

JAMS ARBITRATION CASE REFERENCE NO. 5110000212

San Jose Police Officers' Association;
[REDACTED]

Petitioners,

vs.

FINAL AWARD

**City of San Jose;
San Jose Police Dept.,**

Respondents.

Introduction

This matter involves an arbitration of a grievance brought by the San Jose Police Officer's Association (SJPOA) challenging the termination of officer [REDACTED] (hereinafter, [REDACTED] against the City of San Jose and the San Jose Police Department. The parties agreed to the undersigned Arbitrator, pursuant to Article 25.8-25.10 of the Memoranda of Agreement (MOA) of the City of San Jose and the San Jose Police Officer's Association dated July 1, 2021-June 30, 2022. (Ex. 90.)

Pursuant to the grievance procedures, and because of additional hearing time needed, the arbitration hearing was held in two (2) sessions, February 12-16, 2024, in Walnut Creek and March 12-15, 2024, in Sacramento, California.

The SJPOA and [REDACTED] were represented by [REDACTED] and [REDACTED] of [REDACTED], LLP. The City of San Joe and the San Jose Police Department were represented by the San Jose City Attorney and [REDACTED]

The following witnesses were sworn and testified: [REDACTED]
[REDACTED]
[REDACTED]

Exhibits 1-91 and two videotapes were admitted.

Issues

Although the parties framed the issues somewhat differently, the issues are:

Was there just cause to support the termination of [REDACTED] If not, what is the appropriate level of discipline?

Contract Provision

Section 25.8.1 of the MOA provides that employees in the bargaining unit shall only be disciplined for cause. Section 25.5.5 provides, in part:

The Arbitrator shall hold a hearing on the issue or issues submitted, or as determined by the Arbitrator ... and render a written opinion and reasons for the opinion as soon after the hearing as possible. The opinion shall be final and binding on both parties and shall be limited to the issue or issues involved. (Ex. 90 at SJ00825.)

Standard of Review and Burden of Proof

The Arbitrator will review de novo the charges, the facts, disputed legal issues and whether the investigation was complete, thorough and reflects just cause for the discipline imposed. If it does not, what is the appropriate level of discipline?

Respondents have the burden of proof to show that a thorough investigation was carried out which supports the charges made and the discipline imposed. Duty Manual C1723 states that a preponderance of the evidence standard applies, which requires proof that the “existence of a fact is more probable than its nonexistence” to sustain an allegation of misconduct. (Ex. 76 pp. 124-125.)

Credibility of Evidence and Witnesses

The Arbitrator has considered the evidence presented and weighted the credibility of that evidence and the witnesses, and the Findings and Analysis herein reflect the Arbitrator’s credibility conclusions.

Findings

July 17, 2021 Incident

██████████ graduated from the Police Academy and became a sworn police officer in approximately June 2020. (AT 1523:19-1524:5 (██████████) She then attended and completed the Field Training Officer Program and became a “solo beat” or patrol officer. This was her lifelong ambition which she pursued even over her parents’ objections. She was ██████ years old on July 17, 2021, and had been serving as a patrol officer for approximately eight months. On July 17, 2021, at around 2:30 a.m. ██████ neared an intersection of ██████████ Avenue and ██████ Road, and observed several cars leaving a parking lot where a bar was located. She had prior experiences in that area and had made prior stops for DUI and had recovered weapons.

One of the departing vehicles was a black ██████████ sedan which exited the parking lot and was driving outside the lanes and weaving between lanes. ██████ decided to stop the vehicle as there

were traffic violations and she suspected a DUI. She reported she was going to initiate a stop and radioed the license plate number. Then she activated her lights and chirped her siren while on [REDACTED] between [REDACTED] Road and [REDACTED] Street. She chirped the siren to get the uninvolved vehicles to move over.

[REDACTED] testified she was not initially directly behind the black [REDACTED] and she was uncertain whether the driver of the [REDACTED] knew she intended him to stop. The video shows a white car pulled to the curb and stopped which may have increased her uncertainty about whether the black [REDACTED] knew she was signaling him to stop. The [REDACTED] then made a sharp right turn on to [REDACTED] Street and [REDACTED] followed, accelerating to keep up with him to ensure he knew she wanted him to stop. [REDACTED] was now directly behind the black [REDACTED] and she was followed by [REDACTED] who also had his lights and siren on.

The vehicles proceeded on [REDACTED] Street at high speed until [REDACTED] saw the black [REDACTED] run the stop sign at [REDACTED] Street and [REDACTED] Street. At that point she put on her brakes and rapidly slowed and shut off her lights and siren. Even though she slowed significantly, she did go through the stop sign at [REDACTED] Street, although she said she'd slowed enough to "clear" the intersection, she continued to slow and stopped. [REDACTED] was coming up next to her. Both officers heard a crash. [REDACTED] and [REDACTED] proceeded to the intersection of [REDACTED] Street and [REDACTED] Road. There was a lot of debris on the street. [REDACTED] drove to the location of the black [REDACTED] and some people there told her he had left his car, which was badly damaged, and run away. [REDACTED] followed with her flood lights on where the witnesses said the suspect had run but did not see him.

She then returned to the scene and parked her patrol car, so it was blocking traffic on the east side of [REDACTED] Road. She then left after some time and wrote her report. She later reported being "overwhelmed and stressed." (TR 1533:10-1562:12 ([REDACTED])

This was the first time that a person failed to stop when [REDACTED] signaled them to do so. It was also the first time [REDACTED] was at the scene of a severe accident.

[REDACTED] told [REDACTED] the passenger in the other car was dead and had been thrown out of the car on impact with the [REDACTED]. [REDACTED] had gone to the area of the crash as [REDACTED] went to the location of the [REDACTED]. [REDACTED] had immediately called for medical assistance.

Following the accident, officers collected a number of video surveillance cameras from homes and businesses. [REDACTED] [REDACTED] had been at the scene and had talked with [REDACTED] ([REDACTED] supervisor) as well as [REDACTED]. Later that day he sent a request for a department-initiated investigation (DII) with respect to the accident to [REDACTED] [REDACTED]

████ had told █████ and █████ she had attempted to stop the suspect on █████ and █████ Street as she suspected a DUI. █████ said in his DII request that he'd seen several videos and felt there were inconsistencies between the videos and the police reports he'd seen. He'd also collected some GPS data which showed █████ vehicle at 80 mph and █████ at 77 mph.

████ █████ listed the sections of the Duty Manual which he felt needed to be investigated, including Sections C2103 and C1302. (Ex. 1, 000116-000117.)

Internal Affairs Investigation:

The SJPD's Duty Manual provides the policies and procedures to be followed (Ex. 76.) The Internal Affairs Department has the responsibility to conduct complete, thorough, and impartial investigations. (Ex. 76.)

The investigation was first assigned to █████ █████ on July 23, 2021. █████ █████ sent a 120-day notice and asked that the videos collected be put together in a synopsis video by █████ █████ but apparently did nothing else.

There is a 365-day limit on the time a department can bring charges against an officer. With that deadline approaching the investigation was reassigned to █████ █████ on March 6, 2022, some eight months after it had been assigned to █████ █████

On May 4, 2022, █████ sent both officers interview notifications, but he did not interview █████ until May 26, 2022. (Ex. 7, p. 00060.) █████ also testified he didn't start to write the analysis portion of his report until after he'd interviewed █████ He submitted his final 55-page report six (6) days later. (TR 239:19-330:2(█████

Internal Affairs Report:

█████ investigative report found that the 12 alleged violations were all supported and recommended it be forwarded to █████ chain of command for Findings and Recommendations. The sections found to be supported by a preponderance of the evidence according to █████ █████ included: L2102, L2111, L2113, L2108, L4435, L4436, L2112, L4203, L6904, L6910, R1108, and R1201. (Ex. 1, 000017-000022.) These were the allegations (charges set forth in the Notice of Intended Discipline (NOID) of July 15, 2022. These allegations do not list either L2103 or C1302.

Pursuant to █████ recommendation, the investigation report was referred to █████ █████ who was about to leave the department, but he was █████ Command Officer in her chain of command. (Duty Manual Section C1716.) Duty Manual Section C1717 sets forth the Command Officer's responsibilities.

These duties include a thorough review of the AI investigation report, including a review of the Officer's records, including but not limited to the IA and personnel records and an employee interview which is audio recorded. [REDACTED] refused the interview, but the Duty Manual states the officer does not have a right to refuse the interview. [REDACTED] refused, but [REDACTED] did not insist, so there was no interview of [REDACTED] by [REDACTED]

Additionally, [REDACTED] was to discuss the investigation with the [REDACTED] immediate supervisor and obtain information concerning the officer's present job performance and any other pertinent factors that might influence a disciplinary recommendation. The immediate supervisor's input is to be documented in the Command Officer's memo. (Ex. 76, pp. 121-122.) [REDACTED] did not interview [REDACTED] immediate supervisor.

[REDACTED] however, completed his work in 10 days and approved all 12 of the IA's findings and recommended that a DRP (Disciplinary Review Panel) be set. (Ex. 101 pp. 00052-00053, [REDACTED])

[REDACTED] [REDACTED] did not interview [REDACTED] He also relied on [REDACTED] "dot" video, without any consultation with [REDACTED] He concluded that [REDACTED] was only 200 feet from the intersection of [REDACTED] Street and [REDACTED] Road when she stopped. [REDACTED] [REDACTED] also considered the synopsis video, prepared also by [REDACTED] to be a "real time" video.

[REDACTED] testified that the "dot video" was not accurate nor was the synopsis video. (TR 516:9-517:11, [REDACTED] The [REDACTED] synopsis video more than doubled the time of the events on [REDACTED] Street. (TR 1362:25-1364:21; [REDACTED] Ex. 89; K & A 003293.)

Finally, even though [REDACTED] acknowledged that training and experience and/or human factors affected performance in sudden events and were relevant to the level of discipline, neither he nor [REDACTED] did any such analysis. (TR 809:23-810:7 [REDACTED] Had [REDACTED] contacted [REDACTED] immediate supervisor, he would have learned that [REDACTED] was still acting as a patrol officer and making vehicle stops and had been doing so for months.

Given the incomplete and erroneous reliance on the "dot's video and the synopsis video", the Arbitrator concludes that [REDACTED] failed to do a thorough and complete review of the IA report as required by Duty Manual C1717.

On July 7, 2022, a Disciplinary Review Panel (DRP) was convened to determine the discipline to be imposed on [REDACTED] (Ex. 1, p. 000040) [REDACTED] [REDACTED] did not attend. [REDACTED] testified he had assumed even before he saw the report that there would be violations because [REDACTED] had already made a preponderance determination. (Ex. 103 at 239:9-243:10 [REDACTED] Depo II.)

██████████ decided to approve the reports and determined that termination was the appropriate discipline. ██████████ also considered two (2) prior disciplinary actions which he said guided his decision to terminate. He stated ██████████ had “poor decision-making” and she had failed to follow the 12 Duty Manual sections upheld by the AI investigation which had led to the death of a civilian. (AT 884:18-24 (██████████) As discussed later, the two (2) prior disciplinary matters were very minor in comparison to the July 21, 2021 event.

Thereafter, at a meeting with ██████████ the recommendation of ██████████ was accepted, and ██████████ was terminated effective August 18, 2022. (Ex. 1, p. 000006.)

As noted earlier, after the charges were filed, and continuing until her discharge, ██████████ continued on her regular duty as a patrol officer. She was not assigned to desk duty, put on administrative leave, but continued to act as a “solo” patrol officer from the time the investigation began on July 23, 2021, when first assigned to ██████████ until the effective date of her termination, August 18, 2022, more than a year later.

Analysis

1. Pursuit Violations: L2102, L2108, L2111 and L2113:

A. Violation of L2102:

The primary focus of ██████████ investigation was the conduct of ██████████ before and after the vehicle collision between the suspect in the ██████████ and a member of the public at ██████████ Street and ██████████ Road. ██████████ concluded that ██████████ violated the pursuit policy. A review of the evidence discloses that the investigation was not thorough, was inaccurate in some respects and failed to examine human factors and crucial facts in the investigation.

██████████ a former San Jose Police Officer, testified that he had written the pursuit policy in 2006-2007 in response to the passage of SB719, which gives municipalities immunity from civil liability arising from pursuits so long as the department’s written policy meets certain vehicle code criteria, and the department complies with annual training and post-pursuit reporting requirements to the CHP via a CHP 187 form. (TR 1661:21-1663:9 (██████████) That policy was adopted on July 1, 2007. (TR 1671:13-1673:1.) The department never sent the CHP 187 form.

██████████ further testified that the purposes of the policy were several: (1) to provide meaningful guidance to officers by (a) crafting workable rules to avoid application of negligence *per se* by setting a reasonableness standard accounting for human performance and perceptual limitations and (b) in light of those limitations, codifying the ambiguity inherent in pursuit

development to afford officers the time necessary to resolve uncertainty and determine action, and (2) to maximize the likelihood of affording the City immunity in civil litigation. (TR 1666:9-1667:11; 17737:7-1738:13 (██████████

The policy was flexible by design, maximizing the circumstances in which a pursuit may be declared while simultaneously disclaiming strict liability and instead adopting a reasonableness standard (for purposes of evaluating compliance for disciplinary purposes). (TR 1739:16-1744:4; 1734:15-1735:5; see also TR 1696:23-1697:10; 1748:1-1749:5 (██████████ noted the necessity for flexibility in policies requiring rapid decision-making under difficult and evolving circumstances.

The pursuit policy does not require “perfect decisions” but “reasonable decisions.” (TR 1734:15-24, Ex. 77 at 000596.) The evaluative standard is whether another officer with the same or similar training and experience, facing the same or similar circumstances would exercise the same or similar judgment. (TR 1706:9-21 (██████████

To achieve that standard, the event in question mandates an exploration and reconstruction of events *through the eyes of the involved officer*, because although the outcome is known at the time of investigation, the officer’s decision-making was made in tense and rapidly evolving circumstances based on incomplete information and uncertain inferences. (emphasis added) (TR 1706:22-1709:2 (██████████ Such situational uncertainties would hold people to unrealistic expectations requiring superhuman judgment. (TR 1697:11-1698:22 (██████████ The reasonable officer assessment does not automatically accept the officer’s account of events. (TR 1834:8-1836:20 (██████████

If there are no truthfulness issues, then the officer’s account is reliable for purposes of determining how the officer processed it and how did that processing play into the objective reasonableness of their actions. (TR 1835:11-1836:20, ██████████

i. Failure to Evaluate Using the Officer’s Perceptions.

In this case, ██████████ failed to access the reasonable officer standard by first failing to reconstruct the event with reference to ██████████ account of her perceptual processing. The conclusions reached were based on ██████████ and ██████████ perceptions of the video evidence. The conclusions reached were based on how the investigators, ██████████ and ██████████ perceived the evidence shown on the synopsis video not on how ██████████ perceived the events.

██████████ and ██████████ both assumed when the black ██████████ took a sharp right turn onto ██████████ Street and his engine made a loud noise as he accelerated around the curve, as heard on the

synopsis video, that [REDACTED] also heard the engine noise and at that point she knew the [REDACTED] was fleeing from her. [REDACTED] never asked [REDACTED] if she heard that engine sound. Her lights and sirens were on, as were [REDACTED]. Her radio was also on as she had reported she intended to make a stop of the [REDACTED]

ii. GPS Data

The analysis of [REDACTED] relied heavily on GPS data, as well as the synopsis video prepared by [REDACTED]. No one was able to identify the sources of the GPS data or provide any opinion as to its accuracy. [REDACTED] was unable to identify the sources of the GPS data (TR 1506: 3-5 ([REDACTED]). There are apparently numerous GPS systems according to [REDACTED] [REDACTED] (Ex. 1104 at 138:3-143:24 ([REDACTED] Depo II.)) [REDACTED] stated that he had no interest in confirming the accuracy of the GPS, having faith the GPS providers did their jobs accurately. [REDACTED] performed a time, speed and distance analysis. (Ex. 107 at 25:24-25:16 ([REDACTED] Depo.)) He determined the GPS was inconsistent and exaggerated the 80-mph speed. (Ex. 107 at 87:25-92:3 ([REDACTED] Depo.))

[REDACTED] [REDACTED] attached different GPS data to his DII memo recommending an investigation. [REDACTED] agreed that the data used by [REDACTED] and [REDACTED] appeared inconsistent. (Ex. 101, 157:11-162:24, [REDACTED] Depo I.)

iii. Video Evidence

The synopsis video created by [REDACTED] [REDACTED] was relied upon by [REDACTED] [REDACTED] who said it showed in “real time” what had occurred. (TR 559:11-16 ([REDACTED])

However, [REDACTED] testified that her assignment was to create a video compilation that merely captured all the events but not to display those events as durationally accurate or “real time”. (TR 516:9-517:11 ([REDACTED]) No one ever spoke to [REDACTED] [REDACTED] about the limitations of her synopsis video. (TR 509:16-18 ([REDACTED])

[REDACTED] Petitioner’s expert, testified the video “extended the period and elongated the time of this incident.” (TR 1363:25-1364:21 ([REDACTED]) and [REDACTED] created their own video compilation to events in “real time.” The [REDACTED] video more than doubles the time of the incident. See Ex. 6, [REDACTED] video synopsis time from turn onto [REDACTED] Street until vehicle stops near [REDACTED] Road to 89 seconds, while [REDACTED] and [REDACTED] real time video measured the duration of the same events to 36 seconds. (Ex. 89, K and F 003293.)

[REDACTED] also created a series of colored dots. She testified the orientation of the dots is inaccurate and unreliable for purposes of speed, distance and proximity. (TR 524:22-526:4 ([REDACTED])

█████ however, relied upon the dot display and concluded █████ was 200 feet from the intersection of █████ and █████ Road. (Ex. 1 at 000048.) This assessment was wrong. █████ estimated █████ car was 400 feet from that intersection. (TR: 1370:21-1373:6 (█████) A simple conversation with █████ could have avoided this error.

Both █████ and █████ concluded that █████ must have seen the collision. (Ex. 1 at 000095.) █████ explained that it was very unlikely that █████ saw the accident. █████ stated she did not see the accident. At that point she had stopped and turned off her siren and lights.

It is clear that █████ concluded that the video surveillance proved that the suspect vehicle was fleeing from █████ when it turned sharply onto █████ Street. █████ also relied on the surveillance video to conclude that when the █████ turned onto █████ that it was fleeing from █████ (EX. 101 at 146:2-10 (█████ Depo 1.)) █████ specifically declared he had the “luxury of seeing the video.” (Ex. 101 at 162:10-25 (█████ Depo 1.))

This misuse of the video evidence is difficult to approve in light of the Internal Affairs Unit Guidelines which specifically caution investigators to be “mindful that audio or video recordings have limitations and may depict events differently than the events recalled by the subject officer.” (Ex. 117, p. 8.)

█████ described her perception that she could not conclude that the black █████ was fleeing her, until it ran the stop sign at █████ and █████ Street.

iv. No Analysis of Human Factors:

█████ made no effort to find what the Police Academy taught with respect to pursuits. (TR 347:10-18; 1127:1-7, █████ Nor did he obtain █████ training file. She did not receive pursuit training until November 2021, months after this event. (Ex. 29, SJ 000181.) █████ explained the Emergency Vehicle Operations course is only 4-6 hours behind the wheel in a parking lot, not at all like the conditions she faced on July 21, 2021. (TR 1668:15-1671:8 (█████

█████ testified that he was effectively precluded from considering or investigating and/or documenting any information pertaining to human factors because it would constitute an impermissible “opinion” or “assumption” and not an objective fact. (Ex. 101 at 232:4-234:14; 263:2-264:12, █████ Depo II.) Not all human factor evidence is an “opinion” – █████ testified because certain things are proven to be factual with regard to human performance and human limitations. (TR 1465:5-1466:8 (█████

However, █████ discussion of human factors was prominently displayed in his draft response to the IPA Appeal. The IPA wanted a truthfulness (a CUBO) evaluation of █████ but █████

She was not. Therefore, her discipline cannot be based on a violation of L2103.

C. L2108

Petitioner asserts that L2108 can't be violated because there was no pursuit, as [REDACTED] stopped following the suspect when he ran the stop sign at [REDACTED] Street and she determined he was fleeing from her and she turned off her lights and siren, and slowed down very substantially. Section L2108 appears from its language to apply only when a pursuit is ongoing. It does not state it is in effect when a pre-pursuit is underway. However, the vehicle code seems to apply whenever the lights and siren are not on.

The [REDACTED] sustained this violation that [REDACTED] [REDACTED] failed to clear the intersection at [REDACTED] and [REDACTED] because she did go through the intersection, which was controlled by a stop sign. However, in the IPA appeal [REDACTED] [REDACTED] said [REDACTED] slowed enough to "clear" the intersection.

If [REDACTED] was going slow enough to "clear" the intersection, as [REDACTED] [REDACTED] opined in the IPA appeal, then she complied with the requirements of L2108 to drive tactically.

D. L2113

[REDACTED] terminated the pursuit after 13 seconds while following the [REDACTED] on [REDACTED] Street. (Ex. 89 ([REDACTED] [REDACTED] testified that [REDACTED] had done all she should have done to meet the requirements of the pre-pursuit policy L2102, so he concluded there was no pursuit.

The fact that [REDACTED] did not evaluate [REDACTED] conduct from her perception rather than the synopsis video means the investigation was not complete, thorough or fair to [REDACTED]

E. *Body Worn Camera Violations of L4435 and L4436*

[REDACTED] was found to have violated the activation and deactivation policies of the Duty Manual. L4435 discusses when to activate the body worn camera (BWC) and L4436 discusses when to deactivate the BWC.

Activation: The section specifically notes that human performance limitations in particularly stressful, critical situations should be considered. [REDACTED] did not investigate human factors at all and disregarded evidence of systemic training issues. [REDACTED] testified she was trained throughout the Field Training that she needed to activate the BWC only when she made contact with the person, i.e., when we got out of the police vehicle during a stop. (Ex. 8 at 0000574 ([REDACTED] She stated her training was when we encounter people then we should activate the BWC. (TR 1569:4-10 ([REDACTED] This training explains why she did not activate the BWC when she initiated the vehicle stop, when following the suspect or upon initially arriving at the scene of the accident.

██████████ also believed the activation policy was as ██████████ understood it. ██████████ testified many officers understood the policy that way as well. (TR 1799:7-18 (██████████

Deactivation: This allegation is based on two times of noncompliance. 1) the 40 second deactivation when ██████████ and ██████████ spoke after they had stopped and 2) a deactivation when ██████████ spoke to ██████████ ██████████ at the scene. (Ex. 1 at 000050 (██████████ Ex. 1 at 000102-000103 (██████████

The contact with ██████████ was not misconduct as ██████████ told ██████████ to turn off the BWC. ██████████ testified in his deposition that he was previously unaware that ██████████ had told ██████████ to turn off the BWC and that if he had known he would not have found a violation. (Ex. 101 at 188:10-191:23 (██████████ He changed his testimony at the hearing and said even if ██████████ had directed ██████████ to turn off the BWC, it only presented a “tough decision” for the officer. (TR 619:20-621:2 (██████████

The ██████████ deactivation was incorrectly calculated by ██████████ ██████████ who stated in his report that it was 80 seconds, when in fact, it was only 40 seconds. (Ex. 1 at 000103.) The conversation with ██████████ was for each to check on the other. ██████████ found ██████████ was still involved with an “active investigation” and, therefore, violated the deactivation policy. That section provides an exception for an officer to deactivate while still assigned to a call or investigation” as long as he/she has cleared the same, is no longer involved in the care or custody of a prisoner or another person, or no longer actively involved in an investigation, including collecting physical evidence.” (L4436.) ██████████ told ██████████ that at the time of the deactivation when speaking with officer ██████████ she was “not assigned to anything.” (Ex. 8 at 000560 (██████████ She said she wasn’t assigned, not collecting evidence and wasn’t making contact with anyone. (Ex. 000561 (██████████

It seems this testimony by ██████████ clearly meets the criteria for the exception to L4436 and should not have been sustained.

F. L211 Communications

This section of the Duty Manual indicates communications which should take place during a pursuit. This section is not mandatory, as it uses the word “should.” It also recognizes that updating information may interfere with driving abilities.

██████████ testified that this section, which he authored, does not set a strict liability standard, but recognizes that updating may affect driving performance. (TR 1773:16-1774:11 (██████████ There was no consideration of whether or not updating information “to the extent practical without

compromising their driving abilities“ might have been a problem for ██████ stated: “I don’t believe specifically I get into that in the write-up.” (Ex. 100 at 154:13-20 (██████ Depo I.))

It appears without considering these limiting conditions that the investigation was not complete or thorough.

2. Investigative Violations L2112, L4203, L6904 and L6910

These Duty Manual sections are based on post-incident investigative conduct.

A. L2112

This section sets forth the actions to be taken to control the scene at the conclusion of all pursuits. ██████ stated in his report that “there was little effort (by ██████ to attempt to capture the suspect.” However, ██████ did pursue the suspect with her flood lights on, but was not successful.

██████ testified that section L2112 had no application to ██████ conduct. (TR 1775:17-1778:6, ██████ The purpose of the policy which ██████ had drafted was to keep over-zealous officers from “bum-rushing” on foot a suspect vehicle at the end of a pursuit. (TR 1775:17-1776:22

██████ also testified that when you have lost visual on the suspect and you find the wrecked suspect car and there is no suspect in the car, the “tactical principles” have no application. (TR 1777-1778:6 ██████ ██████ never exited her vehicle upon her approach to the suspect vehicle. (Ex. 6, video synopsis.) This violation should not have been sustained.

B. L4203

This section is concerned with the arrest of perpetrators at or fleeing from a crime scene (Ex. 1 at 000106.) The suspect here did flee the scene. ██████ made some effort to find him, but did not. ██████ fails to give any credit to ██████ for trying to find the suspect.

C. L6904

This section discusses the officer’s responsibilities upon arrival at the scene of a vehicle accident. There are six (6) bullet points in this section:

1. Parking of city vehicles
2. Initial observations
3. Determine injuries
4. Protection of property
5. Determine nature, i.e., hit and run. If so, it refers officer to L690, and
6. Determine participants

██████████ report faults ██████ only with respect to item 6 (Ex. 1 000107.) ██████████ states that ██████ should have stayed with the potential witnesses and obtained their information. (Ex. 1 at 000107.) This section, in item 5 tells the officer to “determine nature” and if it is a hit and run to refer to Duty Manual section L6910. (Ex. 81.) ██████ had already radioed that it was a hit and run.

As ██████ and ██████████ arrived at the accident scene together, ██████ went to the suspect vehicle and ██████████ went to the victim’s car. ██████ heard ██████████ call for emergency aid at 2:34:43, seconds after the accident. (TR 1632:7-12, ██████

This section was not applicable to these circumstances and should not have been sustained.

D. L6910

This section describes the procedures to be followed in a “hit and run” accident. The section indicates that “after providing medical care to the victims and protecting property”, the officer will locate witnesses who can assist in identifying the suspect and the hit and run vehicle.” (Ex. 82.) ██████ blocked the north side of ██████████ Road with her vehicle. ██████████ Traffic Investigation Report notes that they did locate evidence from the eastbound area of ██████████ Road. (Ex. 87 at 00025, collision scene photos and analysis.) ██████ ██████████ did not credit ██████ with blocking part of ██████████ Road as an effort to preserve evidence.

██████████ never talked to ██████████ or anyone in the Traffic Investigation Unit. (TR 323:11-324:20 (██████████ In his view he had no obligation to seek out or document exonerating information. (TR 211:4-212:18 (██████████ This view was not consistent with the understanding of ██████████ who stated that she “absolutely” expected ██████████ to have sought out and documented exonerating information in his report. (TR 1253:7-23 (██████████ The traffic unit had found that ██████ was not at fault for causing the collision. However, ██████ ██████ considered ██████ action to be the cause of the accident which caused the death of a civilian and this weighed heavily in his decision to terminate ██████ (TR 884:21-24; 86:16-21; 887:1-3 (██████████

The ██████████ report gives the impression that ██████ did not put out any radio information except to ██████████ although she did advise the suspect driver had fled on foot and that he was a black man, and it was a hit and run situation.

At the arbitration, ██████████ repeated that ██████ put out no information about the suspect “at any point.” (TR 130:17-20 (██████████ TR 182:9-14 (██████████ This was clearly misleading and gave an inaccurate picture of ██████████ transmissions. ██████ did fail to put out all information, but under

the circumstances, this was not a crucial mistake, and counseling and more training could correct these lapses. This violation alone was not sufficient to support a termination.

3. Report Writing Violations (R1108 and R1201)

A. R1108

This section states that the most important attribute of any written communication is its accuracy combined with brevity. (emphasis added) (Ex. 84.)

B. R1201

Section R1201 contains “general provisions” (Ex. 85) and states that the “prime objectives” of crime reports is to present “the truth in an impartial manner.”

Sections R1108 and R1201 only apply to written reports.

There is no doubt that [REDACTED] could improve in her written reports. However, that improvement requires coaching and some more instruction and by itself cannot sustain a violation that warrants termination for an inexperienced officer.

Due Process Violations

1. The CUBO Allegation

In his request for a DII, [REDACTED] had indicated that both L2103 and C1302 should be investigated. (Ex. 1 p. 000117.) As noted earlier, L2103 was not listed in the NOID. Section C1302 known as part of the CUBO allegation was considered by [REDACTED] investigation report. However, [REDACTED] exonerated the CUBO allegation. (Ex. 1 at 000113.) [REDACTED] Finding Number 22 stated that the investigation determined the allegations of [CUBO] (C1404; C1302) against [REDACTED] were exonerated. (Ex. 1 at 000114.) This meant that the investigation found [REDACTED] was not “untruthful.”

This finding of truthfulness was agreed to by [REDACTED] and [REDACTED]. The allegation had apparently been raised by [REDACTED] as well as by the IPA (Independent Police Auditor). The [REDACTED] denied the IPA’s request to add the CUBO violations to the investigation. The IPA appealed and [REDACTED] drafted a response for [REDACTED] sending the draft to him on July 11, 2022. (See Ex. I to Petitioner’s Motion *in limine* No. 5.) The City and Department did not include this response in the *Skelly* information given to [REDACTED] and they, in fact, argued it was not relevant. The Arbitrator ordered it to be discovered.

In the memoranda denying the IPA appeal, [REDACTED] states, “I believe that there were human performance aspects that affected [REDACTED] memory during the time the incident

occurred and that she did not intentionally make a false statement.” (IPA Appeal rejection by [REDACTED] [REDACTED] (*Id.* p. SJ 00612.)

The 12 violations listed in the NOID did not list L2103. The basic concepts of due process require the City and the Department to support its termination decision with respect only to the noticed violations. Therefore, a violation of L2102 cannot be used to support the termination. *Coburn v. State Personnel Board*, 83 Cal.App. 801, 806 (1978); *Skelly v. State Personnel Board*, 15 Cal.3d 194, 215 (1975).

[REDACTED] testified that only the violations listed in the NOID can support any discipline. (TR 1228:21-1229:13; 1229:25-1230:10, [REDACTED] She confirmed that the basis for discipline is summarized or enumerated in the Notice of Intended Discipline, NOID. (TR 1246:24-1247:5

[REDACTED] Additionally due process required production of the IPA appeal documents prior to the *Skelly* hearing. *Gilbert v. City of Sunnyvale*, 130 Cal.App.4th 1264, 1277 (2005). The IP appeal and the investigation of [REDACTED] for this incident were happening at essentially the same time. The DRP occurred on July 7, 2022. The [REDACTED] decided on termination and that recommendation was documented by [REDACTED] in a July 8, 2022 memo. (Ex. 102 at 105:24-106:12 ([REDACTED] Ex. 1 at 000040.) The investigative materials with the [REDACTED] recommendation were transmitted to [REDACTED] on July 10, 2022. (TR 1225:24-125:4 ([REDACTED] Ex. 70.) [REDACTED] was served with the NOID on July 15, 2022. (Ex. 1 at 000016.)

The IPA appeal was transmitted on July 8, 2022. (Ex. 62 at SJ 00629.) [REDACTED] [REDACTED] draft memo was sent to [REDACTED] [REDACTED] and transmitted on July 11, 2022. (Ex. 58, [REDACTED] memo; Ex. 102 at 62:20-67:14 ([REDACTED] Ex. 52 at SJ 005888-SJ00591 ([REDACTED] response.)) The IPA appealed the [REDACTED] initial denial on July 13, 2022, and was again denied on July 14, 2022. (Ex. 62 at SJ0063.)

[REDACTED] confirmed she had participated in crafting the response of [REDACTED] rejecting the IPA appeal. (TR 1282:21-24 ([REDACTED]

The appeal documents do discuss human factors which may have affected and explained some of [REDACTED] incorrect statements and perceptions, yet no human factors were considered by [REDACTED] [REDACTED] in his IA investigation.

The City did not supply Petitioner with all the materials it should have before the *Skelly* hearing, and this constitutes a violation of [REDACTED] due process rights.

Remedy

It is noteworthy that following the request for a DII from [REDACTED] and referral to [REDACTED] in Internal Affairs, up until her termination [REDACTED] continued to work as a “solo” patrol officer. She was not reassigned, put on desk duty or administrative leave, even though [REDACTED] felt she had “poor judgment” and was a “danger to the community.” Officer [REDACTED] was not terminated although the GPS indicated he was going 77 mph on [REDACTED] Street. He received far less punishment than [REDACTED]

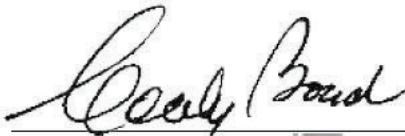
As noted herein, the investigation’s conclusions reached as to the pursuit policy violations were not thorough or complete, and were not sustained by the evidence presented. The other violations which were found are in areas where more training and coaching would be a reasonable remedy.

The remedy for violations of due process is the award of back pay. *Barber v. State Personnel Board*, 18 Cal.3d 395, 402-403 (1976), which cites *Skelly v. State Personnel Board*, 156 Cal.3d 194 (1975).

The Arbitrator concludes that the discipline imposed should be rescinded and [REDACTED] [REDACTED] be reinstated with full back pay.

IT IS SO ORDERED.

Date:


Hon. Cecily Bond (Ret.)
Arbitrator