DANIEL F. JENNINGS

IMPARTIAL HEARING EXAMINER

In the Matter of Arbitration between	) AAA Case Number: 01-16-0000-1520
	)
	)
The City of San Juan San Juan, Texas	)
	) Police Officer Juan Pablo Galindo
	) Grievant
and	)
	)
Combined Law Enforcement Associations of Texas, CLEAT Austin, Texas	) Indefinite Suspension

OPINION AND AWARD OF THE HEARING EXAMINER

July 20, 2016

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ARBITRATION AWARD

In the Matter of Arbitration between

The City of San Juan, Texas

and

Police Officer Juan Pablo Galindo

FOR THE CITY:	Rebecca Hayward, Esq. Alan Ozuna, Esq. Denton, Navarro, Rocha, Bernal, Hyde And Zech, PC
FOR CLEAT	Robert P. Leonard, III, Esq Assistant General Counsel CLEAT
IMPARTIAL HEARING EXAMINER:	Dr. Daniel F. Jennings Department of Industrial Distribution MS# 3367 Texas A&M University College Station, Texas 77843-3367

By the terms of Chapter 143 of the Texas Local Government Code, the City of San Juan, Texas, hereinafter referred to as the "City," and the Combined Law Enforcement Associations of Texas, hereinafter referred to as "CLEAT," pursuant to Section 143.057 of the Texas Local Government Code, Dr. Daniel F. Jennings, Texas A&M University, College Station, Texas, was selected by the parties to serve as an impartial Hearing Examiner. A hearing was held at the City's Fire Station, No. 2 Conference Room, 2301 North Raul Longoria Road in San Juan, Texas on April 26, 2016. Full opportunity was afforded the parties for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments. Both Parties submitted written post-hearing briefs on June 13, 2016. These proceedings were declared closed on June 13, 2016.

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ISSUES

Issue #1: Whether Grievant Juan Pedro Galindo used excessive force when he struck an arrestee who was handcuffed.

Issue #2: Was there just cause to impose disciplinary action upon Grievant Juan Pedro Galindo?

Issue #3: Whether an indefinite suspension was the appropriate discipline or was such discipline excessive?

ARBITRABILITY

Both parties agreed at the beginning of the present arbitration hearing that the present case is properly before this Hearing Examiner.

CIVIL SERVICE RULES

All affairs of the City's Police Department shall be conducted in accordance with the provisions of the Fire Fighters' and Police Officers' Civil Service, Texas Local Government Code Chapter 143; Fire and Police Civil Service Commission Rules and Regulations, and Police Department Rules and Regulations.

FIRE AND POLICE CIVIL SERVICE COMMISSION RULES AND REGULATIONS

Rule 9: Cause for Removal or Suspension

01. The head of the Fire or Police Department may suspend or remove a fire fighter or police officer under the Department head's supervision or jurisdiction for the violation of any duly adopted or promulgated rules falling within one or more of the following subject matter areas authorized by Law:
    3. Acts of Incompetence
    6. Act showing lack of good moral character
    12. Violation of any applicable fire/police rule or special order

Rule 10: General Conduct

01. The following rules of General conduct shall apply to all firefighters and law enforcement officers:
    3. Not violate any provisions of the rules and regulations of the City;

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4. Be responsible for fulfilling the public's trust, which is to conduct themselves in a manner, on or off duty, which will not impair the public's confidence or trust in the operation of the Department or the public's confidence or trust in the integrity of the employees of the Department;
6. Not engage in any activity, whether on-duty or off-duty, which would be unbecoming, of a member of the Department;
   a. Conduct unbecoming a member of the Department includes any unethical or otherwise reprehensible acts that a reasonable law-abiding citizen of the community would find offensive and which diminish the personal integrity of the individual and the Department;
   b. Conduct unbecoming a member of the Department includes conduct that would reasonably have a tendency to lessen the confidence of he public in the management and/or operations of the Department generally;
   c. It also includes engaging in any personal conduct or act, which if brought to the attention of the public, could result, justified.

POLICE DEPARTMENT RULES AND REGULATIONS

Section 3: Personnel Administrative Police

3.14—Disciplinary Action

It is the policy of the Department to use disciplinary actions with the view to preserve and safeguard the integrity of the Department and to instill an attitude of voluntary compliance with the rules and regulations of the Department;

Section 4: Prohibited Conduct

4.01—Prohibited Conduct

The following are examples of conduct, which are determined to be serious offenses and may result in suspension or termination.

1. Violation of any Federal or State penal statute, ordinance of the City, or rule, regulation, or Procedures of the PD.
2. Incompetence in carrying out any assigned duty.
3. Immoral conduct defined as conduct on or off duty which brings discredit, humiliation, or embarrassment to the PD or its employees.
5. Conduct prejudicial to good order defined as conduct on or off duty which interferes with the orderly conduct of SJPD operations or which, although not "immoral" per se brings discredit to the Department or its employees.
6. Mistreatment, either verbal, or physical, of an arrestee, or private citizen,

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4.02—Code of Conduct
On the pages that follow is a code of conduct, which will serve as a mandatory guideline for members of the Department. Violations of any of the duties imposed by the code of conduct can result in disciplinary action commensurate with seriousness of the violation and consideration the factors set forth for the imposition of discipline.

4.04—Standards of Conduct
No officer shall falsely arrest, imprison, or cause any malicious prosecution to be instituted against any person. Officers shall use only such force as is necessary to affect an arrest. All officers shall protect the rights of any person held in custody and no officer shall verbally abuse or use unnecessary violence against any person…

Section 10: Internal Procedures

10.03—Violation of Rules
Officers/employees shall not commit acts or omit any acts, which constitute a violation of any of the rules, regulations, policies, directives or orders of the Department or the City of San Juan, whether stated in this document or elsewhere.

10.11—Improper Conduct
Improper conduct is defined as any of the below listed reasons and shall be grounds for discipline action. Just cause shall be determined to be satisfied when one or more of the below reasons have been adequately documented by incident or evaluation reports or other supporting data.
…
M. Physical or verbal abuse of a person in custody of the department.

10.36—Unbecoming Conduct
Officers/employees shall conduct themselves at all ties, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an officer shall include that which brings the Department into disrepute or reflects discredit upon the officer/employee as a member of the department, or that which impairs the operation or efficiency of the Department or officer/employee.

Section 13: Arrest/Search/Seizures

13.02—Necessary Force in Making Arrest
Officers when making a lawful arrest shall not use more force than necessary in making the arrest, or in dealing with a prisoner or any person, and shall not subject such a person to more restraint than is necessary, for his/her arrest and detention, and for the safety and protection of the arresting officer. (Note: once the subject has stopped resisting no further force should be applied).

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TEXAS LOCAL GOVERNMENT CODE—CHAPTER 143—MUNICIPAL CIVIL SERVICE FOR FIREFIGHTERS AND POLICE OFFICERS

Section 143.010—Commission Appeal Procedure

(a) Except as otherwise provided by this chapter, if a fire fighter or police officer wants to appeal to the commission from an action for which an appeal or review is provided by this chapter, the fire fighter or police officer need only to file an appeal with the commission within 10 days after the date the action occurred.

(b) The appeal must include the basis for the appeal and a request for a commission hearing. The appeal must also contain a statement denying the truth of the charge as made, a statement taking exception to the legal sufficiency of the charge, a statement alleging that the recommended action does not fit the offense or alleged offense, or a combination of these statements.

...

(e) The affected fire fighter or police officer may request the commission [or the Hearing Examiner] to subpoena any books, records, documents, papers, accounts, or witnesses that the fire fighter or police officer considers pertinent to the case. The fire fighter or police officer must make the request before the 10th day before the date the commission hearing will be held.

(f) The commission shall conduct the hearing fairly and impartially as prescribed by this chapter and shall render a just and fair decision. The commission may consider only the evidence submitted at the hearing.

...

Section 143: 051—Cause For Removal or Suspension

A commission rule prescribing cause for removal or suspension of a firefighter or police officer is not valid unless it involves one or more of the following grounds:

...

(3) acts of incompetency;

(4) neglect of duty;

...

(8) conduct prejudicial to good order;

...

(12) violation of an applicable fire or police department rule or special order.

Section 143.052—Disciplinary Suspensions

...

(b) The head of the fire or police department may suspend a fire fighter or police officer under the department head's supervision or jurisdiction for the violation of a civil service rule. The suspension may be for a reasonable period not to exceed 15 calendar days of for an indefinite period. An indefinite suspension is equivalent to dismissal from the department.

...

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(e) The written statement filed by the department head with the commission must point out each civil service rule alleged to have been violated by the suspended fire fighter or police officer and must describe the alleged acts of the person that the department head contends are in violation of the civil service rules. It is not sufficient for the department head merely to refer to the provisions of the rules alleged to have been violated.

Section 143.053—Appeal of Disciplinary Suspensions

...

(e) In its decision, the commission shall state whether the suspended fire fighter or police officer is:
(1) Permanently dismissed from the fire or police department;
(2) Temporarily suspended from the department; or
(3) Restored to the person's former position or status in the department's classified service,

(f) If the commission finds that the period of disciplinary suspension should be reduced, the commission may order a reduction in the period of suspension. If the suspended fire fighter or police officer is restored to the position or class of service from which the person was suspended, the fire fighter or police officer is entitled to:
(1) Full compensation for the actual time lost as a result of the suspension at the rate of pay provided for the position or class of service from which the person was suspended and
(2) Restoration of or credit for any other benefits lost as a result of the suspension, including sick leave, vacation leave, and service credit in a retirement system. Standard payroll deductions, if any, for retirement and other benefits restored shall be made from the compensation paid, and the municipality shall make its standard corresponding contributions, if any, to the retirement system or other applicable benefit systems.

(g) The commission may suspend or dismiss a fire fighter or police officer only for violation of civil service rules and only after a finding by the commission of the truth of specific charges against the fire fighter or police officer.

Section 143.057—Hearing Examiners

(a) In addition to the other notice requirements prescribed by this chapter, the written notice for a promotional bypass or the letter of disciplinary action, as applicable, issued to a fire fighter or police officer must state that in an appeal of an indefinite suspension, a suspension, a promotional bypass, or a recommended demotion, the appealing fire fighter or police officer may elect to appeal to an independent third party hearing examiner instead of to the commission. The letter must also state that if the fire fighter or police officer

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elects to appeal to a hearing examiner, the person waives all rights to appeal to a district court except as provided by Subsection (j).

...

(f) In each hearing conducted under this section, the hearing examiner has the same duties and powers as the commission, including the right to issue subpoenas.

...

(j) A district court may hear an appeal of a hearing examiner's award only on the grounds that the arbitration panel was without jurisdiction or exceeded its jurisdiction or that the order was procured by fraud, collusion, or other unlawful means. An appeal must be brought in the district court having jurisdiction in the municipality in which the fire or police department is located.

BACKGROUND

On December 31, 2015, Grievant Juan Pablo Galindo received a letter of indefinite suspension from Police Chief Juan Gonzales. At that time the Grievant had been employed by the City as a Police Officer for almost seven years and had never been disciplined for misconduct. The events leading to the Grievant's indefinite suspension are described by the City in the December 31, 2015 letter of indefinite suspension as follows

1. On December 14, 2015, at approximately 7:13 pm, Office Elias Lopez was dispatched to an apartment located at 208 Camino Road in reference to a runaway.

2 At that location, Officer Lopez made contact with a minor, Stacey Torres, and her boyfriend, Victor Manuel Aguirre.

3. After confirming through dispatch that Torres was the runaway, Officer Lopez proceeded to handcuff Torres and escort her out of the apartment.

4. Torres began actively resisting and while Officer Lopez was escorting her out of the apartment, Aguirre punched Officer Lopez in the back of the head and they engaged in a physical altercation.

5. At approximately 7:23 pm, Officer Lopez advised dispatch that he is requesting backup and uses code "10-18" which is urgent.

6. Officers Mario Hernandez, Jonathan Monroy, Salvador Hernandez and the Grievant responded. The Grievant, who was working overtime at the police

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station on a particular assignment,[1] heard the request for backup over the radio and also responded to the scene.

7. Officer J. Monroy's dash camera shows that Officer M. Hernandez arrived on the scene first with Officers J. Monroy and S. Hernandez arriving shortly thereafter. These Officers then proceeded to handcuff Aguirre and bring him to his feet.

8. Officer Monroy's dash camera and his body worn camera (BWC) show Officer Monroy and S. Hernandez proceeding to escort Aguirre to a patrol unit for transport.

9. The dash camera and body worn camera (BWC) of Officer Monroe show the Grievant arriving on the scene in his patrol unit and Officers S. Herandez and Monroy proceeding to escort Aguirre to the Grievant's patrol unit for transport.

10. Officer Monroy's BWC then shows the Grievant exiting his vehicle, and then exchanging words with Aguirre. The BWC then shows the Grievant giving a knee strike to Aguirre's groin area, and it further shows Aguirre doubling up in pain in response to the Grievant's knee strike.

11. Officer Monroy's BWC as well as the reports from Officer S. Hernandez and Monroy show that Aguirre was not actively resisting as he was being escorted to the Grievant's patrol unit. Furthermore, Aguirre was handcuffed and was detained by both Officers Monroy and S. Hernandez. Despite this, however, the Grievant proceeded to strike Aguirre in the groin area without any apparent reason.

12. Officer S. Hernandez also indicates that as he, Officer Monroy, and Aguirre were next to the Grievant's patrol unit, he (S. Hernandez) felt that it was safe to conduct a pat down. The video confirms that prior to the Grievant's knee strike to Aguirre's groin and while the Grievant and Aguirre are exchanging words, Officer Hernandez is attempting to conduct a pat down.

13. Officer Monroy further indicates that he observed the Grievant place his hand on Aguirre's left shoulder, thinking that the Grievant was going to assist in maneuvering Aguirre into your unit. Instead, the Grievant unexpectedly gave a knee strike to Aguirre's groin area, causing unnecessary pain to a prisoner in custody.

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[1] At the time of the present incident, The Grievant was assigned to the Stonegarden Grant Program. During his shift, the Grievant was assigned to stop vehicles he observed commit traffic violations and be on the lookout for human smuggling and narcotics. On December 14, 2015, at approximately 7:30 pm, the Grievant was working overtime processing an arrest when he heard Officer Elias Lopez's call for "urgent backup." The Grievant contacted the Dispatcher for specific information. During this time the Grievant heard over the radio what he believed to be Officer Lopez grasping for air. Fearing that Officer Lopez was in a struggle for his life, the Grievant drove "code" which means lights and siren to Officer Lopez's location.

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Chief Gonzalez further states in the December 15, 2015 letter of indefinite suspension, Officer Monroy's BWC and the Department's investigation, show that the Grievant's knee strike to Aguirre's groin area exceeded the standard use of force allowed by Department standards and that the Grievant's actions were not in compliance with the City's "Use of Force" rules. Chief Gonzalez further stated that he had read the Grievant's Garrity statement which explained the Grievant's actions. Chief Gonzalez also states: "while a trained control knee strike is utilized as part of the Pressure Point Control Tactics (PPCT) and may be used in appropriate circumstances, it does not appear to me, nor do I find, that the use of this control techniques technique was warranted in the situation that you encountered with Aguirre."[2] Following the conclusion of an internal affairs investigation, the matter moved to the present arbitration of April 26, 2016

POSITION OF THE CITY

Chief Gonzalez testified during the present arbitration hearing that he was made aware of the incident involving the Grievant and Aguirre in several ways. First, on December 14, 2015, at the end of Officer Monroy's shift, while Sergeant Garcia was assisting in downloading Officer Monroy's video, he (Garcia) observed the Grievant "kneeing" a suspect in the suspect's midsection. Sergeant Garcia noted that the suspect was handcuffed, was not being combative or resisting and was standing straight up and cooperating with police officers."[3] Sergeant Garcia further noted that the preceding events "needed to be reported

[2] City Exhibit "A", p. 2
[3] Arbitration Hearing Transcript, p. 122, lines 1-9

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to the Chief" and he did so.[4] Also on the night of December 14, 2015, the Grievant advised the Chief that a serous incident had taken place that night and described the events that had so occurred. Chief Gonzalez watched the video the next morning.[5] Chief Gonzalez then advised the Grievant that charges would be filed against the Grievant. On December 15, 2015, an internal affairs (IA) investigation was opened.[6]

Several days after the beginning of the present IA investigation but before a level of discipline had been imposed on the Grievant, Officer Monroy's BWC depicting the Grievant kneeing the handcuffed Aguirre, was released to the media without the Chief's authorization. Such a release caused the generation of negative comments.[7]

The City discusses three elements in its argument that the present appeal should be denied. Following is a discussion of these elements on a point-by-point basis.

(a) The truth of the Charges:

During the present arbitration hearing, the Grievant testified and admitted that he struck Victor Manuel Aguirre, but did not offer any witnesses to support his characterization of the events that occurred on the night of December 14, 2015. The City maintains that the events depicted in Officer Monroy's dash cam video and his BWC clearly established the description of the present incident as outlined in the December 15, 2015 letter of indefinite suspension. On the night of

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[4] Ibid
[5] City Exhibit FI, pp. 32-33
[6] Arbitration Hearing Transcript, p. 23, lines 13-20; City Exhibit 2B
[7] Arbitration Hearing Transcript, p. 43, lines 23-25 ; p. 44, lines 1-12

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December 14, 2015, Officer Monroy's dash cam video depicted that officers have picked up Aguirre from the ground and handcuffed him.[8] Next, the officers are seen on the video escorting Aguirre to a police unit for transport. Officer S. Hernandez is attempting to conduct to a pat down on Aguirre before placing him in the police unit. The video shows that Aguirre was handcuffed and was being escorted by two officers.[9] The Chief testified during the present arbitration hearing, "at this point, I don't see him (Aguirre) resisting at all."[10] The Chief also explained that the officers had discovered that Officer M. Hernandez's unit did not have a cage and the weapon carried in the patrol unit was exposed.[11] The video next shows the Grievant arriving at the scene in his patrol unit. Officers Monroy and S. Hernandez then walk Aguirre to the Grievant's patrol unit that is parked on the street. [12] Chief Gonzalez testified that while Aguirre was being escorted to the Grievant's patrol unit, Aguirre was not resisting, pulling away, kicking, or shouting at anybody. [13] The video then shows the Grievant and Aguirre at the Grievant's patrol unit talking with each other.[14] The Chief again testified that it does not appear that Aguirre was antagonizing the Grievant in any way. [15] Seconds later, the BWC showed the Grievant placing his right arm over the Grievant's left shoulder and without warning, striking Aguirre in the groin, upper thigh area with his knee.[16] The Chief testified that the BWC and the video

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[8] Ibid, p. 30, lines 18-25
[9] Ibid, p. 32, lines 1-5
[10] Ibid, p. 26, lines 13-25; p, 27, lines 1-4
[11] Ibid, p.27, lines 7-19
[12] Ibid, p 31, lines 5-11
[13] Ibid
[14] Ibid
[15] Ibid, p. 31, lines 15 -25
[16] City Exhibit 1D, Officer Monroy's BWC

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established that Aguirre was not being aggressive, not resisting, was in handcuffs with his hands behind his back, was not making gestures and was not doing anything that would warrant the type of knee strike delivered by the Grievant.[17] Also, prior to the Grievant striking Aguirre, the video showed Officer S. Hernandez attempting to pat down Aguirre. The Chief testified that a pat down would not be performed on a suspect that is actively resisting. [18]

Officer S. Hernandez's stated in his IA *Garrity* statement: "the male (Aguirre) was passively resisting by tensing his body, but his actions did not require the use of greater force. I felt it was safe to conduct a pat search and started doing the search when suddenly the male yelled and his body went down." [19] Also, Officer Monroy stated in his IA *Garrity* statement, that the Grievant's knee strike to Aguirre was unexpected. Officer Monroy continued;" I observed the Grievant place his right hand on the male's (Aguirre) shoulder and I thought he was going to put the male in the patrol unit. Unexpectedly, the Grievant gave a knee strike to the male's upper inner thigh. After the strike I heard the male subject scream and lower his upper body." [20]

Later the BWC and the video showed Officer Monroy assisting in the arrest of the runaway, Stacey Torres. The BWC showed Torres head-butting and biting Officer Monroy after she had earlier bitten Officer Lopez and that Torres was actively resisting the officers. However, Torres was not struck by any of the officers nor was any pain compliance force used against her by the officers who

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[17] Arbitration Hearing Transcript, p. 32, lines 9-14
[18] Ibid, p. 33, lines 1-13
[19] City Exhibit 1F, p. 41, lines 9-26
[20] Ibid, p. 44, lines 19-23

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were at the scene. Chief Gonzalez testified that Torres's behavior was worse than Aguirre's because she actively continued to resist and to get away from the officers. However, she was not struck [21]

In summary, the City contends that the preceding evidence supports and confirms the reasons listed by the City in its decision to indefinitely suspend the Grievant.

(b) Grievant Galindo's Testimony:

At the time of his indefinite suspension, the Grievant was a "Use of Force" Trainer for the City's Police Department For informational purposes, the City uses a training program which has the name "PPCT" which is used by many police departments. [22] During the present arbitration hearing, the Grievant did not deny striking a handcuffed and detained individual in violation of the City's Police Department's Rules and Regulations, but stated that the imposed discipline of an indefinite suspension was excessive. The Grievant argued that the unauthorized video release which showed the Grievant striking Aguirre forced the Chief into making the indefinite suspension decision.

(c) Chief Gonzalez's Disciplinary Decision:

The City explains that because the events of this matter are not in dispute, the remaining issue is whether the imposed discipline of an indefinite suspension was reasonable and appropriate. During the present arbitration hearing, Chief Gonzalez did not deny that the negative press release had impacted him. The

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[21] Arbitration Hearing Transcript, p. 37, lines 13-15

[22] "PPCT" is an acronym for "Pressure Point Control Tactics" which is a training course that focuses on two primary areas: controlling low-level resistance with finger tip pressure to nerve pressure points and controlling high-level resistance with defensive counter-strikes and the baton, which produces motor dysfunctions and controlled stuns.

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Chief further testified that had the video not been released, he would have reached to the same decision in terms of the level of discipline.[23] Following are the Chief's testimony regarding his decision:

> The final outcome of my decision would not have been changed. Taking everything into consideration, the entirety of the circumstance, the officers' statements, Officer Galindo's own statement, the lack of taking any type of responsibility in that incident, the overall training that he has, his training and experience, obviously as an instructor, as an officer, obviously as someone who has had many incidents that he has responded to, and many arrests as well. It wouldn't have changed the outcome.

The Chief testified during the present arbitration hearing that he took into consideration the fact that the Grievant did not accept any responsibility for his actions and has never acknowledged any misconduct on his part. [24] In fact, the Grievant affirmatively stated that he did not commit any misconduct and that Aguirre was "physically fine" after the Grievant's knee strike.[25]

The Grievant has argued that the imposed discipline of an indefinite suspension is too severe when compared with other officers who have been charged with the "use of force" violations. The Grievant has used two examples: Officer Sanchez who was disciplined for excessive tazing a subject and Officer Chapa who struck an individual with his handgun.[26] However, the Chief explained that he takes every case as different and applies the appropriate and correct measure to be taken based on the entire circumstances and the incident itself. [27]

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[23] Arbitration Hearing Transcript , p. 43, lines 15-24
[24] Ibid, p. 109, lines 23-25; p. 110 lines 1-17
[25] Ibid, p. 101, lines 20-25, p. 102, lines 1-25
[26] See Union Exhibit #3 and #4.
[27] Arbitration Hearing Transcript, p. 68, lines 6-13.

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With respect to Officer Sanchez, he was not a seasoned officer and he was not a trainer as was the Grievant. Further, the facts of the scenario involving Officer Sanchez were far different than the present case. As the Chief explained, the female subject in "Sanchez" was actively resisting arrest, actively resisting transport, and the Chief considered this when he imposed a 15-day suspension.[28]

"Chapa," occurred at a time when the Chief implemented a "Discovery Review Board" which was composed of department supervisors. The Chief stated that for training purposes, he wanted his sergeants and supervisors to be inclusive in the disciplinary actions and recommendations. The Chief explained the review board decided to impose a 2-day suspension based on the facts of the situation involving Chapa. The facts indicated it was a vehicle pursuit, the individual at issue was a convicted felon who had placed the public in danger by traveling at high rates of speed down the expressway, was not handcuffed, was still inside the vehicle and the officers were trying to extract him from the vehicle.[29] While the Chief admits that his decision was final, he went with the review board's decision based on the facts of the case, and as stated above, to include them in the disciplinary process. Had he not had the review board in place, the Chief would have preferred to have imposed a higher level of discipline. Additionally, Officer Chapa is no longer with the City's Police Department.[30] Further, after this instance, Chief Gonzalez disbanded the review board. The supervisors were not looking at all the angles, were involved in

[28] Ibid, p. 82, lines 7-15
[29] Ibid, p. 84, lines 1-10
[30] Ibid, p. 83, lines 11-14

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discipline themselves and the Chief believed the review board was no longer effective.[31]

The City contends that the Grievant clearly believed and stated he was singled out by the Chief who has imposed lighter discipline on other officers (Sanchez and Chapa) for what the Grievant has considered to be similar conduct. However, the Grievant then argued the Chief imposed an indefinite suspension because the Chief did not want to look as if he was showing favoritism toward the Grievant. [32] The City maintains that other than the Grievant's contradicting arguments; there is no evidence to support his allegations that he was either singled out or treated unfairly. Further, the Chief denies such allegations.

The Chief testified that he thoroughly thought about the level of discipline imposed in the present matter. In deciding on the Grievant's level of discipline, the Chief explained that he explored options other than an indefinite suspension. He took into consideration the fact that the Grievant was a seasoned officer, was an investigator and was responsible for many different things.[33] The Grievant testified he holds several instructor certifications: "such as the PPCT, OCE, chemical monition, PIT maneuver, [and] ASP." [34] At the same time, however, the Chief further explained that the Grievant's training is above many of the officers in the Department and "his actions were not consistent with what I believe that he

[31] Ibid, p. 83, lines 5-23; p. 89, lines 9-15
[32] Ibid,, p. 137, lines 1-18
[33] Ibid, p. 46, lines 1-8
[34] Ibid, p. 91, lines 18-25

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should have done based on his training and experience." [35] The Chief chose not to go with a suspension of days and additional training because the Chief did not "believe that there was any other additional training that he could provide to the Grievant based on the fact the Grievant was already a PPCT instructor and utilized this technique . . . I did not see this officer being more efficient or effective to this department."[36] The City maintains that no additional training exists from which the Grievant can learn from his behavior. As the Chief stressed throughout the hearing, PPCT is a legitimate method to ensure subjects comply with the commands of the officer, but the use of this force must be immediately necessary, and in this case, it was not immediately necessary.[37] The Chief further stated that he understands the stress of these types of calls as the call from December 14, 2015 was a distress call from a fellow officer. However the Grievant has testified that he was calm and collected throughout the entire call. As a result, the Grievant's training should have taught him that no knee strike was needed in this instance.[38] The Grievant, however, stated the knee strike was warranted because there was another fight going on with the female.[39] The Chief however stated that because Aguirre was already controlled by two Officers, the Grievant could have gone directly to the situation involving the female, thereby allowing the two officers to place Aguirre in the patrol unit.[40]

The City contends that the reasonableness of a particular use of force is typically judged from the perspective of a reasonable officer on the scene, rather

[35] Ibid, p. 46, lines 1-8; lines 18-25
[36] Ibid, p. 36, lines 1-7
[37] Ibid, p. 74, lines 19-21
[38] Ibid, p. 46, lines 1-7; p. 30, lines 11-14
[39] Ibid, p. 98, lines 12-17
[40] Ibid, p. 36, lines 13-25; p. 37, lines 1-5

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than with 20/20 vision of hindsight. The BWC and dash cam video showed that none of the other officers on the scene felt it was necessary for the Grievant to knee strike Aguirre. Additionally, none of the other officers on the scene used pain compliance use of force against the female who had already bit one officer on the arm and head-butted another.[41] The Chief recognized that the Grievant's knee strike was excessive, inappropriate and unnecessary after watching the BWC. Also, a review of the statements of the other officers on the scene who felt that no additional force was necessary further establishes that an inappropriate use of force had been used by the Grievant.[42]

In his decision to terminate the Grievant (or any other officer) the Chief considers termination a hard thing to do and acknowledges the impact a termination can have on an officer's livelihood.[43]. This viewpoint further confirms that the Chief's decision to indefinitely suspend the Grievant was not done arbitrarily. The Chief explained his reason for indefinite suspension further:[44]

> Everything was taken into consideration as to all the officers that were present. It was a distress call. It was an officer who needs assistance call, but officers are bound to – they're bound to the policies and procedures of the department in a situation like that. I take into consideration their training, their experience, their asset as to what they've done in this department and what they continue to do. It's always not something that I take pleasure in terminating officers, but I do consider the fact that in this case, an indefinite suspension was something that – it was necessary.

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[41] Ibid, p.29, lines 21-25; p. 30, lines 1-23; p. 37, lines 13-15; City Exhibit ID, 2:05-2:36; City Exhibit 1E, 4:53
[42] Ibid, p. 29, lines 21-35; p. 30, lines 1-23; p. 37, lines, lines,13-5; City Exhibit 1F, p. 41 & p. 44
[43] Ibid, p. 140, lines 1-12
[44] Ibid, p. 51, lines 8-19

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As the Chief explained, emotions run high in these types of calls and officers are going to make mistakes, but for an officer with he Grievant's level of training and expertise, it is simply unacceptable to strike a non-resisting, handcuffed individual. What the Grievant is charged with in this case is failing to hold to minimum standards set by the City's Police Department in regards to use of force. These standards are expected for all police officers and especially for the seasoned veteran such as the Grievant.[45]

The City maintains that in light of the totality of the circumstances, the Chief has shown that an indefinite suspension is merited in this case and is the appropriate level of disciple. [46] As such, given the overwhelming evidentiary support for the present charges, together with Chief Gonzalez's well-reasoned approach to the disciplinary decision, this record amply supports the reasonableness of the Grievant's indefinite suspension. Thus, under the generally accepted standard of review of civil service disciplinary cases, if the Hearing Examiner cannot in good conscious find the Chief's decision to be unreasonable, arbitrary, or capricious, then the decision should stand.

The City contends that there being nothing unreasonable, arbitrary, or capricious about the Chief Gonzalez's decision the City requests that this Hearing Examiner find that Chief Gonzalez's decision is factual, legally correct, fair and a reasonable application of his disciplinary authority.

In conclusion, for the foregoing reasons, the City requests that this Hearing Examiner provides the following relief:

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[45] Ibid
[46] Ibid, p. 61 lines 8-17

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1. That the material factual matters contained in Chief Gonzalez's charging instrument and the rule violations specified therein are true and correct; and,

2. That the disciplinary suspension as to each of the charges specified therein are fair and reasonable; and,

3. That the Grievant's appeal is denied and the disciplinary suspension is sustained.

CLEAT'S POSITION

CLEAT discusses eleven elements in its argument that the present appeal should be sustained. Following is a discussion of these elements on a point-by-point basis

(a) Have all the Charges against the Grievant been factually proven?

In the December 15, 2015 letter of indefinite suspension issued to Grievant Juan Pablo Galindo by Police Chief Juan Gonzalez, the City lays out numerous specific policy violations the Chief maintains supported his decision to indefinitely suspend (terminate) the Grievant. The letter of indefinite suspension issued to the Grievant contends that all of the allegations against the Grievant have been sustained.

Looking at the numerous charges leveled against the Grievant, it is easy to see that the City believed that it needed to stack as many charges as possible in order to ensure that something stuck. While the vast majority of these allegations are not supported in fact, the Grievant has accepted full responsibility for his actions. The Grievant acknowledges that he utilized a compliance strike on Aguirre both in his initial reports of this matter and in all the subsequent statements he has provided. The Grievant understands and accepts that

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discipline may be warranted but he believes that the discipline should be fair, reasonable and commensurate with the nature of the violation and in keeping with the past practice of the City's Police Department.

However when one looks closely at the facts and evidence gathered during the internal affairs investigation nothing presented by the City in its case supports the sustaining of the charges or the Chief's decision in this case.

Conduct and Violations

The City has alleged that the Grievant engaged in Conduct Unbecoming an Officer, Violating State and/or Federal Laws, Engaging in Immoral Conduct and Mistreating an Arrestee, when on the night of December 14, 2015 when he responded to an urgent distress call from an officer who was in need of immediate assistance. One of the first issues the Chief pointed out in his December 31, 2015 Letter of Indefinite Suspension was that the Grievant's account of the event did not match up with the video recording of the event nor the reports submitted to Internal Affairs during their investigation. Chief Gonzalez testified that he did not observe Aguirre resisting or failing to comply with the officers. But the statements provided by the officers who were escorting Aguirre to the Grievant's patrol unit provide support for the Grievant's recollection of the events that night. The Grievant wrote in his incident report that he observed Officers Salvador Hernandez and Officer Jonathon Monroy walking towards the patrol units with a male subject, later identified as Victor Manuel Aguirre, who was still actively resisting.[47] When the Grievant was asked on cross examination during the present arbitration hearing what he meant by that, the Grievant

[47] City Exhibit #1F

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testified that as he arrived on scene he observed Officers S. Hernandez and Monroy escorting a male subject towards his patrol unit. The Grievant stated that he observed the Officers with their arms interlocked with those of the male subject. The Grievant further testified that he believed the male must have been resisting to some degree as the normal way of escorting a subject who is being completely cooperative and compliant is to hold on to the subjects elbow or back of their arm.[48] Officers S. Hernandez and Monroy had to hold onto the male much more securely leading the Grievant to believe the male was not walking of his own free will and thereby resisting.[49] This was corroborated by both Officer Salvador Hernandez and Jonathon Monroy. In his initial report Officer Hernandez stated that he helped escort Mr. Aguirre to Investigator Galindo's vehicle and as he was standing there he heard Mr. Aguirre begin to argue with Investigator Galindo and that he had to hold him back due to Mr. Aguirre still tensing up while being pushed towards the vehicle. In his IA statement Officer S. Hernandez states that he recalls that while Aguirre was walking towards the Grievant's patrol unit, Aguirre was passively resisting by tensing his body.[50] While Officer S. Hernandez wrote that he did not feel Aguirre's actions required a greater use of force, such a statement appears to imply that a greater use of force was not required to escort Aguirre. Remember, the Grievant's decision to utilize the PPCT compliance strike on Aguirre occurred from the decision that it was necessary to get Aguirre into the patrol unit as quickly as possible after Aguirre began arguing with the Grievant. Officer Monroy's initial report and IA statement

[48] Arbitration Hearing Transcript, p. 117, lines 23-25; p. 118, lines 1-4
[49] City Exhibit #F, p. 50, lines 16-7
[50] Ibid, p. 41, lines 19-29

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also corroborate the Grievant's assertion that Aguirre was not being 100% cooperative. Officer Monroy wrote in his initial report, "at the time the officer was escorting the male subject, the male subject began getting into a verbal confrontation with [the Grievant]..." [51] In his report to IA Investigators Officer Monroy wrote; "Officer S. Hernandez then started to escort the male further west and I assisted. While escorting the male, the male was yelling and making his body tense but we still managed to escort him.[52]

Clearly the Grievant's belief that Aguirre was not being fully cooperative was true and correct. However, the Chief has insisted that Aguirre was fully cooperative despite what his officers have included in their reports and statements. In his December 31, 2015 indefinite suspension letter, Chief Gonzalez talks about the "compliance strike" issued by the Grievant as a mistreatment of an arrestee. The Chief testified during the present arbitration hearing that "pressure point control tactics are for extreme circumstances in situations in which the suspect is not under control. [53] However, the Grievant testified during the present arbitration hearing, that he issued the "compliance strike" in accordance to what he believed was his training through the PPCT course put on by the City's Police Department. In that course, officers are instructed to use various forms of pain compliance to obtain and then maintain control over a subject. The course teaches officers things to watch out for as indicators of possible physical resistance. One of the first things the course teaches is a Resistance/Control Continuum consisting of Levels of Resistance

[51] City Exhibit I, p. 28
[52] City Exhibit F, p 44, lines 5-16.
[53] Arbitration Hearing Transcript, p. 35, lines 13-16

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that describes threatening, resistive, or assaultive behavior on behalf of a subject and teaches officers to think of the Resistance/Control Continuum as being reactionary. Following is a discussion of these Levels of Resistance.[54]

> *Psychological Intimidation*: Nonverbal clues indicating a Subject's attitude, appearance, and physical readiness. (Blank stare, clenching of the fist(s), tightening of jaw muscles, etc.) The subject may comply with verbal attempts at control, but displays visual nonverbal cues indicating potential physical violence.

In their respective reports both Officers Hernandez and Monroy both state that Aguirre was tensing up his body and not cooperating 100% during their escort of him. Aguirre also failed to immediately get into the Grievant's vehicle and instead turned to confront the Grievant. These actions could be construed as possible signs that Aguirre was potentially going to start to physically resist. Such a fear was expressed by the Grievant in his testimony during the present arbitration hearing.[55]

> *Verbal Noncompliance*: Verbal noncompliance is any verbal response indicating subject unwillingness to obey verbal commands of detainment, arrest, or to stop unlawful or dangerous behavior. Verbal Noncompliance may come in the form of a quiet statement such as, "No I will not put my hands behind my back", to threatening verbal statements directed at the operator. From an operator safety perspective, any statement of verbal non compliance should be taken seriously. However, when the intensity of a subject's voice tone increases with a threatening message, and when it is combined with threatening body language and decreasing the distance to the operator, operators should raise their level of awareness and be prepared to respond to sudden attacks by the subject.[56]

The Grievant testified during the present arbitration that he felt that Aguirre was challenging him. During cross-examination, the Grievant testified that in the

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[54] Union Exhibit #2, pp. 2-5
[55] Arbitration Hearing Transcript p. 98, lines 12-19
[56] Union Exhibit #2, pp.2-5

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Mexican Culture, the words used by Aguirre could be used as a verbal challenge when directed at someone. The Grievant felt that the language used by Aguirre was an overt act of aggression.[57]

> *Passive Resistance:* Passive Resistance is any type of resistance where the subject does not attempt to defeat the operator's attempt to touch or control him/her, but he/she will not voluntarily comply with verbal and physical attempts of control. (e.g., dead weight does not react to verbal commands, etc.)....
>
> At some point it may become necessary to use force (e.g. soft empty hand techniques, i.e., pressure points, joint locks, etc.) to resolve the situation. The selection of a reasonable control method or compliance technique is crucial. The objective is to resolve the situation using a control technique that will be effective and has the least potential for injury to operators and subjects. Operators are not required to choose the least intrusive control method, only a reasonable one. [58]

Throughout his testimony during the present arbitration, the Grievant stated that he was concerned for the safety of Officer Elias Lopez and that he could still hear a commotion behind him as he dealt with Aguirre. The Grievant stated that almost immediately after exiting his patrol unit he encountered Aguirre who began to approach him and began yelling at him. The Grievant reiterated that it was his belief he needed to get Aguirre into his vehicle as quickly as possible so that he could turn his attention to what was happening behind him.[59] The Grievant made the decision to utilize what can be described in the PCPT Training Manual as a *Stunning Technique* which is defined as: [60]

> The stimulation of overwhelming sensory input that is sudden, intense, and unexpected...a stun will last an average of 3-7 seconds and will allow an operator sufficient time for follow-up control.

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[57] Arbitration Hearing Transcript, p. 124, lines 23-25; p. 125, lines 1-25; p. 126, lines 1-7
[58] Union Exhibit #2, pp. 2-5
[59] Arbitration Hearing Transcript, p. 126, lines 10-17
[60] Union Exhibit #2, pp.2-5

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Because of the immediacy of the situation, the Grievant chose to deliver a "Compliance Strike" to the Aguirre's femoral nerve cluster location in the inner thigh. [61] The Grievant knew from his PPCT training that striking the femoral nerve cluster in the subject's inner thigh results in Motor Dysfunction and Mental Stunning. Additional expected effects of striking the femora nervel are high intensity pain, Flex-Reflex of the affected leg and Sympathetic Reflex Response of the unaffected leg.[62] This strike did exactly what Grievant hoped it would do. It resulted in an immediate, but temporary, infliction of intense pain causing Aguirre to become 100% compliant and allowed officers to place him into the Grievant's patrol unit without further delay.[63] After Aguirre is placed in the Grievant's patrol unit, you can see officers running to assist Officer Lopez who is now engaged in an active struggle with another subject in the yard of the location. [64] Had officers been forced to engage in a physical struggle with Aguirre, they would not have been available to assist Officer Lopez as they did.

Chief Gonzalez admitted on cross examination that officers on scene assessing the situation sometimes see things differently.[65] Even if the Chief believed tha Aguirre was being totally cooperative, those who have participated in the PPCT course know that even Totally Cooperative Subjects can in an instant become uncooperative and resist at any moment. However, in this case, Aguirre was showing signs that he was not a totally cooperating suspect through acts of passive resistance and by confronting the Grievant, the Grievant believed

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[61] Arbitration Hearing Transcript, p. 97, lines 14 -20.
[62] Union Exhibit #2, pp. 4-6
[63] City Exhibit # J-1D
[64] City Exhibit #J-1E
[65] Arbitration Hearing Transcript, p. 60, lines 17-21

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the issuance of the "Compliance Strike" was necessary to get Aguirre into the patrol unit given Aguirre's demeanor. Thus, the "Compliance Strike"was based on the training the Grievant had received.

In the December 31, 2015 letter of indefinite suspension, the Chief cites violations of State and Federal Laws as part of his decision making process. But as the Chief testified on direct examination, this matter was reviewed by several Law Enforcement agencies and NO [emphasis added] criminal violations were found that resulted in any criminal charges being filed against the Grievant. [66] The Chief also cites in the indefinite suspension letter that the Grievant mistreated Aguirre who was an arrestee. It is important to note that Aguirre has never filed a complaint against the Grievant. While the Department does not require Aguirre to complain in order for it to investigate this matter, it seems reasonable to believe that had Aguirre been mistreated as an arrestee he certainly would have voiced an objection.

As described above, the Grievant utilized a pain compliance strike on Aguirre. That move, which was taught to the Grievant through the PPCT Training he received from the City's Police Department, is designed to gain quick immediate compliance over a subject. The Grievant testified during the present arbitration hearing that he did not have any personal history with Aguirre nor were his intentions to harm or injure Aguirre. The Grievant's approach was to get Aguirre in the patrol unit as quickly as possible so that the Grievant could assist Officer Lopez. Aguirre did not suffer any injuries as a result of the "Compliance Strike" being issued. Aguirre can be seen on the video tape footage of the

[66] Ibid, p. 85, lines 20-25; p. 86, lines 1-5

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booking area at the City's Police Department.[67]Aguirre is seen walking around without any ill effects of the compliance strike and can be seen talking to the Grievant and Officer S. Hernandez.

The Chief seems to take great umbrage at the fact that Aguirre was handcuffed and therefore not a threat to anyone. But on cross examination, Chief Gonzalez admitted that force may be used on a handcuffed prisoner depending on the circumstances.[68] In fact the Chief testified that other Officers in the City's Police Department had used force against handcuffed prisoners.[69] Chief Gonzalez also testified that he took into consideration that Officer S Hernandez believed the situation to be safe enough to conduct a pat down search of Aguirre.[70] But on cross examination Chief Gonzalez admitted that an Officer would conduct a search of a suspect for officer safety reasons, looking for weapons or other contraband even if the subject was actively resisting.[71]

Finally Chief Gonzalez on direct claimed that the Grievant has failed to accept responsibility for his actions on the night of December 14, 2015.[72] But on cross examination the Chief admitted the Grievant did nothing to try and hide or cover up his actions of that night and he did accept responsibility.[73] As the Chief testified, the Grievant self-reported the matter to the Chief the night of the incident. The Grievant also included the fact that he had issued the compliance

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[67] City Exhibit #J, F1 Video
[68] Arbitration Hearing Transcript, p. 63, lines 18-21
[69] Ibid, p. 63, lines 22-26; p. 64, lines 1-6
[70] Ibid, p. 40, lines 10-15
[71] Ibid, p.69, lines 4-16
[72] Ibid, p. 44, lines 18-19
[73] Ibid, p. 71, lines 15-17

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strike to Aguirre in all his reports.[74] The Grievant testified that he accepts that he may have made a mistake in judgment using the compliance strike he chose but he steadfastly denies that he committed misconduct or acted maliciously towards Aguirre by trying to hurt him.

(*b*) *Was the punishment imposed by the City's Police Department disproportionately severe under all the circumstances?*

YES [emphasis added]. CLEAT argues that the punishment was severe when all facts are properly analyzed and then correctly applied to the day in question. The alleged harm to the City's Police Department was greatly exaggerated. In regards to the numerous allegations against the Grievant, the City failed to prove by a preponderance of the evidence that the Grievant actually engaged in the misconduct cited in the December 15, 2015 letter of indefinite suspension. The City failed to produce any credible evidence to sustain the allegation/accusation that the Grievant acted improperly when he delivered a compliance strike to Victor Manuel Aguirre on December 14, 2015. The Grievant was responding to an officer in distress call. He testified at the arbitration that as he drove to the scene with his lights and sirens on he was experiencing anxiety and an adrenaline surge over the safety of Officer Elias Lopez. Almost immediately upon his arrival the Grievant is approached by two officers, S. Hernandez and J. Monroy, who were escorting a male towards the Grievant's patrol unit. No sooner did the Grievant exit his vehicle, he was confronted by Aguirre. Instead of going and assisting Officer Lopez, the Grievant had to turn his attention to Aguirre. The Grievant testified that he did not know the status or

[74] Ibid, p. 53, lines 12-25; p. 54 lines 1-8

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location of Officer Lopez. Fearing for Officer Lopez' safety the Grievant felt that it was imperative to get Aguirre inside the patrol unit ASAP so that he (the Grievant) could go and assist the other officers. CLEAT explains this is the reason why the Grievant issued the compliance strike to Aguirre. There was no intent to harm Aguirre. The Grievant had no malice towards Aguirre. The compliance strike that the Grievant issued to Aguirre had been taught to him by the City's Police Department. The Grievant testified that even before the PPCT training he received, the move was one taught to officers by Chief Gonzalez. Then there was the leaking of the video tape. The Chief testified there was a lot of negative publicity regarding this matter. The Chief was under severe public scrutiny. The Chief testified that the public displaying of the tape **did** [emphasis added] cause him to seriously consider his decision to indefinitely suspend the Grievant. CLEAT contends that the Chief yielded to the weigh of public opinion and chose the option that would provide him the desired relief from all the public pressure.

(c) Did the City's Police Department conduct a thorough investigation into the incident?

NO [emphasis added]. CLEAT maintains that the City's Police Department did not perform a thorough investigation. CLEAT also explains that another requirement upon an employer in a "just cause" hearing is that the employer must prove they conducted a **thorough investigation** [emphasis added] into the incident. Again, CLEAT argues that that the City failed to do so.

CLEAT explains that in cases involving discipline of law enforcement officers, the courts and arbitrators tend to require an employer's investigation of

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misconduct be just as through and complete as would the employer's investigation in a criminal case. [75] Such an investigation should, at a minimum, include **all** [emphasis added] investigatory leads and conducting personal interviews with witnesses.[76] This would include not only interviewing witnesses and taking their statements, but reviewing the information and also taking it into consideration. CLEAT contends that a conscious disregard of important witness statements and/or evidence would constitute an inadequate and less than through investigation.

CLEAT explains that the present incident occurred on December 14, 2015. The Chief issued the Indefinite Suspension Letter to the Grievant on December 31, 2015, only two weeks after the incident date. CLEAT contends that the City, in its haste to get this matter closed, failed to have IA interview the only individual who may have been able to clear up any questions regarding the matter. IA failed to make any attempt to speak with Aguirre, the subject who received the Grievant's compliant strike. CLEAT maintains by at least failing to speak with Aguirre, IA Investigators denied the Grievant a full, fair, and impartial investigation.

(d) Were other employees who engaged in conduct similar or identical to that of the Grievant treated as harshly by the City's Police Department?

NO [emphasis added]. CLEAT explains that evidence was introduced during the present hearing that at least two officers who were alleged to have committed policy violations like or similar to that of the Grievant received

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[75] See *Aerosol Techniques, Inc.*, 48 LA 1278 (Arbitrator Board, 1967)
[76] See *City of Oklahoma City*, 100 LA 1183 (Arbitrator Woolf, 1993)

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discipline far less severe than an Indefinite Suspension. First, was Officer Ricardo Sanchez who earlier in the year was issued a fifteen day suspension after allegations he used excessive force on a handcuffed prisoner. Officer Sanchez had tazed a handcuffed female prisoner repeatedly to the point where the officer with him had to intervene to stop Officer Sanchez.[77] The IA investigation revealed that the woman was already handcuffed when Officer Sanchez antagonized her causing her to react. To make matters worse when the woman's adult son complained about the mistreatment, he was threatened by Officer Sanchez with being tazed if he didn't stop asking questions about his mother. At the time of the incident, Officer Sanchez believed that he was justified in using the force that he had applied against the suspect, only to learn that such force was excessive and was disciplined for his mistake. Chief Gonzalez acknowledged the facts of the Sanchez case during the present arbitration hearing and that he had signed off on the fifteen day suspension.[78] The Chief also testified on cross examination that he issued a two day suspension to Officer Chappa who was found to have struck a prisoner in the head with his firearm causing an injury to the prisoner. Also, there was the case of the supervisory police officers who tazed a civilian employee. All the supervisors were instructors on Tazer and knew how to properly handle and operate the Tazer device. All the supervisory police officers who were involved received only suspensions for their actions. As in the Grievant's case these Officers may have

[77] CLEAT Exhibit #3
[78] Arbitration Heating Transcript, p. 65, lines 1-25.

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been mistaken about the application of force used in a particular situation, but Chief Gonzalez did not fire them for such actions.

(e) *Was the Grievant's misconduct the product of action or inaction by the City's Police Department?*

NO [emphasis added]. The allegations of misconduct do not appear to be the result of any action or inaction on the part of the City's Police Department. However, there was no evidence introduced at the hearing to indicate that any updated training had been offered or given regarding the use of PPCT during the last three years. The Grievant denied the allegations of misconduct leveled against him by the City's Police Department. The Grievant testified that he accepts that he may have made a mistake in using the type of compliance strike he chose, but he did not do it maliciously or to injure somebody on purpose, which the Grievant considered to be misconduct.[79]

(f) *Did the City's Police Department take into consideration the Grievant's good or exemplary work record?*

NO [emphasis added]. Chief Gonzalez did not mention or make any reference to the Grievant's good work history in the written statement /charge letter served upon the Grievant. The Grievant had no suspensions, demotions, or terminations issues to him. CLEAT maintains that is obvious that the Grievant was a dedicated, hard working officer. While the Grievant had been employed with the City's Police Department for less than seven years, he had been promoted to Investigator and assigned to Major Crimes and was the Team Leader for the Regional SWAT Team. Nothing in the Grievant's work record was

[79] Ibid, p. 131, lines 20-25; p. 132, line 1.

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presented at the present arbitration hearing to indicate that he was a problem employee.

(g) *Did the City's Police Department take into consideration mitigating circumstances?*

NO [emphasis added]. CLEAT explains that a critical element of "just cause" is whether or not the employer took mitigating circumstances into consideration while imposing discipline. [80] **This requires the employer to take into account the officer's state of mind at the time of the alleged misconduct** [emphasis added],[81] the officer's physical condition, [82] and whether the officer was provoked into the misconduct. [83] As stated throughout this brief, it is evident the City's Police Department failed to investigate and consider the **totality of the circumstances** [emphasis added] involved in the incident. The City's Police Department did not mention or make reference to any of the mitigating circumstances in the written statement/charge letter. The Grievant believed at the time he decided to issue the compliance strike on Aguirre, he believed Aguirre was confronting him and challenging his arrest. CLEAT maintains the Grievant was concerned about the safety and wellbeing of Officer Elias Lopez whose whereabouts and status were unknown to him.. The Grievant could hear what he believed to be a confrontation still going on in the yard of the location. The Grievant also believed that time was of the essence and felt he needed to get Aguirre into his patrol unit as quickly as possible. The Grievant needed to do something that would allow him (the Grievant) to gain immediate

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[80] See *City of Oklahoma City*, 100 LA 1183 (Arbitrator Woolf, 1993)
[81] See *New York State Department of Correctional Services*, 69 LA 344 (Arbitrator Kornblum, 1977)
[82] See *Childress v. Department of Police*, 487 So. 2d. 590 (La, App. 1986)
[83] See *San Francisco Police Department*, 94-1 ARB 4001 (Arbitrator Riker, 1993)

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and total control over Aguirre without causing Aguirre prolonged or permanent injury. If the Grievant had attempted to utilize open hand techniques such as suggested by Chief Gonzalez, the Grievant risked getting into a prolonged resisting arrest situation. Due to the nature of the situation the Grievant felt he needed to get to Officer Lopez' location as quickly as possible given what he perceived to be an ongoing volatile situation and a lack of manpower on scene. The Grievant made a split second decision to issue a compliance strike. There was no malice or ill will towards Aguirre. As the Grievant testified he had never previously encountered Aguirre. Nothing Aguirre said that night was offensive or personal towards the Grievant. This was not a personal attack against Aguirre but a professional tactical decision made to expedite Aguirre into the patrol unit. After the compliance strike was issued, Aguirre immediately went into the patrol unit. Although Aguirre cried out due to the immediate intense pain, which is the intended effect of the strike, Aguirre fully recovered moments later. There was no injury sustained by Aguirre. The strike accomplished its intended purpose. While the Chief may not have agreed with the Grievant's choice of the strike, the fact is the Grievant made a spur of the moment decision based on the situation in which he found himself.

(h) Was the Grievant subjected to progressive or corrective discipline?

NO [emphasis added]. The Grievant was never subjected to progressive or corrective discipline as required under the 'just cause" standard. CLEAT argues that the principal of progressive or corrective disciplines mandates that punishment be meted out in increasingly severe doses in an effort to correct (as

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opposed to punish) the behavioral problems of an employee.[84] As shown during the present arbitration hearing, the Grievant had no prior disciplinary history. Also, examples were presented in which certain officers who were accused of the same violations received far less discipline than the Indefinite Suspension received by the Grievant.

(i) Was the City's Police Department motivated by anti-union bias?

NO [emphasis added]. No evidence was presented during the present arbitration hearing of any ant-union bias. However, at the time of the December 14, 2015 event, the Grievant was President of the Police Association. Chief Gonzales testified that Sergeant Garcia, one of the individuals believed to have been responsible for leaking the video to the News Media, was at one time the President of the opposing union. Chief Gonzales testified that both men had ongoing issues with each other and Sergeant Garcia had complained in the past to the Chief about the Grievant.[85]

(j) Are the Rules of the City's Police Department clear and understandable?

YES [emphasis added]. However, as stated in preceding sections, there were several examples provided in which officers had used force contrary to the Rules and Regulations of the City's Police Department and these officers were not issued an Indefinite Suspension. At the time of the present incident, the Grievant believed he had properly used the compliance strike that had been taught to him by the Department. The Grievant's decision to utilize the

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[84] *Tinner v. Police Board of Chicago*, 378 N.E. 2d 1166 (ILL App. 1978); *Shlumbohm v. City of Sioux Falls*, 630 N.W. 2 d 93(S.D. 2001); *Broward County Sheriff's Office*, 122 LA 56 (Arbitrator Cocalis, 2005)
[85] Arbitration Hearing Transcript, p. 55, lines 9-21

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compliance strike was made in a matter of seconds during the handling of an officer in distress call.

(k) Is the Grievant likely to engage in similar misconduct in the future?

NO [emphasis added]. CLEAT states that the Grievant will not engage in similar conduct in the future. The Grievant has acknowledged his mistakes in this matter, and has accepted full responsibilities for his actions. CLEAT explains that the Grievant has learned from the mistakes he made during this incident and will not engage in the same behavior.

In summary, CLEAT asserts the evidence has clearly shown that the City and Chief Gonzalez were wrong in concluding the Grievant deliberately disregarded department policy and tried to intentionally harm Aguirre when he issued a compliance strike to the femoral nerve cluster, Absent any evidence to the contrary, the mere fact that the Chief did not believe the Grievant's testimony is not sufficient on its own to meet the City's burden of proof. The termination of the Grievant is unfounded and arbitrary and capricious. There is no foundation on which the City may rely, with the testimony and evidence as presented at this arbitration hearing, to uphold the termination of Grievant Juan Pablo Galino.

WHEREFORE, PREMISES CONSIDERED, the Grievant requests that this Honorable Hearing Examiner **GRANT** [emphasis added] the Grievant's appeal/grievance and, in all respects, reinstate the Grievant to his job as an Investigator with the City's Police Department; assign the Grievant to his previous position in the City's Police Department prior to termination; have the records of the Grievant to show no break in service as a peace officer with the

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City's Police Department; award the Grievant all back pay, vacation time, sick time and all other attendant benefits and emoluments of his position as an Investigator that he would have enjoyed had he not been terminated, including health benefits; order the City to remove from his personnel files with the City and the City's Police Department, including files in the Internal Affairs Division, all documents relating in any manner to the incident giving rise to the arbitration concerning the Grievant. The City should be ordered to submit the required documentation to the Texas Commission on Law Enforcement (TCOLE) showing the Grievant has had continuous service from December 31, 2015 with no break in service and all other relief, at law or equity, which the Grievant has shown to be justly entitled.

If the Honorable Hearing Examiner determines there were violations of Civil Service Rules and/or Department Policy, and that discipline is warranted, the Grievant still maintains the City failed to show by a preponderance of the evidence that the Grievant was deserving of an indefinite suspension and therefore the Grievant requests that the indefinite suspension be overturned and in lieu of the indefinite suspension, a more reasonable and fair discipline be issued based on the facts as presented in this arbitration hearing.

OPINION OF THE HEARING EXAMINER

Both Parties were well represented, presented persuasive arguments and submitted excellent post-hearing briefs. Each Party agreed that the present case was properly before this Hearing Examiner and has agreed to the following facts:

1. This Hearing Examiner has jurisdiction to hear this matter;

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2. On December 14, 2015, at approximately 7:13 pm, Police Officer Elian Lopez was dispatched to an apartment located at 208 Camino Road in reference to a runaway. At that location, Officer Lopez made contact with the runaway, Stacey Torrez, and her boyfriend, Victor Manuel Aguirre. After confirming that Torrez was the runaway, Officer Lopez proceeded to handcuff Torres and to escort her out of the apartment. Torrez began an active resistance and Aguirre punched Officer Lopez in the back of the head. Aguirre and Officer Lopez then engaged in a physical altercation.

3. At approximately 7:23 pm Officer Lopez advised dispatch for backup and used code "10-18" which is urgent.

4. Officers Mario Hernandez, Jonathan Monroe and Salvador Hernandez immediately responded to Officer Lopez's request for assistance.

5. At approximately 7:30 pm while processing paperwork for an arrest in the police station, Grievant Juan Pablo Galindo heard Officer Lopez's call for "urgent backup." The Grievant believed that Officer Lopez was "in a struggle for his life" and drove "code" to Officer Lopez's location which means "lights and siren."

6. Officer M. Hernandez was the first officer to arrive at Officer Lopez's location while Officers J. Monroy and S. Hernandez arrived shortly thereafter.

7. Officer Monroy's dash video camera and his body worn camera (BWC) showed Aguirre being handcuffed and brought to his feet.

8. Officer Monroy's BWC showed Monroy and Officer S. Herandez escorting the handcuffed Aguirre towards the Grievant's arriving patrol unit with the intention of placing Aguirre into that police unit.

9. Officer Monroy's BWC showed the Grievant exiting his vehicle and exchanging words with Aguirre. The BWC then showed the Grievant giving a knee strike to Aguirre's groin area and it further showed Aguirre doubling up in pain in response to the Grievant's knee strike.

10. The Grievant advised Police Chief Juan Gonzalez on the night of December 14, 2015 of the events that had occurred that night including the Grievant imposing the knee strike to Aguirre's thigh.

11. Later, a copy of the video showing the Grievant imposing the knee strike to Aguirre was released to the local media without the Chief's authorization. The unauthorized video generated considerable unfavorable publicity for the City's Police Department.

13. The Grievant received an indefinite suspension on December 31, 2015.

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14. The Grievant filed a timely appeal on January 5, 2016.

15. The matter moved to the present arbitration hearing on April 26, 2016

In the final analysis, this Hearing Examiner is convinced that the Grievant should not be punished for his actions of December 14, 2015. The testimony presented in the present case indicates that the City failed to apply the just cause standard when it indefinitely suspended the Grievant. Hence, the Grievant's indefinite suspension is to be set aside.

In fashioning a decision for the present case, this Hearing Examiner has considered four factors: (1) the type of standard—just cause or good of the service—that is proper and appropriate to be used by the City in administering discipline to the Grievant, (2) the burden of proof, (3) the City's imposed discipline, and (4) should the punishment assessed by the City be upheld or modified? Following is a discussion of these factors on a point-by-point basis.

(1) The proper and appropriate standard—Just Cause or Good of the Service:

Arbitrator Norman Brand has provided the following commentary on just cause:[86]

> Just cause is not an easily defined concept. In one respect, just cause can be shorthand for what an arbitrator thinks is fair. If after considering the facts, the arbitrator concludes that the employer failed to treat the employee fairly, he/she will find there was no just cause for the discipline. Or, he/she will find there was just cause if the employer treated the employee fairly. Since individual notions of fairness vary, and the facts that led to the discipline are often unique, it can be very difficult to determine the principle that led the arbitrator to his/her decision. However, over many arbitrators and many cases some principles have emerged.

[86] N. Brand and M. Biren, Editors-in-Chief, *Discipline and Discharge in Arbitration*, 2nd Edition, Arlington, VA: BNA Books, pp. 30-32, (2008)

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The principles of just cause allow an employee to be discharged in two types of situations: the final step in the progressive disciplinary process [87] or a single incident of a very serious misconduct. [88] The employer is not rigidly bound to the application of progressive discipline in every situation; a single occurrence of certain types of misconduct may warrant a discharge even if it is the first offense.[89] There is general agreement that summary discharge may be warranted for certain types of misconduct such as theft, dishonesty, serious threats, serious safety violations, striking a supervisor or similar types of misconduct. An employee who engages in these types of serious misconduct may be subject to discharge, even in the absence of a specific rule. [90]

During the present arbitration hearing, the Grievant testified and admitted he had imposed a knee strike on Aguirre's thigh. Further, the Grievant's actions were recorded on Officer Monroy's BWC. The City maintains that the events pertaining to the present matter are not in dispute. Thus, the issue is whether the imposed discipline was reasonable and appropriate. The Grievant testified during the present arbitration hearing, that the unauthorized video release which showed the Grievant kneeing Aguirre and then Aguirre doubling over in pain, forced the Chief into making the indefinite suspension. Further the Grievant testified that the imposed discipline of an indefinite suspension is too severe when compared to the discipline meted to other officers who have been charged

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[87] *City of Cooper City*, 118 LA 842 (Arbitrator Hoffman, 2003); *Union Foundry Co.*, 120 LA 161 (Arbitrator Howell, 2004); *Midwest Coca-Cola Bottling Co.*, 94-1 ARB 4086 (Arbitrator Reynolds, 1993)
[88] *E.B. Petty Paper Co.*, 121 LA 1821 (Arbitrator Allen, 2006); *PPG Industries*, 122 LA 1250 (Arbitrator Suntrup, 2006); *Dravo Lime Co.*, 96-1 ARB 6067 (Arbitrator Imundo 1995),
[89] N. Brand and M. Biren, Editors-in-Chief, *Discipline and Discharge in Arbitration*, 2nd Edition, Arlington, VA: BNA Books, pp. 80 (2008)
[90] Ibid, p. 81

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with "use of force" violations. Chief Gonzalez testified that he considers each case to be different. In the present matter, the Chief considered that the Grievant was a seasoned police officer and that his training is above that of many other officers in the Department. The Chief maintained that no additional training exists from which the Grievant can learn from his behavior. The Chief further testified that he had observed the video in which the Grievant is shown kneeing Aguirre. Based on that observation, the Chief contends that he didn't observe Aguirre to be "resisting, pulling away, kicking, or shouting at anybody" nor he observe Aguirre to be "antagonizing the Grievant in any way."

Arbitrator Collins has ruled that the "determination of whether the force used in a specific situation was necessary is a proper matter for police management." [91] However, Arbitrator Collins further ruled that such a decision should be supported by the facts and can be modified only if it is supported by the facts.[92] Arbitrator Frost in his ruling regarding the use of police management discretion[93] quoted the often-cited opinion of Arbitrator Whitney McCoy regarding the use of managerial discretion in discipline cases:[94]

> Where an employee has violated a rule or engaged in conflict meriting disciplinary action, it is primarily the function of management to decide upon the proper remedy. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, it is not justification

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[91] *City of Pomona*, 84 LA 1123 (Arbitrator Collins, 1985)
[92] Ibid
[93] Sheriff of Boward County, 98 LA 219 (Arbitrator Frost, 1991)
[94] Stockham Pipe Fittings, 1 LA 160 (Arbitrator McCoy, 1945)

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> for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which highly aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated, and unions would take every case to arbitration. The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action is proved--in other words, where there has been abuse of discretion.

Also, in a decision involving the managerial discretion of a police department, Arbitrator James Stewart stated:[95]

> The Police Department is a para-military operation with codes of conduct that is more firm, more focused, and more disciplined than are the Rules and Regulations that apply to most other types of employment. Because of the para-military nature of police work, an Arbitrator should not sustain a grievance solely because an officer did not like the penalty imposed. If the Police Administration has met the contractual requirements of due process, fairness, and just cause, ---the decision is theirs, not the arbitrators'.

Thus, the preceding arbitral decisions state that police managerial discretion should not be overturned unless the police management has acted in a capricious, unreasonable, or in an arbitrary manner and has not disciplined for just cause.

(2) Burden of Proof:

CLEAT contends that the City's Police Department has the burden of proof. For informational purposes, Chapter 143 of the Texas Local Government

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[95] *Town of Newinton*, 98 LA 886 (Arbitrator Stewart, 1993)

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Code (TLGC) does not require a Hearing Examiner to use a specific burden of proof---rather it states that the hearing should be conducted "fairly and impartially" and that the Hearing Examiner should render a just and fair decision.[96] In determining a burden of proof for the present matter, this Hearing Examiner turns to the Elkouris who state that arbitrators have used three approaches in imposing the burden of proof. Following is a brief description of these approaches listed from the least to the greatest burden: (1) preponderance of the evidence (the Arbitrator is persuaded by the evidence); (2) clear and convincing evidence (the truth of the asserted facts is highly probable) and (3) evidence beyond a reasonable doubt (evidence that a reasonable mind might accept as adequate to support a conclusion).[97] The standard of proof in civil cases is the preponderance of evidence.[98] In the context of the present case, it is appropriate that this Hearing Examiner utilizes the preponderance of the evidence standard.

(3) The City's imposed discipline:

At no time during the City's investigation into the present matter, did the Grievant deny that he imposed a knee strike to Aguirre's upper thigh. However, both CLEAT and the Grievant maintain that the imposed discipline of indefinite suspension was excessive. Turning to the events of the night of December 14, 20015, the Grievant testified that he believed the behavior exhibited by Aguirre while he was being escorted to the Grievant's patrol unit by Officers Monroy and

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[96] *TLGC* 143.010(f)
[97] *Elkouri & Elkouri, How Arbitration Works,* 7th ed. K. May, Editor-in-Chief, 2012 (Arlington, VA. Bloomberg BNA Books, pp. 15d; 24-26
[98] *Turner v. City of Carrollton Civ Serv*, 884 S.W. 2d 889 (Tex App- Amarillo, 1994)

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S. Herandez was not one of compliance. The Grievant provided undisputed testimony during the present arbitration hearing that Officer Lopez was having difficulty in restraining the runaway, Torrez, while Aguirre was being escorted to the Grievant's patrol unit. Also there were indications that a crowd was developing around Torrez and Officer Lopez. The Grievant testified during the present arbitration hearing that Aguirre had indicated in Spanish to the Grievant of the possibility that he (Aguirre) would not peacefully enter the Grievant's patrol unit. Further, the Grievant wanted to quickly place Aguirre into the Grievant's patrol unit, thus freeing Officers Monroy and S. Herandez to assist Officer Lopez in his involvement with Torrez. Testimony presented at the present arbitration hearing indicated that Torrez has earlier bitten Office Lopez, had head-butted him and later bit Officer Monroy after Monroy had been released from escorting Aguirre to the Grievant's patrol unit.

The Grievant testified during the present arbitration hearing that the knee strike he imposed on Aguirre's thigh was an acceptable approach to quickly allow officers to gain compliance over suspects in a manner that did not cause injury to the suspect. The knee strike's purpose and technique was well described in a manual developed by PPCT Management Systems, referred to "PPCT" and utilized by the City's Police Department. The Grievant had been designated as the PPCT Trainer for officers in the City's Police Department.

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(4) Should the punishment assessed by the City be upheld or modified?

Arbitrator Thomas Levak [99] in determining an appropriate penalty for a correctional officer (CO) who had used excessive force stated the following from the Elkouris:[100]

> The Elkouris have indicated that offenses are of two general types: major offenses such as gross insubordination, stealing, or assault on a foreman which always justify a lengthy suspension or discharge, regardless of the employee's past record; and minor offenses, such as negligence, absenteeism, or the like, which mandate the use of lesser, progressive, discipline. However, arbitrators have established a middle ground in which a lesser suspension is more appropriate than a greater one.

Arbitrator Levak in (98 LA 545) further stated that he was interested in determining how other arbitrators had ruled in cases involving the use of excessive force and reported that he had conducted independent research to aid in his determination of an appropriate discipline for (98 LA 545) involving the CO that was before him. Arbitrator Levak observed that cases involving the discharge and discipline of COs and police officers are covered in Section 100.55, "Hiring; tenure; discharge; and discipline" of *Labor Arbitration Reports* published by BNA. After conducting his research, Arbitrator Levak reported that from 1965 until 1990[101], four cases involving the use of excessive force by either COs or police officers were published in *Labor Arbitration Reports.* These include:

City of Pomona, 84 LA 1118 (Arbitrator Collins, 1985)

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[99] *State of Alaska,* 98 LA 545 (Arbitrator Levak, 1992)
[100] Elkouri & Elkouri, *How Arbitration Works* 4th Ed. (Washington, DC: BNA Books, 1985)
[101] Arbitrator Levak rendered his opinion for *State of Alaska*, 98 LA 545 in January 1992.

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Board of Commissioners, Broward County Florida, 83 LA 185 (Arbitrator Kulkis, 1984)

City of Redwood, 83 LA 1254 (Arbitrator Concepcion, 1984)

City of Hartford, 62 LA 1281 (Arbitration Panel—Blum, Chair; Arborio, Klinski, 1974)

Following is a brief description of the ruling of the respective arbitrator for each of the four preceding cases together with Arbitrators Levak's ruling for 98 LA 545.

City of Pomona, 84 LA 1118: Arbitrator Collins sustained the 20-day suspension of a police officer who, following the arrest and apprehension of a suspect, struck the arrestee on the back with a "billy club" and pushed him flat on the ground after the arrestee failed to obey the police officer's order to lie on the ground.

Board of Commissioners, Broward County Florida, 83 LA 1985: Arbitrator Kulkis set aside the discharge of a CO who issued a reasonable and proper order to an inmate, which was refused, and the inmate then made an aggressive movement toward the CO accompanied by loud and profane language. The CO seized the inmate and brought him to the floor, accidentally knocking down a nearby CO in the process. Arbitrator Kulkis stated that the CO exercised reasonable force under the circumstances and that such action taken in a "heated moment" should not be second-guessed and that whenever possible, deference must be given to these "split-second" judgments. Arbitrator Kulkis also ruled that it was unfair for "outsiders" to penalize a CO using some "better" standard of justice. According to Arbitrator Kulkis, if a CO acts in "reasonable

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conformity" with the standards taught and known to be acceptable to his peers, then he should not be penalized simply because some other course of action upon later review and analysis might be deemed to be "more reasonable."

City of Redwood, 83 LA 1254: Arbitrator Concepcion found that the eight-day suspension of a police officer who pulled a citizen to the ground and put an arm bar restraint on him after the citizen had run into the police officer with a pick-up truck was too severe in that the police officer was not guilty of gross misconduct and reduced the eight-day suspension to a four-day suspension.

City of Hartford, 62 LA 1281: The Arbitration Panel found that the indefinite suspension of a police officer who swung his leg in the direction of a handcuffed prisoner's back was excessive and reduced the discipline to an eight-month suspension.

State of Alaska, 98 LA 545: Arbitrator Levak sustained the forty-two hour suspension of a CO who struck a mentally ill inmate with his closed fist after the inmate moved with clenched fists toward a male psychiatric nurse and later struck a female nurse on the side of her head with his fist. Arbitrator Levak stated that if the CO had acted in "reasonable conformity" to the standards for which the CO was trained, then the CO would have not been penalized. However, Arbitrator Levak concluded that the CO had failed to follow the standards for which he was trained.

A review of the preceding five arbitral decisions from 1965 until 1990 indicate that in situations in which COs and police officers use excessive force, arbitrators have considered such offenses to be middle-ground in which a lesser

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suspension is more appropriate than a greater one. These decisions also provide precedents into situations in which COs and police officers have been disciplined for the use of excessive force. For example, Arbitrator Levak stated that if CO and police officers act in "reasonable conformity" to standards, then they should not be disciplined when force is used on a citizen or arrestee. Further, Arbitrator Kulkis ruled that the behavior of COs and police officers should not be second guessed by others who attempt to apply a "better standard" and that deference must be given to these "split-second" judgments.

Thus, from the perspective when force is used by COs and police officers to subdue individuals, we have multiple opinions in which arbitrators have so ruled. These rulings state that if COs and police officers act in a "reasonable conformity" with the standards taught and known to be acceptable to the peers of the CO or police officer, then COs and police officers should not be penalized simply because another course of action was available upon a later review.

This Hearing Examiner conducted research similar to that performed by Arbitrator Levak in investigating arbitral decisions involving the use of "excessive force." This Hearing Examiner reviewed the publication *Labor Arbitration Reports* from 1991 through 2013 to determine the rulings of arbitrators in cases involving the use of excessive force. In 1991, the discipline and discharge of COs and police officers was moved from Section 100.55 of the *Labor Arbitration Reports* published by BNA Books to Sections 100.5507 "Suspensions and Disciplinary Actions" and Section 100.55250 "Assaults, fighting, troublemaking, harassment, and obscene language."

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This Hearing Examiner located thirteen cases as follows:

Sheriff of Broward County, 98 LA 219 (Arbitrator Frost, 1991)

City of Redwood City, 98 LA 307 (Arbitrator Riker, 1991)

State of Alaska, 98 LA 545 (Arbitrator Levak, 1992)

Town of Cromwell, 101 LA 388 (Arbitration Panel—Steward, Chair; Ryan, Pizzi, 1993)

City of La Porte, 106 LA 887 (Arbitrator Goodman, 1996)

City of Joliet, 112 LA 468 (Arbitrator Perkovich, 1999)

City of Melbourne, 121 LA 1345 (Arbitrator Robinson, 2005)

Clermont County Sheriff, 125 LA 592 (Arbitrator Bordone, 2008)

City of Duquesne, 126 LA 1723 (Arbitrator Felice, 2009)

City of Paris, Texas, 127 LA 1818 (Arbitrator Moore, 2009)

City of Houston, 128 LA 910 (Arbitrator Moore, 2010)

Shiawassee County Sheriff, 133 LA 69 (Arbitrator Knott, 2013)

City of Tampa, 133 LA 1128 (Arbitrator Smit, 2013)

Following is a brief description of the ruling of the respective arbitrator for each of the thirteen preceding cases. (Note: State of Alaska, 98 LA 585 was included in Arbitrator Levak's research findings).

Sheriff of Broward County, 98 LA 219: Arbitrator Frost sustained a discipline of a 15-day suspension and six months of probation upon return from the suspension of a deputy sheriff who with other deputies were breaking up camp sites of homeless individuals. The deputy sheriff became engaged in a heated discussion with one of the homeless people who was upset that the deputies were destroying the campsites. The deputy sheriff ordered the individual

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to leave the area and the individual refused to do so. The deputy sheriff then handcuffed the individual with his hands behind his back and then struck the individual on the back of the leg with a "riot baton." Arbitrator Frost concluded that 'based on the evidence and testimony presented at the arbitration hearing, he (Frost) had no basis to alter the penalty.

City of Redwood City, 98 LA 307: Arbitrator Riker ruled that the City of Redwood City improperly imposed a 30-day suspension on a police training officer for hitting a handcuffed prisoner in a holding cell who was attempting to spit in the officer's face for a second time. Arbitrator Riker stated "the use of force was taken only after the grievant (the police officer from City of Redwood City) was assaulted by the prisoner and that only enough force was used to counteract a second assault. This was not a situation where the grievant could have backed away and the speed of the occurrence suggests a reasonable behavior on the part of the officer."

Town of Cromwell, 101 LA 388:The Arbitration Panel ruled that the City of Cromwell did not have just cause to suspend a police officer for three days who, while on duty directing traffic at a construction site, drew his weapon on an agitated and belligerent construction worker who refused to follow the officer's traffic flow instructions. The Arbitration Panel stated that "although the Department's rules and Regulations stated that weapons should not be displayed or brandished as a threat unless its actual use in a situation is proper...many police officers testified at the arbitration hearing that they frequently draw their guns even when deadly force is not used...the grievant (the Town of Cromwell

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police officer) testified that he had drawn his gun at least 12 times even though he has not used deadly force."

City of La Porte, 106 LA 887: Arbitrator Goodman ruled that a 15-day suspension was appropriate for a police officer who kicked the head of a suspect who was fighting to get up after other officers had forced the suspect to the ground. Arbitrator Goodman stated that the grievant and three other police officers were at the scene and that these four officers should have restrained the suspect without having to kick the suspect in the head.

City of Joliet, 112 LA 468: Arbitrator Perkovich overturned a three day suspension of an off-duty police officer who ordered customers in a bar to take their arguments outside the bar. After joining the customers outside the bar, the officer ordered them to engage in a fist fight. The City maintained that the grievant's (the off-duty officer) actions were an example of the use of excessive force. The only previous discipline received by the grievant was an oral reprimand.

City of Melbourne, 121 LA 1345: Arbitrator Robinson reduced the 40 day suspension of an 18 year police officer to 10 days for threatening to assault a convenience clerk into selling cigarettes to the officer's underage female companion.

Clermont County Sheriff, 125 LA 592: Arbitrator Bordone sustained the 60 day suspension of a police officer who lost his temper during the processing of an arrestee and struck a security camera causing significant damage.

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City of Duquesne, 126 LA 1723: Arbitrator Felice sustained the five day suspension of a police sergeant but overturned the sergeant's demotion to patrol officer. The sergeant was completing a report at the police station when he became involved in an argument with another officer. The sergeant pushed the other officer against a wall and struck him with a closed fist.

City of Paris, Texas, 127 LA 1818: A police officer received a three day suspension for slamming a handcuffed suspect onto the hood of a police vehicle in the course of arresting the suspect. Arbitrator Moore ruled that the suspect was capable of injuring the officer and overturned the three day suspension, ordering back pay for the three days.

City of Houston, 128 LA 910: After apprehending a suspect who had fled the scene of a burglary, a police officer received an indefinite suspension for kicking the handcuffed suspect in the groin. Arbitrator Moore overturned the indefinite suspension and ordered no other discipline for the police officer who was also awarded back pay. Arbitrator Moore noted that the police officer had eight years experience as a police officer and an outstanding performance raring.

Shiawassee County Sheriff, 133 LA 69): Arbitrator Knott overturned the demotion of a sergeant (the grievant) in a correctional facility to corrections officer for assaulting a disruptive inmate and ordered a one week suspension for the grievant.

City of Tampa, 133 LA 1128: Arbitrator Smit overturned the indefinite suspension of a police officer who received an indefinite suspension for having a female's handcuffed arms extended past her mid back to the point where the

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female's feet barely touched the ground. Arbitrator Smit noted that the police officer had a six year work record without any imposed discipline.

Again, in the preceding cases presented by this Hearing Examiner, we learn that in situations in which COs and police officers use excessive force, arbitrators have continued to consider such offenses to be middle-ground in which a lesser suspension is more appropriate than a greater one. Also, Arbitrators Riker and Kulkis indicate that in a situation in which a police officer uses force to subdue a citizen or arrestee, the speed of the incident is a factor in determining the discipline that is to be imposed.[102]

Based on all the testimony presented during the present arbitration hearing and in the Parties' post-hearing briefs, this Hearing Examiner rules that Grievant Juan Pablo Galindo acted in "reasonable conformity" to the training he has received. Grievant Galindo had been employed with the City's Police Department for nearly seven years at the time of the December 14th, 2015 incident. He had been promoted to Investigator and assigned to Major Crimes and was the Regional Team Leader for the Regional SWAT Team. No evidence was introduced during the present arbitration hearing that the Grievant was a problem employee. In fact, no criminal charges have been brought against the Grievant. Chief Gonzalez testified that the Grievant was better trained than many of present City's Police Officers. Two other police officers who had committed policy violations similar to that of the Grievant received discipline far less severe than an indefinite suspension.

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[102] *City of Redwood City*, 98 LA 307 (Arbitrator Riker, 1991); *Board of Commissioners, Broward County Florida*, 83 LA 185(Arbitrator Kulkis, 1984)

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The Chief testified that he based his decision to impose the indefinite suspension after watching a video of the December 14, 2015 incident. However, actual events experienced on a first-hand basis on a quickly evolving situation can present a different set of dynamics. The Grievant testified during the present arbitration hearing that he was confronted with the following situation on the night of December 14, 2015. In addition to his presence at the scene, four other officers were present at the 208 Camino Road location. Two officers were escorting the suspect, Aguirre, toward the Grievant's police unit. One officer was involved in subduing the runaway, Torrez, while the other officer was involved with crowd control. Aguirre spoke in Spanish to the Grievant indicating that a problem could quickly develop if the officers attempted to place Aguirre into the patrol unit. Thus, the Grievant had to act in such a manner that Aguirre would peacefully and quickly enter the patrol unit thus freeing the two escorting officers to assist in crowd control and dealing with Torrez. Accordingly, the Grievant relied on his PPCT training to manage Aguirre's behavior. One approach was to utilize a knee strike to Aguirre's thigh to achieve Aguirre's compliance. It was undisputed during the present arbitration hearing that the Aguirre did not suffer any physical effects from the knee strike.

Based on all the preceding evidence and testimony, this Hearing Examiner rules that insufficient evidence has been offered to persuade him that Grievant Galindo violated any of the City's Rules or Regulations on December 14, 2015. Thus, the present grievance is sustained and the Grievant is to be returned to work without penalty.

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AWARD

The appeal of Grievant Juan Pablo Galindo is sustained. The imposed discipline of Indefinite Suspension is to be overturned and no additional discipline is to be imposed on the Grievant. Grievant Galindo is to receive back pay from the date of his indefinite suspension (December 31, 2015) until he is returned to work. Grievant Galindo is to be made whole in every way in accordance with Section 143.053(f)(1)(2) of the Texas Local Government Code Chapter143.

The City is also ordered to submit the required documentation to the Texas Commission on Law Enforcement (TCOLE) showing the Grievant has had continuous service with the City's Police Department from December 31, 2015 with no break in service.

This Hearing Examiner is to retain jurisdiction of the present case for thirty days.

College Station, Texas
July 20, 2016

Daniel F. Jennings
Impartial Hearing Examiner

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