the investigation report found that the Appellant had properly reported the incident and had provided Mr. Lopez with adequate medical aid. In addition to the Investigative Report, a Use of Force form was prepared by and approved by the Department, which determined that the Appellant had followed Department policy regarding the use of force and the allegation that the Appellant had used excessive force was unfounded.

On May 11, 2023, following the issuance of the Investigative Report, the Department issued a Notice of Intent to Terminate. (MX 1) The dispute before the Arbitrator arises from the Department's termination of the Appellant from his position as a Police Officer. In the Notice of Intent to Termination, the Appellant was informed that he was being terminated for engaging in prohibited conduct listed in Article 7.3.1 of the Agreement, Department Policy Manual, Section 320.5, Cause for Discipline, and Personnel Rules and Regulations, Section 12.3, Causes for Disciplinary Action.

The Appellant was charged with the alleged violation of the following policies, rules, regulations, and procedures:

- City Policy 12.3(e): Inability, unwillingness, refusal, or failure to perform work as assigned, required, or directed.
- City Policy 12.3(h): Unacceptable behavior toward the general public of fellow employees or officers of the City 3. City Policy 12.3(l): Violations of any of the provisions of these working rules and regulations or departmental rules and regulations.
- SRPD Policy 320.5.7 (a): Negligence of Duty.
- SRPD Policy 320.5.1 (a): Violation of or ordering or instructing a subordinate to violate any policy, procedure, rule, order, directive, requirement, or failure to follow instructions contained in department or City manuals.
- SRPD Policy 320.5.7(b): Unsatisfactory work performance including but not limited to failure, incompetence, inefficiency, delay in performing and/or carrying out proper orders, work assignments, or the instructions of supervisors without a reasonable and bona fide excuse.
- SRPD Policy 320.5.8 (e): Disparaging remarks or conduct concerning duly constituted authority to the extent that such conduct disrupts the efficiency of this department or subverts the good order, efficiency, and discipline of this department or that would tend to discredit any of its members.
- SRPD Policy 320.5.8 (i): Any act on - or off-duty that brings discredit to this department.

- SRPD Policy 320.5.9(f) Discourteous, disrespectful or discriminatory treatment of any member of the public or any member of this department or the City.
- SRPD Policy 320.5.9 (g) Use of obscene, indecent, profane or derogatory language while on duty or in uniform.
- SRPD Policy 320.5.9 (m) Any other on or off-duty conduct which any member knows or reasonably should know is unbecoming a member of this department is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.
- City Policy 12.3(q): Other acts inimical to the public service.

Following receipt of the Notice of Intent to Terminate, the Appellant requested a *Skelly* meeting to present his position concerning the allegations contained in the charging document. The *Skelly* meeting was held on June 21, 2023, before *Skelly* Officer Darin White. The Appellant, his attorney, Julie Fox, and City Attorney Robert Epstein attended the meeting. Following the review of the charges, the evidence, and the Appellant's responses to the allegations, *Skelly* Officer White sustained the charges filed and found no new evidence to reduce or modify the charges filed and therefore sustained the Department's decision to terminate the Appellant.

On June 27, 2023, the Appellant was issued a Notice of Final Decision to Terminate Employment by Mr. Darin White. (MX 2) The notice indicated that the Department after careful consideration of the facts and the evidence found that the Appellant had violated Department and City policies, rules, regulations, and procedures to warrant his termination from service. The Appellant was informed that his termination would be effective as of June 28, 2023. The Appellant was given notice that under the provisions of Article 7, Section 7.3.2, of the Agreement, the Appellant had the right to appeal the decision to terminate.

After the Appellant received the Notice of Final Decision to Terminate, he filed a grievance and appealed his termination. The grievances in question were submitted to the City in writing and thereafter processed in accordance with Article 7, Procedures, Sections 7.4, Grievance Procedures, and Section 7.3, Disciplinary Action, of the Agreement. (MX 1) Following unsuccessful attempts at resolving the alleged incidents of misconduct, the issues were appealed in accordance

with Articles 7, Section 7.3.2, Appeal, of the Agreement. (MX 1) The representatives for the Department and the Appellant agreed to have Daniel R. Saling appointed as Arbitrator to hear the Appellant's appeal and on August 23, 2023, the California State Mediation and Conciliation gave Mr. Saling official notification of his appointment.

The appeal hearing was held at the City of San Rafael Safety Center, 1375 Fifth Avenue, San Rafael, California 94901. The hearing was scheduled for March 18 -22, 2024. The actual hearings were conducted on March 18<sup>th</sup>, 19<sup>th</sup>, 21<sup>st</sup>, and August 19, 2024. The hearings originally scheduled for June 20<sup>th</sup> and 22<sup>nd</sup> were canceled by the parties. During the course of the hearing, all parties were afforded the full opportunity for the presentation of evidence, examination, and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing and were duly sworn.

The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received both briefs electronically on or about November 23, 2024.

The parties stipulated that the appeals were timely and properly before the Arbitrator. Under the provisions of Article 7, Procedure, Section 7.4.4, City Manager and Arbitration, the arbitrator's decision will be final and binding.

### **GRIEVANCE ISSUES TO BE RESOLVED:**

At the commencement of the hearing, the parties agreed to submit a joint statement of issues.

The mutually agreed submission was as follows:

1. Was there just cause to terminate the Appellant?
2. If not, what is the appropriate remedy?

### **FACTUAL BACKGROUND**

Set forth in this Background is a summary of undisputed facts and evidence regarding disputed facts sufficient to understand the parties' positions. Other facts and evidence may be noted in the Discussion below to the extent knowledge of either is necessary to understand the Arbitrator's

decision. The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

The Appellant was employed by the Department on September 30, 2019, as a police officer and additionally during his tenure worked as a Field Training Officer (“FTO”). The Appellant was terminated from service with the Department on June 28, 2023. The Appellant was a sworn officer with the San Rafael Police Department for approximately 5 years before his discharge.

At approximately 6:52 pm on July 27, 2022, Officer Daisy Mazariegos (“Mazariegos”) was patrolling in the Canal District of the City of San Rafael and observed three men standing on the sidewalk on a public street drinking beer and playing loud music. The Department had instructed patrol officers to be on the lookout for individuals drinking alcohol and loitering in public areas. Officer Mazariegos pulled her patrol vehicle to the curb and approached the men who were drinking alcohol in public.

Officer Mazariegos called for backup and the Appellant overheard her conversation with the three men over the radio as he drove to the call. Officer Mazariegos had instructed the three men to sit down. One of the men, Mr. Julio Lopez (“Lopez”), spoke some English and was asked for his identification. He stood to retrieve the document and was immediately told to sit down on the curb, but he did not react to Officer Mazariegos’s numerous directions to sit down immediately. The Appellant arrived at the scene and got out of his patrol vehicle and in a deep and commanding voice told Mr. Lopez to “sit the fuck down.” The Appellant was alleged to have escalated the situation by making unnecessary and confrontational comments to Mr. Lopez. The Department alleges that the Appellant’s conduct escalated the situation and resulted in Mr. Lopez being taken to the ground, placed in handcuffs, and arrested.

Following the incident, the Department did not allege that excessive force was used by the Appellant during the July 27, 2022, incident. The Investigative Report found that the allegation that the Appellant had used excessive force was unfounded. Further, the Department investigated the alleged use of excessive force, and the Use of Force form was completed and approved by senior members of the Department. After its investigation, the Department found that the

Appellant had acted within Department policy and that he had not used excessive force against Mr. Lopez during his detention on July 27, 2022.

On September 1, 2022, the public became aware of the July 27, 2022, incident when the body-worn camera footage of the incident somehow was leaked to ABC7 News in San Francisco. Mr. Dan Noyes, a broadcaster on the evening news did a new story and showed a portion of the video footage on-air. The issue of police abuse has been in the news since the killing of George Floyd in Minneapolis, Minnesota on May 25, 2020, by a group of police officers during a routine stop and was considered a worthy news story.

Following the George Floyd incident, there had been protests and riots that questioned the use by police officers of excessive force. Much of the protest focused on the need for institutions like police departments to confront their role in perpetuating racial inequities. Based on the public protest, new legislation was enacted regarding police reform and the police departments throughout the United States examined and evaluated their use of physical force policies.

Based on public concern following the George Floyd incident, cities throughout the United States experienced protests and some riots. Once the video footage of the July 27, 2022, incident was aired, there was an immediate public outrage, and members of the community and individuals from across the United States and some from other countries immediately expressed their concern regarding the organization and professionalism of the Department. Protests and marches were held, and members of the general public attended the City Council meeting to express their concerns and often asked that the Appellant and Chief Spiller be terminated.

On September 2, 2022, the morning following the airing of the July 27, 2022, incident the Department was flooded with telephone calls from the public expressing their concerns. Most of the phone calls were made to the Department's non-emergency telephone lines and were answered by non-sworn employees of the Department. Most of the telephone calls received were vulgar, offensive, sexually explicit, angry, and threatening. The angry telephone calls began on September 2, 2022, and continued for weeks thereafter.



## **DEPARTMENT'S POSITION**

The Agency believes that it has disciplined the Appellant for just cause because he violated Department and City policies, rules, regulations, and procedures. The Department contends that the evidence unequivocally established that just cause existed to impose discipline on the Appellant and that the decision to terminate his service with the Department was appropriate and just.

Just Cause requires that a person being disciplined must be found to have violated the policies, rules, regulations, or procedures that they have been charged with and know or should have known that the violation or misconduct could result in discipline up to and including discharge. The evidence established that the Appellant participated in conduct and violated established Department and City policies, rules, regulations, and procedures and that he knew that such violations could result in the issuance of discipline up to and including termination.

The July 27, 2022, incident began when Officer Mazariego stopped to investigate three men who appeared to be drinking beer in public in violation of a City ordinance. Officer Mazariego observed three Hispanic males standing either on the sidewalk or the street with numerous empty beer bottles lying in the street. The three men were asked what they were doing and one of the male individuals, Mr. Julio Lopez, indicated that they were drinking beer after work.

Officer Mazariego had her microphone on her vest activated when she called and requested backup, and the Appellant was able to hear her verbal commands to the three detained individuals. The Appellant was dispatched as the backup officer and instead of providing routine backup, the Appellant acted confrontationally, aggressively, and in an intimidating manner toward the three detained individuals. The Appellant immediately told Mr. Lopez to "sit the fuck down!" Mr. Lopez had been directed and he was complying with Officer Mazariego's demand for him to present his identification which required him to stand to remove his wallet from his pants pocket.

Mr. Lopez reacted to the Appellant's initial state and told the Appellant that he did not have to speak to him in such a manner, but the Appellant continued to antagonize and bully Mr. Lopez without justification. The Appellant did not attempt to provide Mr. Lopez with why he was being

detained but his comments only intimidated and harassed the detainee. The Appellant's actions and comments were not designed to de-escalate the situation but resulted in an escalation of the incident. The Appellant's misconduct and actions resulted in Mr. Lopez having to be physically taken to the ground, handcuffed, and arrested.

The Appellant's alleged aggressive conduct toward Mr. Lopez did not stop once he was placed in handcuffs and arrested. When Mr. Lopez was being taken to a patrol vehicle, the Appellant followed him and continued to bully, intimidate, and antagonize him. The Appellant's conduct as the cover was inconsistent with Department policies, rules, regulations, and procedures. The Department contends that the Appellant's conduct during the July 27, 2022, incident was contrary to the Peace Officer Standards and Training ("POST") policies regarding the need to de-escalate an incident and never to take actions that will escalate the incident.

The *Skelly* hearing officer did not find any evidence or information that would mitigate the Appellant's termination. The Department contends that the evidence clearly established that the Appellant did not follow Department procedures and violated Department policies, rules, and regulations, regarding his conduct toward Mr. Lopez on July 27, 2022.

The Department believed that it did not abuse its discretion in the termination of the Appellant based on his conduct toward Mr. Lopez. The Appellant's conduct toward Mr. Lopez was unnecessary and abusive and such conduct warranted termination. During his investigative interview, when the Appellant was asked if he would do anything differently if he could redo the events of July 27, 2022, he answered, "No." The Appellant's response established that he is not willing to correct his improper behavior and if a similar situation were to occur in the future, the Appellant would not do anything differently. The Appellant is unwilling to learn from his actions and they are contrary to Department and City policies, culture, and values, and necessitated his termination from service.

The Appellant's conduct on July 27, 2022, negatively impacted the morale of the Department. Additionally, the Appellant's conduct adversely affected the Department's working relationship with the citizens of San Rafael.

The third-party investigation regarding the Appellant's conduct on July 27, 2022, concluded that if the Appellant had utilized de-escalation techniques and demonstrated more professionalism, the incident could have been avoided. The investigator stated in his report that the Appellant lacked accountability for his actions and indicated that he would have done nothing different than he did if a similar situation were to occur in the future.

The Department, after reviewing the Investigative Report, decided that the Appellant should be terminated. Chief Spiller decided to terminate the Appellant instead of using a lesser form of discipline because of the seriousness of his conduct and the impact it had on the Department and the community. The community members who attended the City Council meeting expressed that they did not trust the Appellant and called for his termination. The Department contends that if the Appellant had been given a lesser penalty and not terminated, this would be a total violation of the public trust.

The Appellant violated City Policy 12,3(a) by not professionally performing his assigned duties. The Appellant after arriving at the incident, did not attempt to de-escalate the situation but used inappropriate language and attempted to intimidate Mr. Lopez. The Appellant's conduct escalated the situation, resulting in Mr. Lopez's arrest for what should have been a minor infraction. The Appellant's conduct was not consistent with the Department's expectations of a police officer and was inconsistent with his role as a backup officer. The Department contends that the Appellant's actions reflect his inability to perform the work required of a police officer.

The Appellant violated numerous City policies by being overly aggressive and discourteous to Mr. Lopez. The Appellant failed to properly perform his duties as a sworn officer. His behavior was inappropriate and below the standard expected of sworn officers by the Department. The Appellant was negligent in performing his duties and failed to perform his duties competently and inefficiently, which reflected poorly on the Department's reputation.

The body-worn camera footage established that after Mr. Lopez was taken to the ground, handcuffed, and arrested. After the arrest, the Appellant boasted to his colleagues about the incident and stated that Mr. Lopez, "had a bad day." The Appellant was not the arresting officer and therefore had no reason to follow Mr. Lopez to the patrol vehicle after his arrest and ask him if he was "ok" and then state that he should not have fought with the arresting police officers.

The camera footage reflected the Appellant's aggressive interaction with Mr. Lopez and this inappropriate interaction was the basis for the San Rafael community member's anger and distrust of the Department which resulted in protests and demonstrations.

Department Policy 320.5.9 prohibits the use of obscene, indecent, profane, or derogatory language of a sworn officer while on duty or in uniform. When the Appellant arrived at the July 27, 2022, incident, he was the backup officer, and the officer in charge was Officer Mazariegos who was in control of the situation. The Appellant immediately used profanity and told Mr. Lopez aggressively and disrespectfully to "sit the fuck down." The Appellant's conduct and use of profanity did not de-escalate the situation but escalated the situation which ultimately resulted in the arrest of Mr. Lopez. The Appellant was a trained officer and knew the techniques that he could have used to calm the situation, but he did not use any of those de-escalation techniques.

The Appellant's conduct on July 27, 2022, was inconsistent with POST Learning Domain 20, Use of Force/De-escalation training. The POST, "Use of Force/De-escalation", has been taught for over 20 years and has in the last few years become a critical component of police officer training. The Appellant alleged that he used profanity toward Mr. Lopez to de-escalate the situation, but the use of profanity is not one of the techniques taught in the POST, "Use of Force/De-escalation" program.

The Department contends that the termination of the Appellant for his violation of Department and City policies, rules, regulations, and procedures was appropriate based on the Investigative Report. The Department's decision to terminate the Appellant was established by the preponderance of the evidence. Following a thorough investigation, the Department concluded that the Appellant's conduct warranted his termination. The Appellant provided no credible evidence that would mitigate his numerous violations of Department and City policies, rules, regulations, and procedures.

The Department believes that based on the Department and City policies, rules, regulations, procedures, and the evidence presented established that there was just cause to terminate the Appellant. Further, the evidence established that the discipline was appropriate and was not

arbitrary, capricious, or discriminatory. The Department requests that the Arbitrator affirm the Department's reasonable and justified decision to terminate the Appellant's employment

### **APPELLANT'S POSITION**

The Appellant contends that the Department and City capitulated to the public outcry based on a video shown on television news that led the general public to assume that the Appellant had used excessive force against Mr. Lopez on July 27, 2022. The Department and the Investigator investigated the Appellant's conduct and action toward Mr. Lopez and found that the Appellant had not used excessive force and the force that he used was within Department guidelines.

After the body-worn camera footage was aired on television, the public became angry and protested the Appellant's apparent excessive use of force. The public concern flowed from the George Floyd case in Minneapolis, Minnesota, where the young black man was detained by a group of police officers during a routine stop and excessive force was used that resulted in Mr. Floyd's death. This incident resulted in protests and riots throughout the United States demanding racial justice and police reform. The protest movement came to the City of San Rafael on September 1, 2023, after the news showing of the July 27, 2022, video footage.

Following the airing of the video footage the City of San Rafael was inundated with telephone complaints demanding the termination of the Appellant for his alleged use of excessive force with Mr. Lopez. The community concern regarding the incident expanded to marches and heated discussions at City Council meetings. The community demanded the termination of the Appellant and Chief Spiller based on misinformation. The Department and the Investigation had determined that the Appellant had not used excessive force against Mr. Lopez and that his actions were within Department policy. The Department and City capitulated to the misinformed demands of the community and instead of addressing the Appellant's alleged violation of policy regarding the use of profanity and his alleged discourteous conduct toward Mr. Lopez, moved to terminate his service. The decision to terminate the Appellant was political and was not for just cause.

In this administrative hearing, the burden of proof falls to the Department to establish that the Appellant's termination was for just cause. In most administrative hearings regarding the

termination of an employee, the burden of proof is by the preponderance of the evidence, but in some cases, there is a higher standard of clear and convincing evidence that must be used. Normally when an employee is terminated by their employer, they are free to apply for work with other companies that perform the same or similar services provided by the former employer. In a police termination, the termination is not a mere job termination by a career termination that limits the terminated officer from working with other law enforcement agencies. Because of the seriousness and effect of the termination of a police officer, there must be a higher level of proof than by the preponderance of the evidence.

Termination of a permanent public employee involves the deprivation of property interest and therefore the terminated employee must be given due process. The termination must be based on credible evidence and not based on suspensions, or assumptions or made for political purposes. To ensure that a permanent public employee's due process rights are protected the public employer must establish just cause to terminate the public employee.

A just cause analysis consists of a series of factors that must be considered before determining if the employee was terminated for just cause. Just cause requires that the employee being terminated is given notice of his/her pending termination and the basis for the termination. The policies, rules, regulations, and procedures that the employee allegedly violated must be rules or managerial orders for the orderly, efficient, and safe operation of the employer's business. Before a permanent public employee is terminated, the employer must conduct a fair and objective investigation of the charges against the employee and must consider mitigating circumstances and appropriate defenses to the filed charges. The employer must establish by substantial evidence that the employee being terminated was guilty of the filed charges. The employer must treat all employees fairly and not issue disparate discipline and the discipline is fair and reasonably related to the charges.

The Appellant contends that his guilt must be established to a reasonable certainty. There was no credible evidence presented by the Department to establish that the Appellant failed to de-escalate his encounter with Mr. Lopez. The Appellant was absolved of any wrongdoing regarding the use of excessive force during the July 27, 2022, incident by the Department's use of force analysis and the Investigator's finding that the Appellant had not used excessive force,

and his actions were within the Department guidelines. The community outrage was based on misinformation and the video played on a television news program was not sufficient proof that the Appellant violated Department or City policies, rules, regulations, or procedures that would establish just cause for his termination.

The Department cannot rely on inadmissible hearsay evidence to prove the truth of the charges. While hearsay evidence is admissible in administrative hearings, the hearsay evidence must be supported by admitted evidence. Hearsay evidence alone cannot establish the truth of the matter and does not satisfy the requirements of due process. The statements and comments from the community regarding the July 27, 2022, incident were based on the assumption of untrained individuals who did not know what constitutes the use of excessive force by a police officer and what techniques a police officer should use in de-escalation a situation in the field. The comments of the members of the community are hearsay and inadmissible on their own to establish the truth of the matter.

One of the elements of just cause is that the discipline must be fair and unbiased and that the discipline administered by the employer must relate to the seriousness of the employee's proven offense and must be reviewed with the employee's work record and service with the employer for purposes of possible mitigation. The Appellant contends that his discipline was unjustified and disproportionate to his alleged misconduct. Further, under the provisions of just cause, employers must consider progressive discipline when determining an appropriate level of discipline.

Progressive discipline is based on the concept of issuing discipline not to punish but to correct the employee's behavior or work performance. The most serious initial charge filed against the Appellant was that he had used excessive force when confronting Mr. Lopez on July 27, 2022, but that issue was determined to be unfounded by the Department investigation and by the third-party Investigator. The other charges that were part of the Notice of Intent to Terminate were alleged violations of Department and City policies, rules, regulations, and procedures for the use of profanity and inappropriate conduct toward a detainee.

The Department alleged that the Appellant violated Department and City policies, rules, regulations, and procedures by not using de-escalation techniques with Mr. Lopez instead of using profanity and attempting to bully and intimidate him. Yet, several witnesses testified that the Appellant had appropriately attempted to de-escalate the incident on July 27, 2022. The Department believed that the Appellant's use of profanity was not a de-escalation technique but was conduct that escalated the situation. Yet, trained police officers and experts in the field of the use of de-escalation techniques testified that the Appellant's use of profanity and his aggressive and commanding conduct was a credible de-escalation technique.

The Appellant was charged with using profanity while on duty or in uniform. Chief Spiller testified that he would not be surprised to learn that officers in the field use profanity as a technique to de-escalate a situation. Further, Chief Spiller testified that the Appellant would have been aware of Mr. Lopez's non-compliance with Officer Mazariegos's commands and that upon arrival at the scene used an authoritative voice and told Mr. Lopez to sit down by stating "Sit the fuck down" to gain control and de-escalate the situation.

Corporal O'Con, the supervising officer on duty on July 27, 2022, reviewed the body-worn camera footage and determined that the Appellant and Officer Mazariegos were attempting to de-escalate the situation. Corporal O'Con, testified that speaking sternly to a suspect and/or the use of profanity is sometimes an effective way to de-escalate a situation. After a thorough review of the body-worn camera footage, he believed that the Appellant's use of a stern voice and use of profanity was an effort to de-escalate the situation.

Mr. Sean McCann ("Mr. McCann") is a Professor of Criminology and has testified as an expert witness on numerous occasions. Mr. McCann was offered up by the Appellant as an expert witness on Police De-Escalation and Tactics, and without objection, he was allowed to testify as an expert witness. Mr. McCann testified that he is familiar with the POST Learning Domain 20, Use of Force/De-escalation training module, and had a working relationship with the training program. Mr. McCann testified that the use of profanity can be used as a de-escalation technique and the use of profanity as a de-escalation technique had been taught in the POST Learning Domain 20, Use of Force/De-escalation training.



In Mr. McCann's opinion that the Appellant's statement, "Sit the Fuck down" was an appropriate de-escalation technique because Mr. Lopez was told multiple times to sit down but had ignored Officer Mazariegos's direct and clear commands to sit down. The video shows that Mr. Lopez, after being directed to sit down and even after he produced his identification remained standing and was putting his can in his pocket, which was a safety concern for the officers. Since the Officers had not done a pat-down search, they were concerned about their safety by Mr. Lopez's non-compliance to the officer's commands.

Even if there is a finding that the Appellant violated some or all the Department and City policies, rules, regulations, and procedures, the penalty of termination is excessive, and the Department did not attempt to adhere to progressive discipline. The Department has not established a clear and convincing standard of proof that the Appellant is guilty of the charges that are the basis of his termination. Even if the Department could show by credible evidence that the Appellant failed to de-escalate the incident on July 27, 2022, the decision to move to termination for a first offense is not commensurate discipline.

The Department's decision to terminate the Appellant was not attempting to rehabilitate him but was an effort to punish him because of the community's unfounded claims of the use of excessive force and the political upheaval that surrounded this matter. Also, the Department did not attempt to consider the Appellant's work record and his lack of discipline as mitigating factors in determining the appropriate level of discipline.

The discipline issued to the Appellant is not supported by credible evidence and the Appellant was not disciplined for just cause. The Appellant requests that the Arbitrator sustain the Appellant's appeal, overturn the termination, return the Appellant to work, and make him whole. To be made whole, the Appellant must be returned to work in his former duties and must be paid all back wages with interest from the date of the Appellant's termination to the date of his reinstatement. Further, the Appellant is requesting attorney fees.

### **FINDING OF FACT & CONCLUSION OF LAW**

The Department must administer discipline to an employee by following certain prescribed policies, rules, regulations, and procedures. The Department must establish that it has a rational

and legal basis for the administering of discipline against an employee. In the furtherance of the goal of improving employee performance and taking appropriate disciplinary action, the Department is obligated to use “just cause” in the administration of discipline of an employee.

### **JUST CAUSE AWARD**

In the field of administrative hearings, the terms sufficient cause, cause, or just cause are synonymous. The term most often used in the field of labor relations is just cause.

“Just cause” consists of several substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Other elements include a requirement that an employee know or reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge; the existence of a reasonable relationship between an employee’s misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

### **Progressive Discipline**

Unless otherwise provided for in the Collective Bargaining Agreement or Administrative Policy or Procedure, discipline for all but the most serious offenses must be imposed at gradually increasing levels. This incremental dispensing of discipline is most often referred to as “Progressive Discipline.” The primary objective of discipline is to correct rather than punish. Thus, for most offenses, employers should use one or more warnings before suspensions, and suspensions before discharge. Yet, some offenses are sufficiently serious to justify serious discipline for a first offense. These include theft, physical attacks, willful and serious safety breaches, gross insubordination, and significant violations of law on the employer’s time or premises. Some Collective Bargaining Agreements and Administrative Policies or Procedures specifically list the offenses that are punishable by immediate discharge. If an Agreement is silent as to what constitutes a serious offense, the arbitrator must determine which are dischargeable offenses by using common sense, past practice, and company, industry, and societal standards.

The principle of progressive discipline benefits employers as well as employees. With positively increasing penalties, employees have an opportunity to conform their conduct and performance to the employer's reasonable expectations. In addition, rehabilitating the employee is less expensive and less disruptive than hiring a replacement.

## **DISCUSSION**

On the evening of May 25, 2020, white Minneapolis police officer Derek Chauvin killed George Floyd, ("Floyd") a Black man, by kneeling on his neck for almost 10 minutes. The death, recorded by bystanders, touched off what is possibly the largest protest movement in U.S. history and a nationwide reckoning on race and policing practices.

Floyd stopped to purchase cigarettes at a Minneapolis convenience store. After a clerk suspected Floyd had used a counterfeit \$20 bill in the transaction, the store manager called the police. When officers arrived, they pulled a gun on Floyd, who initially cooperated as he was arrested. However, Floyd resisted being placed in the police patrol vehicle, saying he was claustrophobic. Officers eventually pulled him from the patrol vehicle and Chauvin pinned him to the ground with his knee on his neck for nine minutes and 29 seconds. Floyd was unresponsive when an ambulance came, and he was pronounced dead at a local hospital.

After the incident video of Floyd's detention and death was posted on Facebook, protests began almost immediately in Minneapolis and quickly spread across the nation. Demonstrators chanting "Black Lives Matter" and "I Can't Breathe" took to the streets from coast to coast, and police departments around the country responded with riot-control tactics. More than 2,000 cities and towns in all 50 states saw some form of demonstration in the weeks after Floyd's death, as well as major cities across the globe. The protests and riots that followed Floyd's death reached the City of San Rafael in September of 2022, when the video of the incident of July 27, 2022, was aired on ABC local news. Even though the two incidents were substantially different and in the local incident, the Appellant was found not to have used excessive force and his actions were within Department policy, this did not stop members from inside and outside the community from demonstrating and demanding police reform.

Even though the July 27, 2022, incident was not a case of the use of excessive police force, the guidelines established in the US Supreme Court decision (“Court”), in *Graham v. Connor*, 490 U.S. 386 (1989), (“Graham”) are equally applicable to the case at bar. The Court stated that “The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” The objective test requires the court or agency to envision a reasonable officer and ask this question: “Based on the totality of the facts and circumstances, could such an officer believe that the force was reasonable?” This same analysis applies to an officer charged with being discourteous and disrespectful to a detainee.

The Department’s decision to terminate the Appellant must be based on just cause and cannot be based on political considerations. The community in its anger regarding the alleged abuse of force called for the termination of the Appellant and Chief Spiller. The telephone calls from community members and the general public throughout the United States and a few foreign countries were often vulgar, offensive, sexually explicit, angry, and threatening. The angry telephone calls began on September 2, 2022, and continued for weeks thereafter. In addition to the phone calls the community protested by attending City Council meetings demanding police reform and the Appellant’s termination.

“Just cause” consists of a number of substantive and procedural elements. One element requires that the charged employee knew or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discipline or discharge. There is no question that the Appellant as an experienced police officer and FTO, knew the Department and City policies, rules, regulations, and procedures. Further, the Appellant was aware that if these policies, rules, regulations, and procedures were violated he could face discipline up to and including termination.

One of the primary substantive elements of just cause is the existence of sufficient proof that the employee engaged in the conduct for which he or she was discharged or disciplined. Clear and convincing evidence must establish that the employee engaged in a particular type of behavior that violated a Department or City policies, rules, regulations, and procedures which was the basis for the Department to issue discipline. The Appellant was charged with using profanity

while on duty and conducting himself during the July 27, 2022, incident in an unprofessional and inappropriate manner.

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### **CONCLUSION**

The Department has trained officers who patrol the City and make decisions daily as to what citizens’ complaints require a warning, a report, an arrest, or some other action. These officers make decisions based on their training and experience. While officers need to be supervised, they do not need to be second-guessed. Officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. An officer’s perception of an event, at the time the event is occurring, may be different than what a casual observer may see and or perceive regarding the same event. Officers at the time they are investigating or making

an arrest are forced to perceive and react based on what they believe is occurring. The officer's perceptions must be measured by what the officer knew at the scene, not by the 20/20 vision of hindsight from a person reviewing the scene from a body-worn camera when the person reviewing the video was not involved or at the scene of the situation.

In this case, the Appellant was alleged to have violated Department and City policies, rules regulations, and procedures by using profanity toward Mr. Lopez when he told him to "Sit the Fuck down." The Department contends that the Appellant's conduct was inappropriate, and it warranted the discipline of termination for a first-time event. The Department believes that the Appellant's conduct escalated the situation and that he should have used de-escalation techniques to calm the situation. The Appellant contends that he was aware of Mr. Lopez's unwillingness to follow Officer Mazariegos's clear and concise demand for him to sit down. The Appellant, with his training and experience, determined that upon his arrival at the scene of the incident, he should in a stern and commanding voice tell Mr. Lopez to sit down. After arriving at the scene of the incident the Appellant to make his point and gain control of the situation, immediately told Mr. Lopez to "Sit the Fuck Down" in the hope that this would de-escalate the situation.

The Appellant had a good work record and during his tenure with the Department, had no discipline history. Before the July 27, 2022, incident, and for weeks following the incident the Appellant performed his assigned duties without issue. It was only after the September 1, 2022, airing of the body-worn cameral footage on ABC News and the community protest that followed the airing did the Department take issue with the Appellant's alleged inappropriate conduct toward Mr. Lopez. The Department's decision to investigate and discipline was based on the community's demand for action and the termination of the Appellant and Chief Spiller. This is a clear example of the Department judging the Appellant's actions not from the perspective of a reasonable officer on the scene but evaluating the Appellant's conduct with 20/20 vision of hindsight. The Department did not base the decision to terminate the Appellant on the totality of the facts and circumstances and did not consider whether the Appellant believed that his conduct at the scene of the incident was reasonable.

The duly elected members of the City Council and the heads of the City Departments were concerned with the community's reaction and looked for ways to answer the community's

concerns. The decision to terminate the Appellant was not based on just cause but was a way to bring closure to the July 27, 2022, incident and allow the City to return to normal.

The purpose of discipline is not to punish an employee but to allow an employee to conduct and perform to the employer's reasonable expectations. The Appellant had a good work performance history and did not have any discipline history. It appears that the Department did not have a concern with the Appellant's work performance until the situation that occurred on July 27, 2022. Even after the incident, the Appellant continued to perform his police duties without issue. The Department did not have an issue with the Appellant's conduct concerning the incident until the issue was made public when the body-worn camera footage was aired on ABC Evening News. After the footage was made public the general public became angry and began to protest the perceived inappropriate conduct of the Appellant and the Department and demand his and Chief Spiller's termination.

The Department is obliged to follow progressive discipline when disciplining a permanent public employee. To achieve the goal of correcting an employee's alleged misconduct, the discipline must be imposed at gradually increasing levels. For most offenses, the Department should use one or more warnings before suspensions, and suspensions before discharge. In this case, the Department did not attempt to correct the Appellant's alleged misconduct but used discipline to punish him based on the protest demands of the community for the Appellant to be terminated.

There was insufficient evidence to establish that the Appellant's use of profanity and his conduct during the July 27, 2022, situation was a violation of Department or City policies, rules, regulations, and procedures that established just cause for any form of punishment and certainly not termination for a first-time offense. The Appellant used profanity but there was no evidence that any other Department employee had received any form of discipline for using profanity while on duty or in uniform. Further, the Appellant was charged with conduct that escalated the situation and that he did not use technology to de-escalate the situation, but an expert witness testified that the conduct of the Appellant was a tactic that can be used to de-escalate a situation. The Appellant being at the scene of the incident used his training and experience to address the situation. The Department did not judge the Appellant's conduct from the perspective of a reasonable officer on the scene but in 20/20 hindsight. The Department's decision to terminate the

Appellant was made after the community protest and was made to appease the demand of the community protesters for termination of the Appellant.

The Department's decision to terminate the Appellant was not for just cause. Furthermore, even if the Appellant had used profanity or had been abusive to Mr. Lopez, this did not justify his termination for a first offense. The Department's decision to terminate the Appellant was excessive and unjust based on the totality of the circumstances.

The body-worn camera footage audio of the July 27, 2022, incident established that the Appellant did on more than one occasion use the word "Fuck." Department Policy 320.5.9 (g) prohibits a police officer from using obscene, indecent, profane or derogatory language while on duty or in uniform. While the rule regarding the use of profanity exists, there was no credible evidence present that any police officer in the Department had ever been disciplined or discharged for the use of profanity while on duty or while in uniform, Chief Spiller testified that he would not be surprised to hear that officers in the Department use profanity while on duty or when in uniform. Officer Oscar O'Con, a former Department employee who served as a supervising officer, testified that he knew that police officers within the Department used profanity while on duty and that he had used profanity while on duty and in uniform.

Sean McCann, a professor of criminology and a recognized expert witness regarding Police De-Escalation and Tactics, testified as an expert witness. Mr. McCann testified that he is familiar with the POST Learning Domain 20, Use of Force/De-escalation training module, and had a working relationship with the training program. Mr. McCann testified that the use of profanity can be used as a de-escalation technique and the use of profanity as a de-escalation technique had been taught in the POST Learning Domain 20, Use of Force/De-escalation training. Further, former Supervising Officer O'Con testified that the use of profanity was an effective tool to de-escalate a situation and communicate the seriousness of a situation to a suspect or detainee. Officer O'Con, the supervisor officer, had reviewed the body-worn camera footage and believed that the Appellant's use of a stern commanding voice and profanity with Mr. Lopez was an effort to de-escalate the situation.

Another element of just cause is that there must be a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be



administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided. The Department's conclusion that the Appellant's conduct on July 27, 2022, was inappropriate was insufficient proof to justify his immediate termination. There was credible evidence present that established that police officers within the Department regularly used profanity while on duty in violation of Department Policy 320.5.9 (g), but there was no credible evidence present that indicated that any police officers within the Department who had used profanity received any form of discipline or were terminated.

The Department presented evidence to establish that the Appellant had used profanity and was abusive to Mr. Lopez but little or no evidence was present as to Mr. Lopez's conduct during the July 27, 2022, situation. Mr. Lopez was stopped for drinking alcohol on a public street. During the stop, Officer Mazariago repeatedly told Mr. Lopez to sit down but he refused to follow the commands. Mr. Lopez appears in the body-worn camera footage to be somewhat disoriented and possibly confused. Mr. Lopez's conduct was non-compliant, and he was difficult to control.

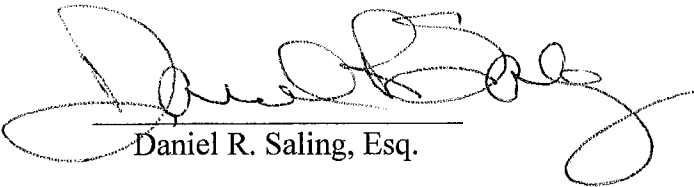
Mr. Lopez testified that during the July 27, 2022, situation he felt "happy." Further, he testified that he weighed approximately 145 pounds and that he had drunk 4-5 beers within approximately one hour just before the time he was detained by Officer Mazariago. Mr. Lopez was not tested for his level of intoxication at the scene of the situation, but scientific knowledge of alcohol consumption would establish that he was legally intoxicated and unable to drive a motor vehicle. Chief Spiller testified that detainees who are intoxicated are less compliant. Mr. Lopez was intoxicated and refused to follow the officer's instructions. When the Appellate attempted to de-escalate the situation by telling Mr. Lopez to "Sit the Fuck down," he was attempting to de-escalate the situation and get Mr. Lopez to comply with the officer's commands.

In applying the elements of just cause to the Appellant's case, it is clear from the evidence that the Appellant did not engage in conduct for which he was disciplined. The Appellant was charged with alleged misconduct, but these charges were not supported by the evidence. Based upon the testimony and the evidence presented during the hearing, I believe that the Appellant was not terminated for just cause.

## Award

For the reasons hereto stated, I, Daniel R. Saling, the duly appointed impartial Arbitrator in this matter, issue the following final and binding decision:

1. The Appellant's Appeal is sustained.
2. The Appellant was not disciplined for just cause.
3. The Appellant should be returned to his position as a police officer for the Department and be made whole by the payment of all wages, benefits, and employee contributions lost as a result of his termination.
4. The Appellant shall be paid interest of 8% for all monies received from the make whole remedy.
5. The Appellant's make whole remedy, and interest shall be reduced by the Appellant's earnings from the date of his termination to the date of his reinstatement.
6. The Appellant's request for attorney fees is denied



Daniel R. Saling, Esq.

December 16, 2024

Date