

DECISION AND AWARD

In the Matter of a Controversy between the

**SAN JOSE POLICE OFFICERS' ASSOCIATION, [REDACTED] [REDACTED]
GRIEVANT**

And

**CITY OF SAN JOSE, SAN JOSE POLICE DEPARTMENT,
EMPLOYER**

For the Grievant:

**[REDACTED] [REDACTED] Esq.
Sideman & Bancroft LLP
One Embarcadero Center
San Francisco, Ca 94111**

For the Employer:

**[REDACTED] [REDACTED] Esq.
Deputy City Attorney
Office of the City Attorney
200 East Santa Clara Street
San Jose, Ca 95113**

Arbitrator:

David A. Weinberg

PROCEDURAL BACKGROUND

Pursuant to the Memorandum of Understanding between the City of San Jose (hereinafter “Employer”), and the San Jose Police Officers’ Association (hereinafter “Association”); the parties selected David A. Weinberg as Arbitrator in the above referenced case. The Arbitrator conducted Arbitration hearings in the City of San Jose , California on June 5, 6, 7, and 26, 2023. The parties filed their closing briefs on August 22, 2023 with the Arbitrator. The parties stipulated that the issue to be decided by this Arbitrator is as follows:

“Was there just cause for the termination of [REDACTED] [REDACTED] if not, what is the appropriate remedy?”

In addition, the parties stipulated the matter is properly before the Arbitrator for resolution and that jurisdiction may be retained to resolve any disputes over the meaning or application of the Decision and Award.

RELEVANT CONTRACTUAL and OFFICIAL DOCUMENTS

1. MEMORANDUM OF AGREEMENT CITY OF SAN JOSE and SAN JOSE POLICE OFFICERS’ ASSOCIATION July 1 2021 – June 30, 2022
2. SAN JOSE POLICE DEPARTMENT MANUAL - Sections: L 1907 Driving, L 6900 Traffic Accidents, L 7000 Accidents involving Department Members
3. SAN JOSE MUNICIPAL CODE Section 3.04.1370 – Causes for discipline; B. Misconduct, C. Incompetence, E. Failure to Observe Applicable Rules and Regulations
4. CVC 22107

STATEMENT OF FACTS

The following is a summary of the facts of the case, which were necessary to decide the matter. A more detailed finding may be found in the Analysis and Discussion section of this Award when appropriate.

██████████ ██████████ (hereinafter "Grievant") began working for the San Jose Police Department as a Patrol Officer in 2012 after graduating from the police academy at Evergreen College and working as a reserve police officer for the City. The incident which led to the Grievant's discipline began on February 15, 2022, when he responded to a call for service while on patrol in District Mary. The call was made by a woman who reported that her ex-boyfriend had assaulted her at her home and was afraid he was still on the premises. She also reported she had seen him earlier in the day with a gun in his waistband. After parking a few blocks away, the Grievant waited for other officers to arrive. After three other officers arrived, they had dispatch call the victim and have her exit the house. After entering the house and determining that the suspect was not at the premises, the officers interviewed the victim who told them she had been assaulted by her boyfriend with open and closed fists and he began to strangle her. She was observed with redness and swelling of the face and marks on her neck. After the officers and the Grievant finished their investigation and left the premises, the victim called dispatch again and reported the suspect had returned and was banging on her window and had a gun in his waistband. Multiple officers responded to this call and could not locate him in the area. Sergeant ██████████ who had responded to the scene instructed the Grievant to obtain a Ramey

warrant, which allows an officer to arrest a suspect on sight. The Grievant was able to obtain this warrant from a judge for an arrest on felony charges of domestic violence, assault with a deadly weapon, and attempted murder.

The next day, February 16, 2022, the Grievant was working his assigned shift. At 1:10am on February 17, the Grievant was on patrol in his vehicle traveling northbound on Balboa Avenue at the intersection of East St. [REDACTED] Street, when he saw a person standing by a light pole at the entrance of Plata Arroyo Park. This location was a couple of blocks from the residence of the domestic violence call from the night before. The Grievant recognized this person as the individual for whom he had obtained the Ramey warrant the previous evening. The suspect noticed the Grievant approaching the park in his patrol car when he was about 100 feet away and began to run into the park. The Grievant activated his lights and siren and drove his vehicle over the curb slowly into the park in pursuit of the suspect. The Grievant continued in his patrol car onto the cement sidewalk on the east side of Plata Arroyo Park. The Grievant continued in his patrol vehicle around the curve while watching the suspect who was on the left side of his field of vision. As the Grievant drove around the curved portion of the park sidewalk and then entered the straight portion of the sidewalk, the suspect changed his direction eastward and ran across the sidewalk and hopped over a low wooden fence on the other side of the sidewalk and into a wooden area. As the suspect was doing this the Grievant collided with an illuminated light pole on the left side of his patrol car, which resulted in the light pole falling over onto the grass. At this point the Grievant saw the suspect run into the wooded

area on the other side of the fence. The Grievant ended his chase at this point and removed his vehicle from the park to Balboa Ave. The patrol car had minor damage to the left quarter panel of his patrol vehicle and the pole was dislodged from its base with exposed wires and was still illuminated while lying on the ground. After exiting the park in his patrol car, he called his supervisor, Sergeant [REDACTED] [REDACTED] on his cell phone to report he was in an accident. [REDACTED] estimated he was going 10-15 mph while he was driving in the park.

Sergeant [REDACTED] testified he arrived at the scene of the accident around 1:20am and observed the Grievant's patrol car to have some minor damage to the left front bumper and observed the light pole down on the grass and it was his understanding the Grievant was driving near the eastern fence line by the sidewalk of the park. [REDACTED] testified he asked the Grievant if he was okay, to which the Grievant replied, "yes". [REDACTED] said he advised the Grievant that he has 24 hours to give a statement and that he can consult with a union rep or a supervisor, and that statement would need to be given to Officer [REDACTED] on a CHP 556, which is a supplemental form. [REDACTED] said he assigned Officer [REDACTED] to prepare the CHP traffic collision report and assigned Officer [REDACTED] to take photographs of the scene, canvas for witnesses, and assigned Officer [REDACTED] to prepare a factual diagram of the accident. Officer [REDACTED] filed a San Jose Police Department report regarding the vehicle accident along with the CHP report, which contained the same information and narrative. In the San Jose Police Report he wrote in part:

Statement of D1 ([REDACTED]) "The following is a summary of D1's statement. D1 was working patrol as unit 71M3. He was in full police uniform and driving a fully

marked police vehicle. At approximately 0105-0110 hours, D1 was patrolling the area of E St [REDACTED] St and Balboa Ave when he observed a male standing on the south east corner of Plata Arroyo Park. Based on the distinctive hair the male had, D1 believed him to be the same suspect who committed a violent felony the night before in the same area (22-047-0053). This suspect had an outstanding Ramey warrant for domestic violence, assault with a deadly weapon, criminal threats, and is known to carry a firearm. As D1 approached the suspect, the suspect observed D1 and ran northbound through the park. D1 approached the end of the street (Northbound Balboa near East St [REDACTED] safely maneuvered his patrol vehicle over the curb at a slow speed and entered the park. D1 continued northbound onto the cement walkway along the east side of the park at approximately 10–15 mph. D1 was focused on the suspect as he believed him to be armed (firearm) and dangerous. As the suspect jumped over a low fence into the creek area, the left front quarter panel of D1’s vehicle License Plate #1541093) collided into a city light pole, knocking the pole over and causing minor damage to the vehicle. The bottom of the pole had exposed electrical wiring and the PD vehicle was moved to the street out of caution. The suspect fled the scene and remains outstanding. The suspect was the only pedestrian observed in the area, and the general area was moderately lit with overhead streetlights. At the time of the collision, the SJPD radio channel was restricted due to an ongoing priority call, a burglary with possible subjects on the scene. When the radio traffic cleared, D1 immediately contacted his supervisor, Sgt. [REDACTED] 33568...¹

Officer [REDACTED] prepared a factual diagram of the scene of the accident for the CHP 555 Report.² Sergeant [REDACTED] prepared a Memorandum for Chief Of Police [REDACTED] [REDACTED] on February 24, 2022. In this Memorandum he made the following Findings and Recommendations:

¹ City Exhibit #2

² My review of the evidence reached the conclusion that this diagram had the placement of the Grievant’s patrol car in an incorrect location in the park.

“The following findings are based upon a review of the collision scene, the statement of the involved driver, and the collision investigation:

*On February 17, 2022 at approximately 0110 hours, a non-injury collision involving a marked San Jose Police Department (SJPD) vehicle (#3666) occurred at Plata Arroyo Park, located at E St [REDACTED] Street and Balboa Avenue. Vehicle #3666 sideswiped a city light pole causing minor damage to the vehicle. As stated in **22107 CVC**: No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in the event any other vehicle may be affected by the movement. Ofc. [REDACTED] was in violation of CVC section 22107: Unsafe turning movement. I recommend the collision be classified as “**Preventable**” per San Jose Duty Manual section L7704 – **Preventable**: The City employee did not exercise prudent and careful judgment to prevent a collision, or operate a vehicle in an unsafe manner, or in disregard of the rules of the road, or contrary to Department procedures.³*

This Memorandum was also sent to Lieutenant [REDACTED] who reviewed Sergeant [REDACTED]’s Report and the traffic investigation of Officer [REDACTED] [REDACTED] testified he used San Jose Police Department Manual Section L1907 as his authority in determining if the accident was preventable. [REDACTED] said that he reached out to the Grievant through Sergeant [REDACTED] to inquire if the Grievant wanted to provide an additional statement, which he declined. [REDACTED] concurred with [REDACTED] that the accident should be classified as “preventable”. He also concurred with [REDACTED] that [REDACTED] violated California Vehicle Code ~22107 when he made an unsafe turning maneuver. [REDACTED] contacted Internal Affairs to obtain the Grievant’s driving record going back three years. [REDACTED] testified that

³ City Exhibit #1

he believed the accident was preventable because he hit a stationary object and it did not matter if he was going one or two miles per hour at the time. On March 9, 2022 ██████ sent a Memorandum to Chief ██████ In this Memorandum he repeated the background information on the accident taken from ██████'s investigation. He also noted that he reviewed the Grievant's IA file and found he had one "Preventable" collision within a three-year period and received a combined discipline of a 40-hour suspension and driver training. In his

FINDINGS AND RECOMMENDATIONS section of this memo ██████ wrote:

*"Based upon my review of the traffic collision report, memorandum, photographs and Officer ██████ statement, I find that Officer ██████ failed to safely make a turning maneuver within the city park, in violation of CVC 22107. This collision, as it concerns Officer ██████ should be classified as "**Preventable**" as defined in Duty Manual Section L7004.*

A review of Officer ██████'s Internal Affairs file determined he has one prior preventable collision within the past three (3) years. Due to Officer ██████ receiving a 40-hour suspension and driver training as discipline for his prior preventable collision, I recommend a Discipline Review Panel (DRP) be convened to consider discipline for Officer ██████ #4212 in reference to this accident."⁴

On May 17, 2022, a Disciplinary Review Panel convened to discuss the Grievant's IA case. In attendance was IA Lieutenant ██████ ██████, Lieutenant ██████ and other personnel in the Grievant's chain of command, (except for Deputy Chief ██████ and Chief ██████ At the DRP meeting Chief ██████ decided that the Grievant should be terminated. On June 22, 2022, the Grievant

⁴ City Exhibit #3

was served with an Intended Notice of Discipline. In this Intended Notice Chief [REDACTED] stated his reasons for the disciplinary action.

“This letter is to notify you of my intent to recommend to the City Manager that you will be dismissed from your position of Police Officer (2215) with the San Jose Police Department. The proposed disciplinary action is based upon the following:

1. On February 17, 2022, at approximately 0110 hours, you were involved in a preventable traffic collision. This collision was your second preventable traffic collision within three years and years seventh known preventable traffic collision while on duty. This conduct is cause for discipline pursuant to San Jose Municipal Code Section 3.0 4.1370: (B) Misconduct (C) Incompetence (E) Failure to Observe Applicable Rules and Regulations

Your conduct violates the San Jose Police Department Duty Manual Section L 1907 Driving, L 6900 Traffic Accidents, and L 7000 Accidents Involving Department Members. Information supporting the charges above is contained in the attached material and is incorporated herein by reference. In addition to considering the significance of the acts noted above, I have reviewed your personal history and noted that you have been employed with the City of San Jose since June 25, 2012. I have also noted the following:

- On or about April 14, 2021, you received a forty (40) hour suspension and were prohibited to drive a City Vehicle (until completion of drivers training) for being involved in another preventable traffic collision on 04-08-2020 (Combined Discipline T2020-0095 and I2020- 0097).*
- On or about September 28, 2017, you received a forty (40) hour suspension, removal from the Field Training and Evaluation program (FTO), were assigned to the Main Lobby, and prohibited from driving a city vehicle for a period of six months for being involved in a preventable traffic collision (03-05-2017).*

- *On or about September 28, 2017, you received a ten (10) hour suspension without pay for violating the terms of your Disciplinary Settlement Agreement for being involved in the 03-05-2017 collision.*
- *You received a “Needs Improvement” in the key element of Judgment and Problem Solving on your performance appraisal for the period of 06-23-2016 through 06-22-2017.*
- *On or about May 08, 2017, you received a Documented Oral Counseling for failure to properly control a citizen’s property.*
- *On or about August 8, 2016, you entered into a Disciplinary Settlement Agreement to serve a ten (10) hour suspension without pay for two preventable traffic collisions 09-14-2015 and 0-130-2016.*
- *You received a rating of Needs Improvement in the key element of Judgment and Problem Solving on your performance appraisal for the period of 06-24-2015 through 06-22-2016.*
- *On or about March 06, 2016, you received a ten (10) hour suspension without pay for accidentally discharging your department-issued Assault Rifle (AR-15) in the field.*
- *On or about October 23, 2015, you received a Letter of Reprimand for a preventable traffic collision (03-14-2015).*
- *You received a rating of “Needs Improvement” in the Key Element of Judgment and Problem Solving on your performance appraisal for the period of 06-24-2014 through 06-23-2015.*
- *On or about November 15, 2014, you received a Letter of Reprimand (LOR) for a preventable traffic collision 07-20-2014.*

Before the proposed discipline is implemented you have a right to request a pre-disciplinary Skelly conference, which provide you an opportunity to respond and provide relevant information. Because this is not an evidentiary hearing, you have no right to call or to cross-examine witnesses. However, you may be represented by a union representative or legal counsel...”⁵

⁵ City Exhibit #5

After the Grievant withdrew his request for a Skelly Conference, a Notice of Discipline was served on the Grievant on July 22, 2022. This letter notified the Grievant he was being dismissed from his position as a Police Officer effective July 23, 2022. In this Notice from [REDACTED] [REDACTED] the Director of Employee Relations she repeated Chief [REDACTED]'s reasons for his decision to terminate the Grievant.

The Grievant's Performance Evaluation for the time period of June 2012 to June 2013 contained one Exceptional rating, three Above Standard ratings, three Meets Standard rating, with an overall rating of Above Standard.⁶ The Grievant's Performance Evaluation from June 2013 to June 2014 contained four Above Standard ratings, three Meets Standard rating, with an overall rating of Above Standard.⁷The Grievant's Performance Evaluation for the time period of June 2014 to June 2015 contained four Above Standard ratings, three Meets Standard ratings, and one Needs Improvement rating in Judgement and Problem Solving, with an Overall Rating of Meets Standard.⁸ For the time period of June 2015 to June 2016, the Grievant received four Above Standard ratings, two Meets Standards, and one Needs Improvement in Judgement and Problem Solving, with an overall rating of Meets Standard.⁹ For the time period of June 2016 to June 2017, the Grievant received six Above Standard ratings, and one Needs Improvement in Judgement and Problem Solving with an Overall Rating of Above

⁶ Grievant's Exhibit #60

⁷ Grievant's Exhibit #61

⁸ City Exhibit #16

⁹ City Exhibit #13

Standard.¹⁰ For the time period of June 2018 to June 2019 the Grievant received four Exceptional ratings, three Above Standard ratings, with an overall rating of Exceptional.¹¹ For the time period of June 2020 to June 2021, the Grievant received seven Above Standard ratings, with an overall rating of Above Standard.¹²

Chief ██████ testified that he reviewed and agreed with Sergeant ██████ and Lieutenant ██████'s findings and recommendations and reviewed all of the diagrams and photographs presented to him by them. He also reviewed his prior disciplinary record and performance evaluations. He said that based on all of his accidents and the progressive discipline and training, the department did everything it could for him and the only way to protect the public and other officers is to dismiss the Grievant. He testified that he had concerns with the lack of a plan by the Grievant as to why he was following the suspect in his vehicle. He testified that he believed there should have been a separate investigation as to his tactical conduct. He said that he concurred with ██████ and ██████ that ██████ violated CVC 22107 and made a turning maneuver that caused the accident based on the diagram. He said that a stationary object does not move and there had to be some kind of turning maneuver to hit the pole. Chief ██████ said it was not possible it was done by a side swipe. He further testified that ██████ and ██████ were incorrect in applying Section 22107 and should have used a different section based on what was presented in this Arbitration. He said

¹⁰ City Exhibit #10

¹¹ Grievant's Exhibit #62

¹² Grievant's Exhibit #63

that in determining the final discipline he looked at whatever was in the IA file for preventable accidents. He said the Lieutenant can only look back three years, but he can look back further. █████ testified that he did not know how fast █████ was going or if he turned left or right. █████ stated the Grievant's driving was such that he caused the accident, and there was no evidence that he was trying to avoid anything when he hit the pole, and he (█████ doesn't know why the Grievant hit the pole which is something that should have been explored more.

The Grievant testified he told Officer █████ at the scene of the accident, where he entered the park, and where he first saw the suspect. Officer █████ in his conclusions did not understand what he was telling him, and he could only enter the park in one location because of a deadbolted pole as well as large boulders. The Grievant said he drove slowly around the curve and then accelerated coming out of the curve and was going 10-15 mph. He said the entire incident from entering the park until the suspect disappeared into the bushes took 15-20 seconds. He said at the time of the incident there was another incident going on, and radio traffic was restricted so he did not think at the time he could get others to form a perimeter, and he decided to detain the suspect on his own or to get close enough to where he could engage him and buy time. He testified that he did not consult with a representative prior to asking Officer █████'s questions because that option was not given to him. He testified that the suspect crossed the path when he was between 20 and 40 feet from the light pole that he hit. He said it took 10-15 seconds for him to hit the light pole from when he entered the park.

Position of the Parties

The following represents a summary of the arguments raised by the parties in this arbitration.

City's Arguments:

The City argues the arbitrator must determine whether SJPD had evidence to support their conclusion that ██████'s conduct amounted to misconduct, incompetence, and/or failure to observe applicable rules or regulations based on a preponderance of the evidence and if so must uphold the penalty imposed by the City. The arbitrator should not substitute their own judgement unless it finds the City's decision was arbitrary, capricious, or a patent abuse of discretion. The arbitrator must also consider whether there is a likelihood of recurrence of the behavior and the potential harm to the public. There is no doubt the City had cause to terminate ██████

The evidence shows that ██████ violated SJPD Duty Manual L 1907 by not using reasonable judgment when operating his vehicle. The evidence shows there was sufficient lighting to see the pole before he struck it and it is inconceivable that ██████ could not have seen the pole as he was driving on the sidewalk in his pursuit of the suspect. Therefore, he did not use reasonable judgment by striking a stationary object. Sergeant ██████'s determination that the accident should be classified as "Preventable" pursuant to L 7004 because he did not pay attention to the roadway and failed to drive the vehicle in a straight course was correct. ██████ also came to the same conclusion that the accident was preventable and was not driving with such due regard to avoid a collision

from happening. [REDACTED] also testified that [REDACTED]'s failure to make a radio dispatch that he was making a pedestrian stop, indicates he was not properly performing his task. The chain of command officers also concurred with the finding that the accident was properly categorized as preventable.

The City argues that [REDACTED] violated California Vehicle Code 22107 by failing to drive the vehicle in a direct course because he veered his vehicle to the left and struck the pole. If [REDACTED] had been driving the vehicle in a direct course, he would not have struck the inanimate object. Sergeant [REDACTED] assigned the closest Vehicle Code provision he could find to [REDACTED]'s driving. This violation of the Code is independent of the determination that he violated the Duty Manual. Sergeant [REDACTED], [REDACTED] and all the other officers found that the Grievant violated L 1907 and L 7004 by operating the vehicle in an unsafe manner and did not exercise prudent and careful judgement to prevent the accident. If the Arbitrator finds that [REDACTED] did not violate CVC 22107 it should not negate the determination that [REDACTED] caused a "preventable" accident.

The City argues that the dismissal of the Grievant is the appropriate level of discipline. His history as an officer is replete with violations, preventable accidents, prior discipline and performance deficiencies in the Key Element of Judgment and Problem Solving. Prior to the accident in 2022, the Grievant was involved in six traffic accidents that were determined to be "preventable". Less than a year prior to this accident [REDACTED] served a 40-hour suspension and was prohibited from driving a vehicle until completion of driver's training. He had also been prohibited from driving a City vehicle for six months and was assigned to

lobby duty for another accident in 2017. He has been warned that his driving was an issue for him, and his driving habits needed to improve. Chief ██████ testified that he considered the Grievant's entire past discipline record in making his recommendation to dismiss. There is no rule or legal authority that precludes the Chief from reviewing and considering the officer's entire accident history when deciding what level of discipline to impose. The Grievant's driving record creates a risk to the public. The Grievant has been progressively disciplined and has attempted to improve his performance and has exhausted all less drastic discipline. Dismissal is the only remaining option. The Grievant caused his seventh preventable accident since 2012, the decision to terminate should be upheld by the Arbitrator.

Grievant's Arguments:

The Grievant argues the City has failed to meet the just cause standard due to the City's POBRA violation when taking ██████'s statement. Sergeant ██████ directed Officer ██████ to take the Grievant's statement while doing the accident investigation. ██████'s interrogation of ██████ which was ordered by ██████ might lead to punitive action and therefore the Grievant was entitled to POBRA protection. ██████'s claim that he advised ██████ he was entitled to consult with a representative before providing a statement is not credible. ██████ never captured this alleged warning on his bodycam and never documented any warning in his report or in any memo. ██████ also failed to inform ██████ about any POBRA rights, and ██████ testified that he was to take the Grievant's statement that night at the scene of the accident. ██████ also testified that he

gave no POBRA directive to [REDACTED] and did not document any discussion with him of his waiver of POBRA rights. The only evidence of [REDACTED]'s POBRA warning is his testimony at the hearing a year and a half after the investigation. [REDACTED] in his testimony, denied ever receiving any POBRA warning or directive from [REDACTED] or [REDACTED]. [REDACTED]'s statement was obtained in violation of POBRA. The Chief of Police testified that he did not believe that [REDACTED] was entitled to POBRA protection in taking his statement about the accident. The assertion that POBRA is only triggered when an interview is conducted by his supervisor or by IA, and only with the intent of future discipline. POBRA encompasses questioning by a commanding officer or any other member of the employing department that could lead to punitive action. Traffic collision investigations are not exempt from POBRA. The case law is clear that POBRA was triggered when [REDACTED] was subject to questioning on matters which in fact lead to his discipline and termination. When POBRA is violated, suppression of evidence is the appropriate remedy, and his statement should be suppressed.

The Grievant argues that the evidence shows there was no violation of CVC 22107 and is inapplicable and cannot support a finding that the accident was preventable. The City has tried, post-hoc to speculate that other reasons support a finding that his accident was preventable. [REDACTED]'s report, which is the foundation of his discipline, found that [REDACTED] failed to safely make a turning maneuver within the city park. The City has failed in their burden to prove a violation of CVC 22107, the basis of the preventable accident. The City cannot rely on post-hoc theories to support the discipline, such as a failure to activate his

BWC or call for additional officers. Having conceded that CVC 22107 is inapplicable, the City now relies on Duty Manual L 1907, and simply articulates that the act of hitting a stationary object is sufficient to conclude the accident was preventable. Nowhere in the Duty Manual does it refer to a brightline stationary object standard. The Chief in his testimony, admitted that [REDACTED] and [REDACTED] were incorrect in applying 22107 and that the Department should have explored more about why the accident occurred and why he hit the pole.

The Grievant argues the Department's investigation was not thorough, fair, or complete and cannot support discipline. The factual record from Officer [REDACTED] is inaccurate as to where and how the accident occurred. It also failed to document the speed of the accident and the location of the suspect. The Department believed that the suspect was on his right for the duration of the incident when in fact he was on his left. [REDACTED] was in fact proceeding straight when he collided with the pole. If the Department had relied upon accurate information, the discipline may never had occurred. With the deficient record created by [REDACTED] [REDACTED] and [REDACTED] the Arbitrator is unable to make factual findings, there simply was not an adequate investigation. The Chief of Police acknowledged there was an incomplete investigation into the Grievant's actions, and he never ordered any additional investigation.

The Grievant argues the accident should have been classified as "other" rather than preventable. This classification is where damage occurs while properly performing a task necessary to protect citizens or their property. There is no dispute that the Grievant's substantive task, seeking to apprehend the

suspect was proper and necessary to protect citizens. The Chief admitted in his testimony he did not have enough information to assess what happened, which should be fatal to the City's case, who bears the burden to support their chosen discipline.

The Grievant argues that the Chief violated Section L 7007 when he used more than three-years of history of preventable accidents as specified in the Duty Manual. ██████ testified that the three-year window was mandated by the Duty Manual and the Grievant was not afforded a clean slate beyond that as the Chief factored in accidents happening more than 7 years ago. Additionally, the Department did not provide to the Grievant all the documents they relied upon in determining his discipline. The City withheld all of the prior disciplinary materials which factored in the termination decision and was not given to the Grievant until the arbitration hearing. ██████ only had one prior preventable accident in the three years preceding February 17, 2022. This accident on April 8, 2020 was not accurately portrayed in that the Grievant was **not sustained** on an allegation of misrepresenting the accident. The City also described an accident which occurred in 2017 in an incorrect manner, as the other driver was found to be in violation of the Vehicle Code and at fault for the collision. Other prior discipline such as an oral counseling for failing to secure a citizen's identification card, which occurred five years ago, have no reasonable connection to the Grievant's driving conduct. The department has also failed to acknowledge the Grievant's last two performance evaluations where he received four exceptional ratings and none below meets standards along with more than a dozen commendations.

The Grievant argues there was not just cause for his termination and he should be reinstated with full back pay including lost overtime.

ANALYSIS AND DISCUSSION

In a discipline case the employer has the burden to prove that it had proper or “just cause” to terminate the grievant. While arbitrators may differ in nuance over the level of weight given to the different elements of just cause, there is broad consensus over its main components. The components can be summarized in the following manner: 1) Did the grievant violate some rule or procedure for which discipline is warranted? 2) Was the grievant aware of, or should have been aware of the rule? 3) Does the Employer have sufficient proof that the grievant engaged in this act? 4) Was the Employer’s chosen discipline reasonable for the offense committed? 5) Is there some reason this discipline should be mitigated, i.e., disparate treatment, seniority, or procedural defect?

It is well understood that the Employer must have sufficient evidence to support their stated charges outlined in the Notice of Discipline. This discipline is based on the Grievant’s accident which took place on February 17, 2022. The Grievant raises a threshold issue that the termination should be rejected based on POBRA violations. I agree with the Grievant’s argument that he deserved the protections offered by POBRA in the Department’s investigation of his traffic accident by [REDACTED] and his assigned team of investigators. I also agree with the argument that [REDACTED]’s report should have mentioned in it, or attached to it in a document, the fact that the Grievant was given a POBRA warning by Sergeant [REDACTED]. I need not make a determination as to whether the Grievant’s POBRA

rights were violated in this case, as I have found that there was not just cause for the termination based on the factual record and the level of discipline imposed.

The Department as explained in their Intended Notice of Discipline determined that the Grievant was involved in a “Preventable” accident on February 17, 2022, which violated multiple San Jose Police Department and Municipal Code Sections. This “Preventable” determination made by Sergeant [REDACTED] was supported by the chain of command and Chief [REDACTED]. However, the investigation by [REDACTED] and his team, which the chain of command and Chief [REDACTED] relied upon, is deficient in that it contains several basic factual errors and lacks several key elements. I should note that this investigation is hampered by the lack of any video recording, either by the activation of the BWC by the Grievant and the team investigating the accident or any patrol car video recording of the incident. Additionally, there was no data taken from the vehicle or an investigation by [REDACTED] which determined the speed of the patrol car during the chase of the suspect by the Grievant. We can only rely on the Grievant’s estimation of his speed, which is understandably unreliable without any supportive data. The evidence shows that [REDACTED]’s report of the accident and supporting testimony, contains basic factual mistakes as to where the suspect was during the chase and the route that Officer [REDACTED] took in the park while driving his patrol car. The evidence shows the Grievant did not make a turning maneuver into the light pole. While the Chief’s Notice of Intended Discipline did not cite CVC 22107, he relied upon [REDACTED]’s report when making his determination of the level of discipline, and his support of the determination that

the accident was “Preventable”. Based on the evidence presented in the Arbitration hearing and the testimony of the participants it cannot be concluded that the Grievant violated CVC 22107 as there was no turning maneuver into the pole and it is more reasonable to assume the Grievant sideswiped the pole while driving on the park sidewalk while following the suspect. The Chief in his testimony acknowledges that he is not sure how the accident occurred based on the evidence, and the incorrect and meager investigative data calls into question the support for a “Preventable” accident conclusion.

The Chief has legitimate concerns about the Grievant driving into a stationary object when there was no evidence of the Grievant reacting to stimuli, such as a person approaching the vehicle or an individual throwing something or shooting at the vehicle. However, this was not the information the Chief based his decision on at the time he determined the Grievant should be terminated. He relied upon ██████’s report that the Grievant violated CVC 21107 by turning into the pole.

The Chief raises legitimate concerns not only about the Grievant’s driving into a stationary object, but his failure to activate his BWC or calling for backup, prior to attempting to apprehend an armed suspect. However, these non-driving issues were not investigated or cited in the NOD and cannot be considered as a basis for discipline. Had the investigation been more accurate and complete there may have been a basis to discipline the Grievant. If this occurred, the City may have a stronger basis to show cause for the discipline of the Grievant for colliding with a stationary object in his pursuit of the suspect that evening and

failing to activate his BWC. However, there still would not have been just cause for his termination for the following reasons.

Whether or not the Chief considers the Grievant's three past years, or the entire past disciplinary record of the Grievant, there is an obligation to consider the complete record of the Grievant during his employment with the Department. The Department has shown the Grievant exhibits a propensity for getting in accidents while operating his patrol vehicle, and it is undisputed that he has received progressive discipline for these preventable accidents. It also cannot be ignored that many of these preventable accidents, including the February 17 accident, were very minor in nature, resulting in no injuries and minimal cost to the City. While this does not prevent discipline from being issued, discipline must be commensurate with the facts of each accident in assessing the level of appropriate discipline.

Just cause demands that the entire record of the Grievant and his service to the Department must be considered, and not just his disciplinary record. The Grievant's Performance Evaluations as determined by his supervisors, show that he has been judged to be a more than average officer. While he had "Needs Improvement" in Judgement and Problem Solving on several of his evaluations, his overall rating has been mostly Above Standard or Exceptional, especially in looking at his most recent yearly evaluations. This record cannot be ignored in determining the level of discipline to be imposed when warranted.

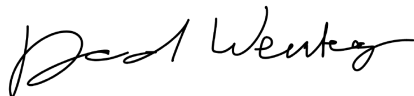
Given that this latest incident was based on an investigation that misstated or did not contain key facts, and that the complete record of the Grievant was not considered I cannot find that there was just cause for his termination. The Grievant shall be reinstated with full seniority and made whole. I note that the Grievant has argued for overtime to be considered in a make whole remedy, which I am not including in this Decision.

I have considered all of the evidence and arguments made by both parties. I, however, may not have repeated every item of documentary evidence or testimony, nor may I have repeated completely all of the arguments presented in the respective briefs.

AWARD

Having received and considered all of the evidence and arguments relevant to this matter, I make the following award:

1. There was not just cause for the termination of [REDACTED] [REDACTED].
The Grievant shall be reinstated with full seniority and made whole.
2. The Arbitrator retains jurisdiction over this matter for the sole purpose of resolving any issue pertaining to the remedy so ordered.
A request to the Arbitrator to exercise jurisdiction shall be made in writing as to the exact issue and shall be served on the other party at the same time that it is filed with the Arbitrator. It is within the sole discretion of the Arbitrator to determine whether the issue presented by the party or parties is within the jurisdiction of this provision pertaining to the Arbitrator's retention of jurisdiction.



David A. Weinberg
Arbitrator
September 22, 2023