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I.

Introduction

This arbitration arises out of a grievance filed by San Jose Police Officers' Association (hereinafter Union) against the City of San Jose (hereinafter Employer or City) concerning the termination of Officer [REDACTED] (hereinafter Grievant).

II.

PROCEDURAL BACKGROUND

This arbitration is pursuant to the Memorandum of Agreement (MOA) entered into by the Parties, effective January 1, 2017, to June 30, 2020.

Fred D. Butler was selected as Arbitrator.

Evidentiary hearings, wherein the parties called witnesses and presented evidence and arguments, were held via Zoom video conferences on August 30, 2021, and August 31, 2021.

The parties stipulated that the arbitrator shall have jurisdiction to rule on all questions of law and evidence as they pertain to the grievance.

The parties also stipulated that the arbitrator shall retain jurisdiction to clarify, interpret, and issue any necessary post-hearing rulings needed to carry out the findings and decisions.

Representing the Union was [REDACTED] Esq. Appearing as witnesses for the Union were [REDACTED], Professor, and the Grievant, Police Officer [REDACTED]. The Union also presented Professor [REDACTED] [REDACTED] as an expert witness in the area of Police Excessive Force.

Representing the Employer was [REDACTED] Esq. Appearing as witnesses for the Employer were [REDACTED], Lieutenant, and [REDACTED] Police Chief.

The parties presented thirteen (13) joint exhibits numbered Joint Exhibits 1 through 13.

The Union presented two (2) exhibits as Union Exhibits A and B.

The Parties presented Joint Stipulated Facts (Joint Exhibit 14) a verbatim record of the hearing was prepared and a transcript was made available. The record was closed on August 31, 2021, and the matter submitted for decision on November 24, 2021, closing arguments and transcript having been received on that date.

III.

STATEMENT OF THE ISSUE

Whether Grievant was terminated for just cause; if not, what should be the remedy?

IV.

RELEVANT STATUTORY, CONTRACT, AND POLICY PROVISIONS

The relevant statutory provisions, in pertinent parts, are outlined below:

San Jose Municipal Code 3.04.1360-Disciplinary action-Authorized when...disciplinary action may be taken against any officer or employee...for any cause for discipline...3.04-1370 – Causes for discipline...A. Malfeasance; B. Misconduct; C. Incompetence; D. Failure to satisfactorily perform the duties of his position; E. Failure to observe applicable rules and regulations...Q. Discourteous treatment of the public or other employees...V. Any other act, either during or outside of duty hours which is detrimental to the public service.

California Penal Code 149...punishes public officers who unlawfully beat or assault any person under color of authority but without lawful necessity. Officers who use excessive force may qualify for prosecution under Section 149.

California Penal Code 835: An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.

The relevant contract provisions, in pertinent parts, are outlined below:

Article 25.5, Step IV Arbitration...25.5.11 The parties agree that the arbitrator shall not add to, subtract from, change or modify any provision of this agreement and shall be authorized only to apply existing provisions of this Agreement to the specific facts involved and to interpret only applicable provisions of this Agreement.

Article 43 Investigations...43.4 The Department shall undertake investigations of possible misconduct and dispose of them within a reasonable period of time...

The relevant policy provisions, in pertinent parts, are outlined below:

L2601-General Provisions...Officers may use force to affect a detention, arrest, prevent an escape or overcome resistance, in self-defense or defense of others. The type and degree of force used will be objectively reasonable and based upon the facts and circumstances of the situation...

L2602-Objectively Reasonable Force (Definition): Objectively reasonable force is that level of force which is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same circumstances as the officer who has actually used force.

Objectively reasonable force is not judged with hindsight, and will take into account, where appropriate, the fact that officers must make rapid decisions regarding the amount of force to use in tense, uncertain and rapidly evolving situations. Important factors to be considered when deciding how much force can be used to apprehend or subdue a subject include, but are not limited to, the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others and whether the subject is actively resisting arrest or attempting to evade arrest by flight...

L2602.5 Tactical Conduct...Based on the totality of the circumstances, and allowing for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving...Department members shall consider...CORE TRANSACTION...lawful detention...or arrest...LEVEL OF URGENCY...whether the suspect presents an immediate and credible threat of physical harm to any person...THREAT ASSESSMENT...Relevant information may include any history of a subject's propensity for violence...COVER, CONCEALMENT, DISTANCE, AND TIME...tactics that may help a Department member avoid and/or minimize the use of physical force...and may assist in de-escalating the situation...CRISIS INTERVENTION TEAM...request that a Crisis Intervention Team member respond to calls where there is information suggesting that the suspect is mentally ill.

SJPD Duty Manual Section C 1308 states Department members will be courteous and professional to the public. Department members will be tactful in the performance of their duties, control their tempers and exercise the utmost patience and discretion even in the face of extremer provocation. Except when necessary to establish control during a violent or dangerous situation, no member shall use course, profanity or derogatory language

V.

FINDINGS OF FACTS

Grievant joined the San Jose Police Department as a recruit on June 15, 2017. He was trained for six months in the Department police academy, including de-escalation training, Grievant also went through a field training program for four months before he started patrolling. Officers are taught that their primary role is to affect arrest, prevent escape, and overcome resistance.

On December 21, 2019, Grievant was on day-shift patrol and was told to police a city park area where there were un-housed people. Three or four other officers were with Grievant, but there was no sergeant present. Two officers made contact with an individual named [REDACTED] They discovered

charges pending against him, and decided to handcuff and transport him to jail. He also had [REDACTED] [REDACTED]. One of the officers told Grievant that [REDACTED] had [REDACTED] and [REDACTED] [REDACTED]. The officers asked Grievant to transport [REDACTED] and have him booked. Grievant put [REDACTED] into the back seat of a patrol car, already handcuffed, and seated him on the right, rear passenger side. (Testimony of Grievant, Tr. 219-226) This Officer found out that [REDACTED] had unseat belted himself and moved to the driver side of the back seat, and was kicking the barrier behind the driver's seat. It was important to get him seat belted again and stop kicking the car. [REDACTED] needed to be seat belted and on the passenger side of the back seat so that Grievant could see him when he transported him. (Joint Exhibit 7, p. 41; Testimony of Grievant, Tr. 315-320; Testimony of [REDACTED] Tr. 362-365, 377)

San Jose police officers receive training every year or two years on de-escalation and the use of force. Prior to the incident with Mr. [REDACTED] Grievant had to use physical force about seven to nine times. It was not an everyday occurrence. None of the people requiring physical force ever made a complaint against Grievant. Before the incident with Mr. [REDACTED] the Grievant had never had a situation where someone was handcuffed, somehow became unseat belted, and had to be moved over to the other side of the back seat of a parked patrol car. (Testimony of Grievant, Tr. 213-217; Testimony of [REDACTED] Tr. 123; Union Exhibit B, pp. 3-6, 3-7; Joint Exhibit 10, p. 2)

According to the Grievant, during the forty (40) minutes Grievant spent with Mr. [REDACTED] Grievant built a rapport with him, but his demeanor changed once he was seated in the back seat of the car and after another officer found a shotgun round in [REDACTED] tent and put it on the front hood of the patrol car. Once [REDACTED] saw this, his demeanor changed. [REDACTED] [REDACTED] started to throw a fit, kicking the back of the car and yelling. Grievant, who forgot to turn on his body camera, tried to deescalate by talking to Mr. [REDACTED] who was asking to use a bathroom. . (Testimony of Grievant, Tr. 230-233, 288) A few minutes later, when Mr. [REDACTED] continued to kick the back shield and yell louder out the window, Grievant turned on his body camera and tried to talk to him, using profanity to let [REDACTED] know that Grievant and the officers meant business, and that [REDACTED] had to stop yelling and kicking. He believed that profanity can be used to try to get someone to cooperate and do something, but not to demean anyone's character. (Testimony of Grievant, Tr. 233-238; Union Exhibit B, p. 3-13)

Grievant opened the patrol car door after seeing that [REDACTED] had unseat belted himself and moved to the driver's side of the car, refusing to move back over to the passenger side.

Professor [REDACTED] points out that officers must ensure that prisoners are seat belted unless they are violent, combatant, or certain other conditions exist. Grievant had seat belted [REDACTED] on the passenger side of the back seat but later could see that [REDACTED] had unseat belted himself, moved to the driver side of the back seat, and was kicking the barrier behind the driver's seat. It was important to get him seat belted again and stop kicking the car. [REDACTED] needed to be seat belted and on the passenger side of the back seat so that Grievant could see him when he transported him. (Joint Exhibit 7, p. 41, Testimony of Grievant, Tr. 315-320, Testimony of [REDACTED] Tr. 362-365, 377)

Grievant tried to pull [REDACTED] back to the passenger side but Mr. [REDACTED] locked his knees and put his feet under the barrier, to prevent being moved. Grievant did not try to open the driver's side of the back of the patrol car because he had been told not to do that, since it would expose his gun side. Also, Grievant believed that pushing would not be as effective as pulling [REDACTED]. And that a person in handcuffs can be resistant, assaultive, and a threat. A handcuffed person can use his head as a weapon. Because the Grievant believed that [REDACTED] was physically resisting, Grievant used what he felt was minimal force by striking the right side of his face with a closed fist. There was not much force in the punch. Grievant asked [REDACTED] if he was hurt by the punch, and [REDACTED] said he was not hurt. Grievant was not trying to hurt [REDACTED] but struck him only to get him to release the lock he had with his feet and knees.

Mr. [REDACTED] did loosen up a little after he was struck, but then started to scream and punched Grievant, and began yelling out the window. After other officers came over, [REDACTED] did not resist anymore. Grievant moved [REDACTED] to the right side and seat belted him. When Mr. [REDACTED] screamed that Grievant hit him, Grievant used additional swear words. Department policy prohibits the use of coarse, profane, or derogatory language. (Testimony of Grievant, Tr. 247-249, 296, 302; Union Exhibit B, p. 3-13)

In October 2020, Lieutenant [REDACTED] received an Internal Affairs Investigation Report concerning Grievant. At that time an 11-page memorandum was prepared recommending a Disciplinary Review Panel (DRP). Lieutenants cannot apply discipline any greater than a letter of reprimand, but they will refer a case to the DRP when they feel a higher level of discipline is warranted. (Testimony of [REDACTED] Tr. 38, 40, 52-54, 61; Joint Exhibit 7)

The Internal Affairs investigator, [REDACTED] found that Grievant struck [REDACTED] as a way of maintaining control of him while [REDACTED] was actively resisting. While at the same time finding that the

force was unnecessary because the Grievant could have asked for help from other officers. (Joint Exhibit 7, p. 29; Union Exhibit B, p. 3-6)

Grievant was charged with tactical errors, swearing, and use of excessive force. (Testimony of [REDACTED] Tr. 79, Testimony of Grievant, Tr. 219; Union Exhibit B, p. 3-6)

A recording of the events in question reveals Grievant using profanity that Lieutenant [REDACTED] and Grievant himself both considered to be not in compliance with the Department policy on courtesy, because [REDACTED] was already handcuffed at the time. (Joint Exhibit 7, p. 13, Testimony of [REDACTED] Tr. 32, 33; Testimony of Grievant, Tr. 278)

Lieutenant [REDACTED] participated in the Disciplinary Review Panel on December 17, 2020. The command staff present adopted the recommendation of Lieutenant [REDACTED] that Grievant be suspended and not terminated. The final decision on discipline is made by the police chief in conjunction with the City Manager and Employee Relations offices. (Testimony of [REDACTED], Tr. 33, 34, 91; Testimony of [REDACTED] Tr. 148, 149)

Police Chief [REDACTED] chaired the DRP and, on December 17, 2020, the DRP recommended a 240-hour suspension. Everyone on the DRP agreed with that at the time. Recommendations are made to the police chief, but the City Manager's Office of Employee Relations has the final say. (Testimony of [REDACTED], Tr. 56, 59, 61, 62, 64; Testimony of [REDACTED] Tr. 189-192; Testimony of [REDACTED] Tr. 352-354; Union Exhibit B, p. 3-6; Joint Exhibit 8)

Although officers are allowed to use force where there is physical resistance, and [REDACTED] resistance was active not passive, it was the choice of force that was being frowned upon. Lieutenant [REDACTED], who was on the DRP panel, but not part of the investigation of the incident, felt that punching [REDACTED] was unnecessary. It is unacceptable behavior to punch a handcuffed suspect in the head. The police chief and the Internal Affairs commander make the decision that an incident should be a DRP matter because the violation is egregious enough to warrant time off or termination. Recommendations are made to the police chief, but the City Manager's Office of Employee Relations has the final say. (Testimony of [REDACTED] Tr. 56, 59, 61, 62, 64; Testimony of [REDACTED] Tr. 189-192; Testimony of [REDACTED], Tr. 352-354; Union Exhibit B, p. 3-6; Joint Exhibit 8) Current Chief [REDACTED] did not participate in the DRP concerning that incident. (Testimony of [REDACTED] Tr. 138-142; Joint Exhibit 7, p. 29)

Although Police Chief [REDACTED] and the DRP made recommendations on December 17 of a suspension, the Chief, following a discussion with [REDACTED] at the City Manager's office on

December 18, 2020, changed his mind and recommended termination. (Testimony of [REDACTED] Tr. 148-150, 169, 170; Joint Exhibits 8 and 9)

On December 18, 2020, Lieutenant [REDACTED], Commander of the Internal Affairs Unit, served Grievant with a Notice of Intended Discipline recommending dismissal from his position of Police Officer with the San Jose Police Department, based on his striking a prisoner in the face with a closed fist while he was seated and handcuffed in the back of the patrol vehicle, and Grievant also using profanity (Joint Exhibits 10 and 11)

Police Chief [REDACTED] became Chief of Police after Chief [REDACTED]. He reviewed this case prior to the arbitration and concluded that he also would have terminated Grievant. (Testimony of [REDACTED] Tr. 165)

The Notice of Discipline found Grievant's conduct to be a cause for discipline pursuant to San Jose Municipal Code Section 3.04.1370 (A) Malfeasance, (B) Misconduct, (D) Failure to satisfactorily perform the duties of Grievant's position, (E) Failure to observe applicable rules and regulations, (Q) Discourteous treatment of the public or other employees, and (V) Any other act, either during or outside of duty hours, which is detrimental to the public service. (Joint Exhibit 10, p. 1)

The Notice of Discipline found that Grievant's conduct violated the San Jose Police Department Duty Manual Sections C1308 Courtesy, L2602 Objectively Reasonable Force, and L2602.5 Tactical Conduct. (Joint Exhibit 10, pp. 2, 4-6)

The Grievant appealed this decision and it was referred to Arbitration

VI.

POSITION OF THE PARTIES

Employer's Position:

It is the Employer's position that the Arbitrator should not change any MOA provisions and is authorized only to apply MOA provisions to the facts. In an employment dispute, the Arbitrator's authority is limited to determining whether "cause" supported the challenged discipline.

The Employer maintains that here, the Arbitrator must determine whether the Police Department had evidence to support its conclusion that Grievant's conduct amounted to malfeasance, misconduct, failure to satisfactorily perform the duties of an employee's position, failure to observe applicable rules or regulations, discourteous treatment of the public or other employees, or any other act either during or outside of duty hours which is detrimental to the public service.

The Employer reasons that the Arbitrator does not have authority to change or alter a discipline that is supported by cause, nor does the MOA permit any other modification to the City's relationship with a Union member. Once the Arbitrator finds that based on a preponderance of the evidence, cause supported the City's discipline; his inquiry is at an end.

The Employer concludes that ample cause supported the City's decision to discipline Grievant. The sole question before the Arbitrator is whether the City had cause to discipline Grievant. The answer is yes.

Every member of the Police Department who reviewed or considered Grievant's conduct concluded that he had violated Department policies on tactical conduct, objectively reasonable use of force, and courtesy, and that this warranted discipline.

Grievant's violations of the Duty Manual demonstrate, malfeasance, misconduct, failure to satisfactorily perform the duties of his position, failure to observe applicable rules or regulations, discourteous treatment of the public or other employees, or any other act detrimental to the public service.

The Employer points out that Grievant committed fundamental, tactical errors during the incident that needlessly endangered himself, the suspect, and other officers. Grievant's failure to follow basic protocol and common sense amounted to failure to satisfactorily perform his duties.

The Employer concludes that the Arbitrator must uphold the Department's discipline of Grievant.

The Employer states that Grievant violated Duty Manual Section L 2602.5 entitled Tactical Conduct. Police Department members are expected to use tactics consistent with department and California training standards. Based on the totality of the circumstances, and allowing for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary, officers shall consider the core transaction, the level of urgency, the threat assessment, cover, concealment, distance, time, and crisis intervention team.

The Employer maintains that Grievant violated Duty Manual Section L 2602.5 in multiple ways. The instructions of that section are all aimed at avoiding the use of force whenever possible. The section makes plain at the outset that officers should be planning ahead whenever they believe that force "may become necessary," and provides specific considerations and options to avoid the use of force.

Section L 2602.5 also instructs officers to request a crisis intervention member where there is information suggesting the suspect is mentally ill. Chief [REDACTED] explained that the reason for this is that officer training teaches de-escalation techniques.

The Employer finds that Grievant did the opposite of what Section L 2602.5 requires when he had multiple opportunities to de-escalate, put distance between himself and [REDACTED] who was handcuffed in the back of the car, or call for other officers or a sergeant. [REDACTED] repeatedly instructed Grievant to call for a sergeant. Grievant admitted he had multiple better options but failed to consider them, as required. His actions violated policy, and this alone is cause for discipline.

The Employer also contends that Grievant violated Section L 2602, which defines objectively reasonable force as that level of force which is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same circumstances.

This takes into account that officers must make rapid decisions and recognizes important factors such as the crime, whether the subject poses an immediate threat, and whether the subject is actively resisting or attempting to evade arrest by flight.

The Employer reasons that although Grievant may have encountered "active resistance," the perspective of a reasonable officer must be considered in conjunction with Duty Manual Section L 2602.5, the whole purpose of which is for an officer to avoid creating his own exigency.

The Employer cites case authority for an officer's use-of-force, the decisions rendering his behavior unreasonable under the totality of circumstances, even if force might be reasonable in isolation, and case authority examining whether an officer's conduct was negligent considering the availability of less intrusive alternatives to the force used.

The Employer also concludes that Grievant violated Duty Manual Section C 1308 by using profanity at least five times. Grievant agrees that he used a "terrible choice of words," and Chief [REDACTED] said it was upsetting to find Grievant using profanity in the context of hitting an arrestee in the head.

The Employer reasons that whether Grievant received specific training on the Duty Manual is irrelevant. All officers are expected to be familiar with the Duty Manual. An officer who violates the Manual is not excused simply because he was not aware of the violation. Grievant himself testified that the Duty Manual policies and procedures are standing orders.

Grievant's violations of the Duty Manual were obvious and also violated a significant amount of training he received, including critical incident training, de-escalation techniques, empathy and respect to the public, communication as an element of force, reasonable use of force, tactics to gain

voluntary compliance, calling a supervisor when a member of the public requests to speak to one, and using other officers when a subject is uncooperative and aggressive.

Therefore, the Employer concludes that this matter does not present a close question. Grievant violated the clear commands of the Duty Manual. He failed to observe basic protocols intended to de-escalate and gain voluntary compliance. He needlessly created exigency where there was none, and used unnecessary force that would have been avoided, if he had complied with his training and Department policies. The San Jose Police Department properly terminated him for this serious misconduct. The Employer respectfully requests that the Arbitrator uphold the Department's discipline as supported by cause.

Union's Position

It is the Union's position that termination is unwarranted where the City failed to establish, through competent testimony, a justifiable basis for termination. Grievant was terminated by [REDACTED] [REDACTED] the Director of Employee Relations, upon the recommendation of Acting Police Chief [REDACTED] [REDACTED]. At the arbitration, the City did not call [REDACTED] [REDACTED], who signed the Notice of Termination, or former Acting Chief [REDACTED] to testify about the reasons or justification for terminating Grievant. Chief [REDACTED] changed his opinion about discipline overnight.

The Union finds Grievant's use of force to be objectively reasonable where the Police Department's Use of Force Policy and Penal Code 835 allow officers to use reasonable force to overcome resistance. [REDACTED] had [REDACTED], [REDACTED] had [REDACTED], and [REDACTED] [REDACTED]

Grievant's using profanity was an approach officers are taught in order to control suspects, as well as using body weapons such as hands and feet. [REDACTED] was struck only because he was physically resisting. It made sense to place a suspect in the rear passenger seat in order to keep an eye on him. Department Policy required [REDACTED] to wear a seatbelt because he was actively resistive, but not violent or combative.

Striking [REDACTED] was a way of maintaining control, according to [REDACTED]'s Internal Affairs report. Mr. [REDACTED] had said he was not injured.

The Union finds no indication that the DRP had input from a Department use of force expert before terminating Grievant. Expert witness Professor [REDACTED] found [REDACTED] to be actively resisting through physically evasive movements "to defeat an officer's attempt at control, including bracing and

tensing.” Professor ██████ found that Grievant’s “distraction strike” was not unreasonable. Regardless of handcuffs, a peace officer must maintain control of a prisoner.

After the punch, which was a low-level use of force, Grievant called other officers over. Sergeant ██████ who responded to the scene and understood the situation, determined that the punch was a Level 1 use of force, the lowest level possible.

The Union maintains that the claimed tactical conduct violations could have, and should have been addressed through training. Lt. ██████ never heard of any officer being terminated for tactics determined in retrospect not to be appropriate, since violations of tactical conduct are addressed through training. However, Lt. ██████ was not aware of any supervisor sitting with Grievant and explaining why it would have been better to call other officers over to help with ██████

Grievant’s use of profanity warranted a letter of reprimand, per Department policy. He used profanity as a method of verbal control to stop ██████ from yelling and kicking. Lt. ██████ never had heard of anyone in the Department being terminated for using profanity toward a suspect. Violations of courtesy are addressed through oral counseling or a letter of reprimand.

The Union contends that Grievant’s conduct should have been a training issue, not a basis for termination. After the District Attorney rejected any criminal charges against Grievant, he was returned to duty with no restrictions or heightened supervision. Chief ██████ determined Grievant should receive a 240-hour suspension, but the following day, after speaking with Ms. ██████ at City Hall, Chief ██████ recommended dismissal. There is no proof that Ms. ██████ was even aware of the exact nature of the situation.

Grievant’s actions warranted training, not termination. The Department has a policy of progressive discipline. Training or counseling can correct behavior. Grievant had no prior discipline or a single complaint during two years with the Department. Lt. ██████ acknowledged that Grievant would call other officers over for help, if a similar situation arose in the future. In fact, a similar situation did occur, and Grievant called a sergeant to use a WRAP so that a suspect could be transported to booking without incident.

The Union points out that Grievant’s evaluations rated him “meets” or “exceeds” standards, and that he has a “solid grasp on Department policies and procedures” and “responds very well to criticisms and suggestions.” As for making arrests and properly documenting events in police reports, evaluations say that Grievant “will improve in this area as he develops more experience and obtains training in related areas, as well as developing composure to deal with agitated subjects.” He “has potential to

become an outstanding officer” and “the knowledge and know-how to become an exceptional officer.” He “could be a tremendous asset to the Department in the future” and “grow and improve as his career advances.”

Grievant’s supervisor believed he was a highly competent officer and saw great promise in him. Grievant’s actions toward ██████ should not result in termination. Grievant did not cause harm to the public service. He remained in his position for 8 to 10 months after this incident. During that time, he was permitted to make arrests and engage with suspects.

The Union points out that ammunition was found in ██████ tent; he provided a false name to police and ██████ who was actively resisting Grievant’s commands.

Finding the likelihood of recurrence to be extraordinarily low, because Grievant acknowledges his mistakes and has conducted himself differently when faced with a remarkably similar situation, the Union concludes that terminating him is unduly harsh and excessive, making a mockery of the Department’s policy of progressive discipline.

Other measures, far short of termination, should have been employed by the City. There was no just cause for termination.

VII. DISCUSSION

The issue in this matter is whether the Department has just cause to terminate the Grievant, a Uniformed Police Officer who the Department determined used unnecessary and unreasonable force against a person in custody, violated Tactical Conduct Procedures and was not Courteous to the individual in violation of Departmental rules and regulations.

More specifically the Grievant in this matter was charged with violating San Jose Police Department Duty Manuals Sections C1308, L2602 and L2602

The facts in this matter are outlined above and are further delineated and agreed to by the parties in a statement of Joint Stipulated Facts (See Joint Exhibit 14)

L2602.5 Tactical Conduct...Based on the totality of the circumstances, and allowing for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving...Department members shall consider...CORE TRANSACTION...lawful detention...or arrest.

A review of the set of circumstance and facts leading to the Officers use of force, it is determined that the Officer used his judgment to determine the most effective way of the dealing with the individual

2602-Objectively Reasonable Force (Definition): Objectively reasonable force is that level of force which is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same circumstances as the officer who has actually used force. Objectively reasonable force is not judged with hindsight, and will take into account, where appropriate, the fact that officers must make rapid decisions regarding the amount of force to use in tense, uncertain and rapidly evolving situations. Important factors to be considered when deciding how much force can be used to apprehend or subdue a subject include, but are not limited to, the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others and whether the subject is actively resisting arrest or attempting to evade arrest by flight...

SJPD Duty Manual Section C 1308 states that Department members will be courteous and professional to the public. Department members will be tactful in the performance of their duties, control their tempers and exercise the utmost patience and discretion even in the face of extremer provocation. Except when necessary to establish control during a violent or dangerous situation, no member shall us course, profanity or derogatory language

A review of the facts in this case, the Arbitrator determines that the Grievant's use of force in this matter was minimal in the form of striking the detainee and justified

As the facts describe above, Mr. [REDACTED] the Arrestee had been placed in handcuffs and placed on the passenger side of the vehicle in accordance with agreed upon procedure.

[REDACTED] found some way to dislodge handcuffs and refused to situation himself on the passenger side. He began to lodge insults and vulgar language at the Officer while continuing to resist being placed in the proper position in the rear of the Vehicle (See Joint Stipulated facts)

Grievant had learned in his field training that he should seat suspects on the rear passenger side of the vehicle in order to see if they are doing something such as trying to unseat belt themselves or slip their handcuffs, and also see if they are having a medical emergency. [REDACTED] had been pat-searched by the other officers, but a full search incident to arrest had not occurred, and he had many layers of clothing. Grievant thought a full search should have been done. For his own safety, and to maintain control, Grievant put the seatbelt back onto Mr. [REDACTED] (Testimony of Grievant, Tr. 227-230)

The Department maintains that an officer can transport a prisoner in handcuffs on either side of the vehicle, and unless the prisoner is armed, there are no safety concerns. While it would be better to put someone on the passenger side of the back seat so as to be able to see him while transporting him to the police station. They maintain that striking ██████ in order to move him to the other side of the vehicle was not an appropriate use of force. It would have been better to get additional officers to move him.

Grievant knew that ██████ ██████, relevant to a threat assessment. There were ██████ ██████ (Testimony of ██████ Tr. 29-31, 45, 46, 92; Testimony of ██████ Tr. 148)

Grievant did not call other officers over when he was attempting to move ██████ because Grievant did not think he needed to call for help in order to deal with only one suspect, and also because the other officers were only 30 yards away, tasked with going through ██████ tent after finding the contraband ammunition. Therefore, Grievant thought he could deal with ██████ by himself. Grievant had asked Sergeant ██████ to come out, because ██████ asked for a sergeant and because there was a potential use-of-force investigation. But Grievant wanted to gain control by putting ██████ on the right side and seat belting him, before Grievant requested a sergeant to come out. Ultimately, another officer took ██████ to jail and booked him. (Testimony of Grievant, Tr. 249-253, 277, 292; Joint Exhibit 7)

The Department is correct in its evaluation that Grievant had other alternatives. The Department continues that although officers are allowed to use force where there is physical resistance, and ██████ resistance was active not passive, it was the choice of force that was being frowned upon. Lieutenant ██████ who was on the DRP panel, but not part of the investigation of the incident, felt that punching ██████ was unnecessary. (Testimony of ██████ Tr. 56, 59, 61, 62, 64; Testimony of ██████ Tr. 189-192; Union Exhibit B, p. 3-6; Joint Exhibit 8)

Because ██████ was resisting, Grievant had to use force to get him to comply including a strike to the face. It is the Arbitrators determination that the level of force was minimal and was a way of getting ██████ to comply with this demand

Grievant has made it clear in his credible testimony that he learned from this encounter and past mistake in arresting Mr. ██████ and had decided that if he were put back on his job, he would do things differently. Grievant believed it was a mistake to not call other officers over to help sooner with Mr. ██████ and that it was a mistake to swear at him.

Based on this Grievant's record and his demeanor at the hearing, the Arbitrator determines and believes that the Officer has learned something from this event, that he did not learn in prior trainings.

San Jose Police Department Duty Manual has a policy allowing a police officer to use profanity only sometimes to assert control over someone in a violent or dangerous situation. However officers are held to a higher standard by the public, based on their profession. The Duty Manual policy on tactical conduct requires officers to slow things down and deescalate. If a suspect continues using profanity, an officer should call someone else over to deescalate the situation. Grievant believed the situation with Mr. [REDACTED] was dangerous after Grievant approached his patrol car and saw that Mr. [REDACTED] had un-seat belted himself and had begun kicking the inside of the car as Grievant approached. (Testimony of [REDACTED] Tr. 109-112, 117, Testimony of Grievant, Tr. 273; Union Exhibit B, p. 3-13)

According to Grievant's supervisor, Lieutenant [REDACTED] there was nothing in the training that two-year officer, received to prepare him to deal with a situation like the one he had when he confronted Mr. [REDACTED] on December 21, 2019. Grievant had no prior sustained complaints for use of excessive force until he confronted Mr. [REDACTED]. Grievant actually had no complaints for anything at all on his two-year record in the Department.

However, Police Chief [REDACTED] noted that even if an officer has been on the force for twenty years with meet-standard performance that alone would not prohibit termination based on only one single incident. But Professor [REDACTED] who trained police officers in use of force, did not see anything in the incident with [REDACTED] that would indicate a truly malignant and malicious police officer who should not have a badge. (Testimony of [REDACTED] Tr. 31, 41-43, 50, 79, Testimony of [REDACTED] Tr. 160-163; Testimony of [REDACTED], Tr. 381; Union Exhibit A; Joint Exhibit 6)

The question of profanity or discourteous behavior is addressed later in this discussion.

The Department also maintains out that making sure a suspect does not have a weapon before placing him in a police vehicle is the responsibility of the officer taking custody of the suspect. If Grievant became concerned that [REDACTED] might have a weapon, the appropriate procedure would be to get additional officers to take [REDACTED] out of the vehicle and conduct a thorough pat search. When [REDACTED] told Grievant to call his sergeant, Grievant should have done that. He had the time to do it. An officer can use profanity to gain compliance with a hostile subject, but Grievant had no need to use profanity when [REDACTED] already was in custody and inside the police vehicle. Officers are trained to deescalate and not respond with more profanity. There were at least four other officers available to assist.

While it is understood and appreciated that Officers should be courteous and use tactics to defuse a situation. Officers should not resource to a screaming or vulgar language episode with the public. Occasionally the definition of the public should be considered. If the purpose of responding in a vulgar use of language is to gain control of a situation with a detainee or an arrestee, then that totality of the interaction must be evaluated by the Department prior to discipline.

In this case, the arrestee was attempting to challenge the Officers authority to seat him properly and in compliance with his training. The resistance required the Office to get control in what the Arbitrator considered a minimal use of force as an attention strike and curse commands in response to [REDACTED]. Therefore the attention strike and the curse commands were justified.

The Department states that if Grievant had called his sergeant on the radio and had him come over to speak with [REDACTED], there would have been no need to do anything else. Swearing at [REDACTED] would not be consistent with police training because it would only get [REDACTED] more upset and hostile. It would have been better for Grievant to get additional officers to deescalate the situation, if Grievant was going to move [REDACTED] from one side of the police car to the other. Once [REDACTED] saw additional officers, the likelihood of resisting would decrease.

In this case that is speculative and this Arbitrator is not convinced of that result... However, the Grievant testified in his Internal Affairs interview that in retrospect, he should have summoned other officers to help him. (Testimony of [REDACTED] Tr. 28-30, 93; Union Exhibit B, p. 3-6; Joint Exhibit 7, pp. 10, 11)

Police Chief [REDACTED] points out that the circumstances of [REDACTED] being handcuffed in the back seat of the patrol car led to a determination that Grievant used a higher category of force, a category three use of force rather than only a category one.

The Arbitrator reviewed Peace Officer Standards and Training. The training is designed to identify that the objective of using force is to overcome resistance to gain control of an individual. Officers must rely upon their own judgment to ensure that the amount of force used to gain and /or maintain control of a subject or situation does not exceed what is objectively reasonable under the totality of the circumstance confronting them. In situations where a subject is actively resistant, possible options are control hold and techniques to control the subject and situation and use of personal body weapons to gain an advantage of the subject. (See POST Learning Domain 20 concerning use of force/desescalation Exhibit B of Expert Witness testimony)

The POST training tends to clarify the training on this category. It is not clear whether the policy conflicts with POST training. However the Department did not attempt to clarify or distinguish the difference.

After he completed a use-of-force report following the [REDACTED] incident, the Grievant continued working without restrictions on making arrests or using force. About a month later, Grievant was placed on administrative leave and remained on leave for several months until he was advised him that the District Attorney was not filing charges, and that he could return to his previous assignments. Once he was back at work, Grievant received no complaints, made some arrests, and was not restricted from making forcible arrests, or restricted from working as a solo officer, or told he was under heightened supervision or scrutiny in use of force. This was further indication that the Department was comfortable with the Officer continuing in his position.

It was also apparent from the testimony of the current Chief [REDACTED] that he did not want Grievant working and representing the San Jose Police Department. Because he felt that Grievant should have known that he was violating policy. (Testimony of [REDACTED] Tr. 156, 159, 164-166, 169, 185; Joint Exhibit 7, pp. 38-45) Chief [REDACTED] was not aware of the Grievant having any other discipline prior to the incident with Mr. [REDACTED]. In addition, Chief [REDACTED] did not participate in the DRP concerning that incident. (Testimony of [REDACTED] Tr. 138-142; Joint Exhibit 7, p. 29)

Former Police Chief [REDACTED] who did participate recommended a suspension. However following an overnight change of his position and a discussion with Ms. [REDACTED] at the City Manager's office on December 18, 2020, changed his mind and recommended termination. (Testimony of [REDACTED] Tr. 148-150, 169, 170; Joint Exhibits 8 and 9)

It was not until after the overnight change in the position of the Chief of Police after a discussion and review by the Employee Relations Department of the city that the Grievant was terminated.

It appears to the Arbitration that other considerations not present during the disciplinary process were "at play." These additional factors or considerations were not present in the record or through testimony or in other documents. Therefore the Grievant did not to have an opportunity to respond. This may also raise issues of Due Process.

In that regard and in applying a complete just cause analysis, it is appropriate to determine whether the penalty is reasonably related to the seriousness of the offense and workers employment record.

It is determined that Termination in this case is excessive and does not.

Therefore the Department did not possess the requisite Just Cause to terminate the Grievant.

There is an opportunity for additional training and counseling, which in this Arbitrations opinion will translate into a positive Police Officer for the City.

There is an opportunity to educate, retrain if necessary and counsel an Officer who has chosen to make that a career and make a contribution. It appears to this Arbitrator that this would be the preferred way of handling this situation.

VIII.

DECISION

The Grievance is granted.

Dated:

12/22/2021


Fred D. Butler, Arbitrator