BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between:	FMCS Case No. 130710-02703-T
	Grievant: Bradley D. Canterbury
THE CITY OF OMAHA, NEBRASKA	
	Issue: Termination of Employment
The Employer	
and	Heard: 10/3/13 Record Closed: 10/31/13
THE OMAHA POLICE UNION LOCAL NO. 101, AFL-CIO-I.U.P.A. (a/k/a Omaha Police Officers Association)	Award Issued: 1/21/14
	Sherwood Malamud Arbitrator
The Union	

APPEARANCES:

Bernard J. in den Bosch, Assistant City Attorney, 80Omaha/Douglas Civic Center, 1819 Farnam Street, Omaha, NE 68183, appearing for the Municipal Employer.

Dowd Howard & Corrigan, LLC, Attorneys at Law, by Michael P. Dowd, 1411 Harney Street, Suite 100, Omaha, NE 68102, appearing on behalf of the Union.

ARBITRATION AWARD

Jurisdiction of Arbitrator

The City of Omaha, Nebraska, hereinafter the Employer or the City, and the Omaha Police Union Local No. 101, AFL-CIO-I.U.P.A. (a/k/a Omaha Police Officers Association), hereinafter the Union, are parties to a Collective Bargaining Agreement that provides for the final and binding arbitration of disputes. The parties selected Sherwood Malamud from a panel submitted to them by the Federal Mediation and Conciliation Service to hear and determine the dispute over the termination of employment of Police Officer Bradley D. Canterbury. Hearing in the matter was held on October 3, 2013, at the Omaha/Douglas Civic Center, Room 804. Witnesses were sequestered. The proceedings were not transcribed. By October 31, the Arbitrator received the original briefs submitted by both the City of Omaha and by the Union, as well

as the Union's letter reply brief. The City elected to forego the filing of a reply brief. The Arbitrator closed the record in this case on October 31, 2013. The Arbitrator considered the testimony, evidence, and the parties' arguments in issuing this Award.

ISSUE

The parties were able to stipulate to the formulation of an issue to be determined by the Arbitrator. It is:

> Was the termination of Police Officer Bradley D. Canterbury for just cause pursuant to the Labor Agreement between the City of Omaha and Omaha Police Union Local No. 101? If not, what is the appropriate remedy?[1]

PERTINENT LANGUAGE EXCERPTED FROM THE 2012-2013 LABOR AGREEMENT

ARTICLE 2

MANAGEMENT RIGHTS

Except where limited by express provisions elsewhere in this Agreement, nothing in this Agreement shall be construed to restrict, limit, or impair the rights, powers and the authority of the CITY as granted to it under the laws of the State of Nebraska, the Home Rule Charter of the City of Omaha, 1956, and the CITY'S ordinances. These rights, powers and authority, include but are not limited to the following:

. . .

5. The right to hire, examine, classify, promote, train, transfer, assign, and retain employees; suspend, demote, discharge, or take other disciplinary action against employees for just cause; and to relieve employees from duties due to lack of work or funds.

. . .

[1]Inherent in the power of the Arbitrator to decide this grievance is the authority to fashion a remedy, if a violation of the Agreement is found.

ARTICLE 6

DISCHARGE AND DISCIPLINE

SECTION 1 DISCIPLINARY ACTION-CAUSE: Any action which reflects discredit upon the service or is a direct hindrance to the effective performance of the CITY government functions shall be considered good cause for disciplinary action. The following are declared to be good cause for disciplinary action against any employee, though charges may be based upon causes and complaints other than those listed:

. . .

(d) Use of abusive or improper treatment to a person in custody, provided the act committed was not necessarily or lawfully done in self-defense or to protect the lives of others, or to prevent the escape of a person lawfully in custody.

(e) Offensive conduct or language toward the public or toward city officers or employees;

. . .

(j) Commission of acts or omissions unbecoming an incumbent of the particular office or position held, which render his admonishment, reprimand, suspension, demotion, or discharge necessary or desirable for the economical or efficient conduct of business of the CITY or for the best interest of the City government;

. . .

Violation of the provisions of this Section may be punishable by reprimand, suspension, demotion, and/or discharge.

. . .

SECTION 2 DISCIPLINARY ACTIONS-REPRIMAND: Any employee may be reprimanded for cause.

. . .

SECTION 3 DISCIPLINARY ACTIONS-SUSPENSIONS: An employee may be suspended without pay for cause for a period or periods not exceeding forty (40) working days in any twelve (12)

consecutive months, however, no single suspension shall be for more than twenty (20) working days.

. . .

SECTION 5 DISCIPLINARY ACTIONS-DISCHARGE: An employee may be discharged for cause. Prior to the discharge becoming effective a written statement containing the reasons for the discharge shall be transmitted to the employee and to the Human Resources Department for inclusion in the employee's personnel file. The CITY may suspend such employee immediately and indefinitely with pay. Prior to the discharge becoming effective such employee shall be entitled to present his side of the facts surrounding the discharge to an impartial CITY decision maker.

. . .

SECTION 7 An accused officer shall be informed of the nature of the investigation and shall receive a written notice of the allegations being investigated against such officer at least twenty-four (24) hours prior to the formal interview by the Police Department. This twenty-four (24) hour period may be waived if the complaint alleges intoxication or drug incapacitation during on duty status. The written notice shall contain the following information: (1) the allegations of the complaint; (2) the time and date and location of the incident giving rise to the investigation, if known; (3) if the complaint is a written document from an anonymous source, such written document shall be provided to the employee. If there exists a written complaint from a City employee (sworn or non-sworn), such document shall not be provided to the accused employee.

In the event that the procedures set forth above are not followed, the charges against the officer will be dismissed without prejudice.

SECTION 8 The CITY agrees to maintain in its Human Resources Department a list of all disciplinary actions against all bargaining unit employees. Disciplinary action shall be defined as all written reprimands, demotions, suspensions and discharges. The list, to be kept current on a weekly basis, shall denominate employee and type of action taken against the

employee, and shall be accessible to authorized UNION representatives only.

At the outset of the hearing, the parties waived the application of Article 8, Section 2, Step 2, which sets forth the timeframe in which the arbitration hearing must be set and the time limit for the issuance of an award.

BACKGROUND

The Omaha Police Department services the metropolitan Omaha area. The area served is divided for patrol purposes into four precincts. The Northeast precinct includes a high crime area. Two patrol officers from the Uniform Patrol Bureau are assigned to cruisers that patrol this quadrant.

The incident that resulted in the discipline of Grievant occurred on March 21, 2013. Grievant worked the C shift, four to midnight. Both he and his partner, Dyea Rowland, are frequently assigned to the same cruiser, patrol car, as they were on March 21, 2013.

At the beginning of their shift, they were in the area, when a request for assistance came from Officer Worm. He was about to impound two vehicles owned by the J family [initials used by arbitrator throughout this award]. The cars were not properly registered and were parked on Seward Street. A citizen complaint brought the unregistered vehicles parked on a public street to the Police Department's attention. Officer Worm's prior experience with the family led to the request for assistance. Officer Worm describes the family as "anti-police."

Grievant and his partner arrived at the 3300 block of Seward Street to join Officer Worm. The tow truck had not yet arrived. Soon thereafter, with the arrival of the tow truck, one of the J brothers exited the J home and other voices emanated from that house objecting to the towing of the two vehicles, one of which was a Mustang.

The tow truck driver began to impound and load the second vehicle, not the Mustang. A blue pickup operated at a high rate of speed stopped and skidded onto the curb. One of the three J brothers, OcJ drove the pickup that stopped within 10 feet of Grievant and Officer Rowland, who were assisting to secure the area for the tow truck driver.

Soon after the arrival of OcJ, a neighbor who lived across the street from J home began to video the events that followed. Grievant in particular, and to a lesser extent Officer Rowland, urged OcJ to return to his vehicle and not interfere with the tow truck driver. OcJ did not heed Officer Canterbury's command. He continued to approach the tow truck. Meanwhile the other J brother, Ja, continued to scream at the officers and the tow truck driver about towing the vehicles.

Ja stepped into the street from the sidewalk and approached Officers Rowland and Canterbury. He returned to the sidewalk when urged to do so by Officer Worm. At one point, Officer Worm warned Ja that the next time he stepped off the sidewalk, he would be arrested. While on the sidewalk and when entering the street, Ja appeared to hold some sort of recording device in his hand. The towing operation, Ja's actions and the arrival and initial interactions between OcJ and Grievant occurred within a period of several minutes.

When OcJ continued to approach the tow truck, Officer Worm told Grievant to arrest OcJ. At that point, OcJ turned around with his back to Grievant, but despite commands from Grievant to OcJ to place his hands behind his back, he did not comply with that order. At this juncture the video shows and his testimony establishes that Grievant performed a hip toss to take OcJ to the ground. Both Canterbury and Rowland instructed OcJ to place his hands behind his back so that he could be placed in handcuffs. OcJ did not comply with this command. Eventually Rowland was able to place OcJ in handcuffs, but only after Grievant administered three open-handed hammer strikes to OcJ's shoulder area.

Exhibit 28 is a timeline prepared by Internal Affairs Sergeant Pruse on April 13, 2013, as part of the Internal Affairs investigation. It occurred subsequent to the recommendation of Chief Schmaderer to terminate Grievant's employment, but prior to the April 17 letter terminating his employment. In Exhibit 18, Sergeant Pruse describes how he prepared the timeline (Exhibit 28):

> R/S and Todd Petrick . . . Crime Lab-criminalist in charge B-Shift, sat down at a computer that had extra memory, graphic cards, and a program to enhance video and audio of the YouTube video that was posted on the internet. R/S (Sergeant Pruse) and Petrick broke down the video by time and frame during our review of video. The review consisted of both of us watching the video and listening to the audio and documenting what can be seen and heard during the incident at . . . Seward Street on 21-Mar-13.
>
> If something was unclear as to what we saw or heard, we watched the same time frame several times to get an accurate description as to what was said by the officer or the parties present. We did the same type of review for everyone's actions and reactions during the video. If something was unclear we would watch the video again and again to make sure both of us were in agreement as to what we saw happen regarding all parties involved.

Lieutenant in charge of the Internal Affairs Division, Patrick Rowland, directed Sergeant Pruse to concentrate on the arrest made by Officer Canterbury of OcJ. Sergeant Pruse describes the direction provided to him by Lieutenant Rowland in Exhibit 18, as follows:

> R/S was told to look at the video when Officer Canterbury is alone with OcJ who was handcuffed on the ground with the officer in a position of control. R/S was told to look for movement by OcJ and how it affected the officer's position of control. Did the officer

> appear off balance? Did the suspect attempt to rise up, roll or buck the officer off his back?
>
> As stated earlier in the timeline, both legs of OcJ move towards the Mustang and at the same time Officer Canterbury is giving verbal commands and striking the suspect three times. There is slight movement by the suspect but it does not appear in the video that the officer loses his balance. The officer is able to maintain a position of control. It is hard to tell where the officer's right leg is positioned on the suspect's body given the angle of the video.

After OcJ is handcuffed, on the ground with Grievant in control of the suspect, brother Ja re-enters the street after telling Officer Worm that he would not do so. Ja approached Officers Canterbury and Rowland and his handcuffed brother, OcJ. The placement of OcJ in handcuffs is recorded at frame number 533 on the video. Tow minutes later, at frame 4,112, Officer Worm begins to run in pursuit of Ja who had entered the street. Ja runs into the residence at . . . with Officer Worm in pursuit.

At frame 4,379, 8 seconds after Worm chases Ja, Officer Rowland leaves Officer Canterbury to assist in the house. At this point, Officer Canterbury is left alone with OcJ. Sergeant Pruse describes what occurs at frame 5,323, 32 seconds after Rowland leaves, as follows:

> Both suspect and Ofc. Canterbury move at the same time. Suspect moves legs towards mustang and Canterbury tells him to stop moving and delivers three strikes to suspects head and either neck or shoulder area. After the strike suspect moves back into original position. Video is unclear as to where officer's right leg is on suspect's body. It appears his right hand is on the suspects head but due to the angle it is hard to tell.
>
> At frame 5,351, strike one. At frame 5,361, strike two. At frame 5,374, strike three. At frame 5,414, suspect's right leg moves back to original position.

The time elapsed from frame 5,323 through 5,414 is recorded at a little over three seconds. It is the second set of strikes while the suspect was in handcuffs and Grievant in control of him that raise the issue of whether Grievant used excessive force. It is Grievant's failure to document his use of the second set of 3 hammer strikes and his failure to explain the need for the use force at this instance that served to undermine the credibility of Grievant's reports for Lt. Rowland and Chief Schmaderer.

The Arbitrator viewed the enhanced CD of the video and the You Tube video as posted on the Internet on ordinary equipment. The Arbitrator could not clearly hear what was said. Although from Sergeant Pruse's account, the criminalist and he were able to detect what Grievant said to OcJ. The record is clear and there is no dispute that subsequent to the second set of strikes, Grievant did not strike OcJ, again. Grievant called for additional assistance while he was alone with OcJ. By the end of this incident approximately, 23 officers were on the scene, not necessarily in response to Grievant's call for additional assistance. Since Grievant was somewhat hidden between two vehicles, those officers responding went to the J home. Eventually, Grievant called attention to himself. Two officers responded and assisted in getting OcJ to his feet and walking him to a cruiser for transport to Corrections.

Grievant stated during the Internal Affairs investigation and at the arbitration hearing that soon after his Officer Rowland left to provide assistance in the house, he felt OcJ move. He believed that the suspect was beginning to engage in conduct that could reverse Grievant's position relative to the suspect and challenge Grievant's control of him. Chief Schmaderer testified that if Grievant's suspicion was correct, then the three strikes and the use of force employed by Grievant on this second occasion were within and conformed to the use of force policy of the Department.

In his letter dated April 4, 2013, in which Chief Schmaderer recommends the termination of Grievant's employment , the Chief sets forth his reasoning underlying his decision, as follows:

You did not complete a Use of Force/Chief's Report that documented your second series of strikes (use of force) against the male party, nor did you add the necessary information concerning the necessity for the second use of force to the Use of Force Report that you did submit. You asserted in your Internal Affairs interview that the Use of Force Report that you submitted contains the needed information regarding the second use of empty hand techniques (hammer fist strikes). Your documentation of the sequence of events on your Use of Force Report clearly goes from your first interaction with the male party, to his aggressive and non-compliant behavior, to him becoming actively resistive, then your takedown and subsequent hand strikes, ending with the handcuffing of the male party. Your report clearly (sets the stage) for the command officer reading the report to understand what actions of the male party you observed which led up to your use of force. At the completion of the reading of your Use of Force Report, the reader is led to believe that there was only one occasion where you needed to use force; it included your take down and then 3-5 hammer fist strikes to the male parties (sic) upper shoulder area.

You made no attempt to place in your report the same detailed information that you described in your Internal Affairs interview. In the interview, you said the male party had grabbed your pant leg with his hands and attempted to roll over in an attempt to cause you to lose your balance, which in turn you stated could have led you to be in a dangerous position. You stated that you believed at the time the male party was making an aggressive move to either injure you or to get away from you, so your response to his movement was to deliver several hammer fist strikes to his upper back in an effort to keep him from moving. Due to the fact hat you did not include the information in your report, it appears that you purposely omitted the information from any reports (including your Supplemental Report) because you either thought that no one had witnessed the event or

> you felt that your second series of strikes on the male party was not in compliance with the Standard Operating Procedures of the Omaha Police Department. Any assertion that you contemporaneously informed a command officer about your actions is without merit, because any such conversation occurred after the public release of the video.
>
> There was also an allegation that you made the comment to the male party that had something to do with shooting him in the head. You denied making any such comment during your interview. The investigation determined that you did make a comment/question to the male party similar to "Do you want to get shot in the head?"
>
> . . .
>
> It is my recommendation that your employment as an Omaha Police Officer with the City of Omaha be terminated.

Chief Schmaderer did not speak directly to Grievant before the Chief made his decision. He relied on the contemporaneous reports of Lieutenant Patrick Rowland, the officer in charge of the Internal Affairs Division, and Sergeant Ceverney who participated with Lieutenant Rowland in the interview of Grievant and several other officers concerning the events of March 21, 2013. Lieutenant Rowland did not testify at the arbitration hearing. Sergeant Ceverney did. A transcript of Grievant's Internal Affairs interview was prepared from the tape recording of that interview. It was not completed by the date of Chief Schmaderer's decision to recommend termination of Grievant's employment.

The Union points to several occasions during that interview in which Grievant admits that he should have separated the first from the second set of strikes. The Arbitrator infers from Lieutenant Rowland's comments during the interview that the Lieutenant formed an opinion that Officer Canterbury deliberately omitted the reference to the second set of strikes. Lieutenant

Rowland compliments Grievant on the complete summary and the full explanation that he provided for the first set of strikes in the Chief's Report he submitted. Lieutenant Rowland did not accept Grievant's explanation that the reference to 3-5 strikes in the Chief's report combines both the first and the second set of strikes. Chief Schmaderer's conclusion that Grievant deliberately omitted reference to the second set of strikes is in line with Lieutenant Rowland's skepticism.

During the interview, Lieutenant Rowland asked Grievant several times whether he stood by the report that he submitted. He asked Grievant was it a good report. Grievant responded that he thought his report was a good report, and that he stood by it. Those responses by Grievant taken together with the disparity between the complete description provided by Grievant concerning the takedown and the use of strikes to gain compliance from OcJ to permit his handcuffing and the omission of any reference to the second set of strikes and the lack of any accompanying explanation for the use of force for the second set of strikes provide the basis for the Chief's decision to terminate Grievant's employment. Chief Schmaderer concluded that Grievant deliberately omitted reference to the second set of strikes to mislead supervision and command that the second set of strikes did not occur. The conclusion that the omission of the second set of strikes was deliberate and meant to mislead translates into a lack of trust in the reports and the actions of Grievant. It is that loss of trust that serves as the basis for the termination.

The record contains extensive testimony concerning the various reports that officers submit when force is used. An initial supplemental report is provided to substantiate the charges filed against a suspect. Grievant prepared such a report to support the misdemeanor charges that Officer Canterbury recommended be brought against OcJ.

It is in the Chief's Report that an officer details the force used. The officer describes what force was used and the reasons for the use of force. The manner in which such reports are prepared appear in General Orders 8-13, 10-

13, Exhibit 20) that issued in February 2013. General Order 8-13 sets out the use of force reporting guidelines for the Chief's Report, as follows:

> A. Chief's Report . . . requirements.
>
> 1. A Chief's Report will be completed to advise the chief of police of the incident when an interaction results in an Officer Response from the **Actively Resistive Subject Category or higher**. Officers **<u>are not</u>** required to complete a Chief's Report to document the use of handcuffs or strength techniques.
>
> 2. Officers will indicate the following by checking appropriate boxes on the form:
>
> a. Officer's use of force response;
> b. Type of Subject Interaction Category; and
> c. Medical treatment if required.
>
> (Emphasis in the original)
>
> . . .

The General Order then proceeds to describe various levels of force that are used and the reasons for those uses. General Order 10-13, Exhibit 21, references low lethality Target Areas in the use of force, as follows:

> Areas of the body that when struck have a low risk of causing serious bodily injury and will most likely only cause temporary discomfort. Motor nerve points, soft tissue areas, pit of the abdomen, and extremities of the body are low lethality target areas. The head will typically not be considered a low-lethality target area. The head may be such a target area only if, considering the nature, location of the strike, and the type of strike, there is a low degree of risk for serious bodily injury.

> Objectively Reasonable Force; the amount of force that a reasonable officer would use when faced with the circumstances presented. An officer's use of force is governed by the reasonableness standard set forth in *Graham v. Connor,* 490 U.S. 386, 395, 109 S.C. 1865, 104 L. Ed. 2d 443 (1989). The inquiry is an *objective* one. The question is whether the facts and circumstances make the force reasonable without regard to the officer's underlying intent or motivation. The reasonableness of a particular use of force will be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight.
>
> Reasonable Belief: A belief that a reasonably prudent officer would hold given the facts and circumstances the officer knows or should know.

POSITIONS OF THE PARTIES

The City Argument

The City notes that Grievant was discharged pursuant to Article 6, Section 1(j) of the parties' Collective Bargaining Agreement. The City acknowledges that it bears the burden of proof. It must establish by a preponderance of the evidence that it had just cause to discharge Grievant. The City argues that just cause requires that a nexus exists between the misconduct, the requirements of the job and the performance of the individual in that position. In this regard, the City cites Specialty Paper Box Co., 51 LA 120, 125 (Nathanson, 1968). Arbitrator Nathanson described the just cause standard in the following terms cited by the Employer as the standard this Arbitrator should employ in this case:

> It is basic that an enterprise, if it is to function at all, requires that someone be vested with authority to run it. In American industries such authority inheres in the employer. When, in the exercise of that right, it imposes discipline for just cause, then the only circumstances under which such a penalty imposed by

> management can rightfully be set aside by an arbitrator are those where discrimination, unfairness or capricious and arbitrary action are proved–in other words, where there has been an abuse of discretion.

The City notes that the Chief authorized 340 hours of overtime in the investigation of the incident on March 21 at . . . Seward Street. The Internal Affairs Division performed a thorough investigation. A review of the Chief's Report filed by Officer Canterbury omits important details of his action, particularly after Officer Dyea Rowland leaves him to assist with the developments in the house at . . . Seward Street.

The crux of this case, the City notes and the basis for the Chief's decision to discharge Grievant, focuses on the Chief's Report that he filed. There is nothing in the report about the use of force that Grievant employed or any reason for the use of force he employed after Officer Rowland leaves the scene to enter the home. Grievant was tucked between two vehicles with the suspect under control. Grievant believed no one could see him. This lack of disclosure through omission was deliberate and undermines Grievant's credibility. Accordingly, the Chief terminated his employment.

The City acknowledges Grievant's takedown (hip roll) and the initial three hammer strikes he delivered to the struggling and resisting OcJ were appropriate and conformed to Departmental policy. Grievant's report is complete and fully justifies the use of force.

The City emphasizes that Grievant's omission of the second set of strikes to the upper shoulder or neck of OcJ while OcJ was in handcuffs on the ground and under Grievant's control only came to light as a result of the You Tube video. But for the video, immediate supervision and the chain of command would not have learned of the second set of strikes.

Subsequent to the incident and after the video appeared on the evening news on March 21, Chief Schmaderer initiated an investigation on the following

day. The call for an investigation precluded Sergeant Woolman's review. He was not present at the time Grievant completed the Chief's Report. Sergeant Woolman previously scheduled and took two hours time off at the end of his shift on March 21. If Sergeant Woolman had reviewed Grievant's Chief's report in the normal course of events, he would not have known of the second set of strikes that Grievant omitted from his Report.

Grievant was interviewed as part of the Internal Affairs investigation initiated by the Chief on March 25, four days after the incident. Grievant had a full opportunity to view the video before he was interviewed by Internal Affairs. Nonetheless, he still considered the first and second set of strikes as one incident. He stood by his report. He maintained that it was a good and appropriate report.

Grievant claimed that he told Sgt. Woolman, his supervisor, about both sets of strikes. Sergeant Woolman did not corroborate Grievant's account. He testified that if Grievant had told him that he struck a suspect while in handcuffs, he would have remembered that conversation. Sgt. Woolman had no recollection that Grievant informed him of a second set of strikes while OcJ was in handcuffs and on the ground under Grievant's control.

Grievant denied, both in the Internal Affairs investigation and at the arbitration hearing, telling OcJ anything that might be interpreted as "Do you want to die today?" Officer Rowland, Grievant's partner, was interviewed in the Internal Investigation (she did not testify at the arbitration hearing). When she entered the cruiser with the oldest of the three J brothers in the back seat in custody for transport to corrections on an outstanding warrant, she states that Grievant informed her, that he told OcJ to stop resisting. If he did not he would die that evening.

Grievant acknowledged both in his Internal Affairs interview and in his testimony at the hearing that striking an individual who is handcuffed is a rare occurrence. The City explained why Grievant lied about the second set of

strikes. It is rare that a suspect in handcuffs is struck by an officer. By omitting the strikes and the explanation for the use of force while the suspect is in handcuffs, it is not necessary for Grievant to explain anything.

Sergeant Woolman became aware of the second set of strikes, when he viewed the video on TV. Sgt. Woolman spoke to Grievant about the incident, but he did so subsequent to the airing of the video on the TV evening news.

It appears from the manner in which Grievant wrote his Chief's Report that he estimated the number of strikes at between three and five. The narrative appears to all have occurred prior to placing OcJ in handcuffs. It is only after the video appears on TV that Grievant claims that OcJ grabbed Grievant's pant leg and attempt to buck or escape from Grievant's grasp.

The City argues there is another reason why Grievant did not detail the second set of strikes. Grievant engaged in Street Justice. Grievant believed he was unobserved, when he administered the second set of strikes.

The City observes that the account of the tow truck driver is at variance with the description of the conduct of the suspect OcJ at the time that both Grievant and Rowland were attempting to place the suspect in handcuffs. The tow truck driver indicated that OcJ was not compliant. OcJ did not actively resist. He did not cooperate. This is at variance with Grievant's account of OcJ's conduct.

Chief Schmaderer reviewed the orders, Exhibit 20 on the use of force, and the particular Standard Operating Procedure for completing use of force reports. Although the City concedes that if the facts concerning the conduct of OcJ were as described by Grievant, then his use of force was appropriate. However, one who reads Grievant's report would have no knowledge that he employed a second set of strikes.

The charge that served as the basis for Grievant's termination appears in Chapter 1, Section 1, Section 13 and 15. Those sections address Conduct Unbecoming an Officer, the failure to make a required report, use of force, profane or insolent language, and improper handling of prisoner property. The failure to disclose by Grievant casts serious doubt as to the veracity of the report he filed concerning his conduct on March 21.

The City emphasizes that, but for the release of the video, no one, not Grievant's immediate supervisor or officers in the chain of command, would have known about the second set of strikes. Grievant only provided an explanation for that second set when the video became public. Grievant provides an account of his conduct when he believed that Ja, one of the brothers, was recording the event from the sidewalk or the street as both Rowland and Grievant were placing OcJ into handcuffs and custody.

The City stresses that, "A police officer's worth to a department is the service that he can provide. If a police officer cannot be trusted by management of the Police Department, then they cannot be trusted by the courts. If one cannot secure convictions and be determined to have integrity, one loses the ability to function as a police officer." City's brief at pages 19-20.

The City concludes that the discipline imposed by Chief Schmaderer is not only appropriate, but solely within his discretion. It is beyond the authority of the Arbitrator to review the discipline issued to Grievant to determine whether that is the appropriate level of discipline to be imposed. It is the Arbitrator's duty to review the discipline issued and determine whether or not the evidence, in light of the contractual obligations, supports a finding that the Grievant violated the departmental standards of conduct. Once a violation is found, the Chief's determination as to the penalty should not be disturbed. The issue as to the level of discipline should only be reviewed with the idea that the Chief's determination to impose discipline did not represent an abuse of discretion.

The City notes that the conduct of officers inside the home bear no relationship to Grievant's conduct. He was not involved in that conduct. He was not disciplined for anything that occurred in that house.

The City dismisses the purported cases that the Union asserts are similar to the one in question. Discipline is imposed under a variety of circumstances. Without testimony concerning the context in which discipline was meted out, it is inappropriate to compare the discipline imposed in this case to discipline imposed in other, what the Union would have the Arbitrator believe to be, similar circumstances. Grievant filed a report aimed to deceive both the Chief and the public. The video exposed his deception. Chief Schmaderer justifiably recommended the termination of Grievant's employment.

The Union Argument

The holding in Graham v. Connor, 490 U.S. 386 (1989) establishes the basic framework to determine whether an officer's use of force is excessive. The United States Supreme Court established that the determination whether the use of force was reasonable should be viewed from the perspective of the amount of force that a reasonable police officer would employ in a particular circumstance.

When the facts of the situation are taken into account from the perspective of Graham v. Connor, the following stands out. First of all, Internal Affairs Sergeant Ceverney had just been placed in Internal Affairs. This is one of his first assignments. Inaccurate verbal reports to the Chief form the basis for the Chief's decision to terminate Grievant within 13 days of the incident on March 21, 2013. The transcripts of the interviews had not yet been prepared. Accordingly, the Chief relied on these verbal reports to determine whether Canterbury, Grievant herein, acknowledged the deficiencies in his report and was willing to amend that report.

The transcript of the Internal Affairs investigatory interview established that Grievant admitted that he should have separated the two sets of strikes and explained the reason for his use of the second set of strikes. The Chief testified to that a Chief's Report cannot be changed is contrary to departmental practice. Both Sergeant Wells (President of the Union) and Sergeant Woolman (Grievant's immediate supervisor) could not recall in their testimony any Chief Report that did not go through revision. Once the Chief's Report is reviewed by the immediate supervisor, the Sergeant, it is then passed up the chain of command. The only reason Sergeant Woolman did not review Grievant's Chief's Report was due to his taking two hours off at the end of the shift on March 21. By the time he returned the next day, Chief Schmaderer had turned the matter over to Internal Affairs which precluded Sergeant Woolman's review of the reports prepared by Grievant, both the Chief's Report and the Supplemental report.

The Union maintains that Sergeant Woolman acknowledges that Grievant spoke with him at the scene pn Seward street on March 21 at approximately 15:20 hours at the time of the incident. He could not recall what Grievant said to him. He was not in a position to deny that Grievant discussed the force he employed both initially and the second set of strikes. The Chief was not informed of the nature of the conversation between Grievant and Sergeant Woolman on the date of the incident. Therefore, that information was not before the Chief when he made his decision to terminate Grievant's employment.

The Union charges that the Department did not follow its own policy and practice. Grievant's reports were not subjected to supervisory review before it went up the chain of command. That review by a supervisor entails the Sergeant sitting down with the officer to go through step by step the events described in the reports.

The Union points out that the Supplemental report prepared by Canterbury is identical to the Chief's Report. Grievant clearly did not

contemplate that these reports would proceed up the chain of command without review. Sergeant Woolman considered this to be a minor incident. If Sergeant Woolman had been given the opportunity to review Grievant's report, the Sergeant testified, he would have instructed Grievant to separate the two series of strikes and explain the reason for each in his Use of Force Reports.

According to the Chief's deposition at page 48-49, the inadequate reporting of these incidents formed the basis for the Chief's decision to terminate the Grievant's employment. The Chief did not consider the account of the tow truck driver. Although that interview was conducted prior to April 4, the Chief was not aware of its existence. The tow truck driver corroborated the evidence that OcJ told his brother Ja to "get these fools." Furthermore, the driver did not hear Grievant use any profane language or make any threats to OcJ, or say anything that could be interpreted as OcJ risked being shot that night, if he did not stop resisting.

Furthermore, the Union notes that Grievant described his conduct to other officers about his use of force prior to the broadcast of the video on the evening news. He spoke to Officers Moore, Hopkins, Reeves, and Pearson about his use of force and the strikes, both to get OcJ to a point where he could be handcuffed, and subsequently, when Grievant felt that OcJ moved in a manner that could have resulted in a reversal of positions to Grievant's detriment.

The Union emphasizes that Chief Schmaderer had 100 days to consider all the evidence concerning the event and to determine what discipline, if any, should be meted out. Instead, the Chief acted within 13 days prior to the preparation of the transcripts of the interviews conducted by Internal Affairs, particularly the interview of Grievant on March 25, 2013.

The Union emphasizes that the expert consulted by the Department, its own use of force expert Edwards, indicated that the force used by Grievant was not excessive. If Grievant's perception that OcJ was preparing to roll Grievant is true, then the use of force was appropriate and not excessive. Street justice

was not meted out by Grievant. Grievant could have used greater force that would have caused injury through the use of elbows and kicks. Instead, he used open hand techniques to gain compliance with his commands. Grievant employed three hammer strikes delivered all within several seconds to OcJ while he was in handcuffs. Grievant had full opportunity to deliver additional strikes be they hammer strikes or use of greater force, elbows and kicks, if he wished to deliver street justice. He did not do so.

The Union explains why Grievant submitted his reports in summary fashion. Officer Worm was the officer in charge of the scene. He was on overtime. He was the lead officer. It was his responsibility to gather the statements from other officers. Grievant prepared both the Chief's Report and the Supplemental report on his phone. He had no expectation that the reports would go up the chain of command without further review.

The Union maintains that Departmental policy allows for substantial changes to be made to a Chief's Report. Grievant did not anticipate that his cutting and pasting of the Supplemental report used to substantiate the basis for the misdemeanor charges filed would be the final draft. Officer Worm testified that in his experience he had never seen a Chief's Report that was not revised.

Furthermore, the Union notes that handcuffed suspects can be dangerous. This evidentiary fact is not in dispute. If Grievant is properly the subject of discipline, then the level of discipline imposed is excessive, according to Sergeant Wells, the Union President, who monitors the discipline meted out by the Department. Under the Collective Bargaining Agreement, a record of discipline is maintained and provided to the Union on a regular basis for its review.

The Union points to the discipline imposed as late as August 25, 2013. An officer hit a suspect in the head, but did not document it at all. That officer received a written reprimand.

When Grievant perceived that the suspect, OcJ, was under control, both initially when Officer Rowland was able to finally place him in handcuffs, and subsequently, when OcJ returned to his initial position, Grievant ceased employing any force against the suspect. The Union concludes, therefore, that the City did not have just cause to terminate the employment of Officer Canterbury.

DISCUSSION

The Standard of Proof-- What the City Must Establish

The City concedes that it bears the burden of proof. It also concedes that it must establish the basis for termination of Grievant's employment by a preponderance of the evidence. However, relying on the award in Specialty Box, the City argues that the Chief's decision should only be set aside if the Arbitrator finds that it was arbitrary, capricious or discriminatory. The standard the City proposes is one much lower than the just cause standard incorporated in the Collective Bargaining Agreement between the Union and the City. Under the contractual standard, the Employer must establish that Grievant deliberately omitted reporting the second set of strikes in an effort to mislead the chain of command, and ultimately the Chief, concerning the second set of strikes.

Although the Chief testified that, based on his review of the evidence, Grievant administered street justice, the City need not establish that as the basis for discharge. Deliberately omitting information from his report concerning the second set of strikes is sufficient, in and of itself, to warrant a conclusion that Grievant's reports would not be trustworthy. Whether the Arbitrator would discharge an employee who is caught submitting a report that is deliberately misleading is beside the point. The Chief may determine that proper supervision and control of officer conduct towards the public necessitates that its officers report truthfully and accurately as possible the events in which they are engaged. An inability to rely on the truthfulness of an officer's report(s) impairs the ability of the Department to monitor officer

interactions with the citizens the Department serves. Furthermore, it may well impact the receptivity of officer testimony in court.

Lieutenant Rowland, who is the command officer in charge of the Internal Affairs Division of the Department, did not accept Grievant's explanation that he grouped together both sets of strikes. It was a matter of style and habit that resulted in his failure to mention and to explain the basis for the second set of strikes in one short narrative. Lieutenant Rowland observes in his interview of Grievant on March 25 that Grievant did such a precise and complete report of the first set of strikes, the total omission of the second set of strikes creates a stark contrast that is not adequately explained by Grievant's claim that is the manner in which he, up to this point, had prepared reports. Neither the City nor Grievant introduced evidence of other reports prepared by Officer Canterbury in situations in which he used force.

The record is clear by any standard of proof that Grievant omitted mention of the second set of strikes. The issue is what inferences may be drawn from that omission. Was the omission deliberate and intentionally misleading? If so, then such a dishonest report may serve as the basis for termination of employment.

Alternatively, the report may be the product of the rush of events at the end of a trying day in which Grievant anticipated correcting and/or expanding on the report he prepared on the 21st on the following day, March 22. He was only prevented from doing so by the Chief's intervention, in accordance with his discretion, to initiate an investigation by the Internal Affairs Division which precluded review of both the Supplemental and the Chief's reports by Grievant's immediate supervisor Sergeant Woolman.

The Crux of this Case

Whether Grievant employed excessive force is not the central focus of this Award. Under the standard of review of an officer's conduct established by

the U.S. Supreme Court in Graham v. Connor, supra, Officer Canterbury's reaction to OcJ's movement must be viewed from the perspective of the reaction of a reasonable police officer in the circumstances that Officer Canterbury found himself. With regard to the appropriate level of force, the parties entered into the following stipulation:

1. Jon Edwards, the Omaha Police Department Use of Force Expert, labeled OcJ' conduct leading to the point of take down as active resistance.

2. Canterbury's take down of OcJ was objectively reasonable, did not constitute excessive force, and was within department policy.

3. While on the ground, OcJ refusal to give his hands to be handcuffed, constituted active resistance and justified Canterbury's issuance of three (3) hammer strikes which were objectively reasonable, did not constitute excessive force, and was within department policy.

4. Strikes to the suprascapular and brachial plexus are acceptable hard empty hand techniques to low lethal target area and are appropriate when tied to active resistance.

5. A hammer strike is less likely to injure a person than a straight punch.

6. A handcuffed suspect can still engage in active resistance.
7. There is nothing in department policy that prohibits striking a suspect in handcuffs.

8. The officer has a right (sic) the right to use force to maintain control of a suspect.

9. If Officer Canterbury perceived that OcJ, while handcuffed, was grabbing his' pant leg and/or ankle and trying to roll him, OcJ would be considered an assaultive high risk suspect.

10. Verbal commands are not required for an assaultive high risk suspect before the officer utilizes force, however, it is preferred if circumstances allow.

11. Use of force largely depends upon officer's perception of suspects conduct but,

12. If Officer Canterbury perceived that OcJ was an assaultive high-risk suspect (i.e. trying to buck or roll the officer and actively attempting to grab his pant leg or ankle) then the force used by Canterbury in issuing three (3) additional hammer strikes to gain control was appropriate.

13. Jon Edwards is of the opinion that the fact that a suspect may be in handcuffs during assaultive high risk behavior and strikes are used by officer to gain control, it is not necessarily essential to document in the Chief's Use of Force report that the suspect was in handcuffs, but that it should be documented in some report prepared by the officer.

The question of Grievant's intent, when he omitted reference to the second set of strikes to cover up his use of excessive force is addressed through an analysis of the Chief's report he submitted. He is required by Departmental policy Order 10-13 to describe and explain the reason for the use of force. Omission to mislead would then shed light on the intent of Officer Canterbury, when he delivered the second set of strikes.

There are potentially four sources in this record that answer the question did Officer Canterbury omit the second set of strikes to cover-up his use of excessive force? The video itself supports Officer Canterbury's account. An instant before Officer Canterbury delivered the second set of strikes, the video reveals that OcJ moved.

The second source that reflects on Grievant's action is the Chief report he filed. As noted above, it totally omits reference to the second set of strikes. This source supports the City's decision

The third and fourth sources are based on Grievant's account of his action in the Internal Affairs interview of March 25, 2013 and in his testimony at the arbitration hearing. The Internal Affairs interview, conducted by Lieutenant Rowland and assisted by Sergeant Ceverney, contains the following exchange between Grievant and the head of Internal Affairs. At page 47 of Exhibit 13, the transcript of the interview, Rowland asks Canterbury:

> (PR=Lt. Rowland; BC=Bradley Canterbury)
>
> PR: OK, Um, with, with that being said, what, what is your understanding of what we can do if somebody's (sic) handcuffed?
>
> BC: Uh, that part, that's the part I don't agree upon. And that's because I've had too much experience and there's too many statistics out there showing you just the opposite: which is well, there (sic) in cuffs; you can only do a certain amount to them. Like they're just as able to harm somebody–mainly a cop–being in handcuffs as they are when they're out of handcuffs–uh, especially somebody who's, with his history. Uh, Granted, it was after the fact I found out how many entries he's had. But this is not the first time he's fought a cop.
>
> And, um, so the, the way I understand it is it's pretty much frowned upon to strike somebody who's in cuffs; especially if you just walk up and hit him in the face. Um, this individual was on the ground. He's shown this entire time that he has no regard for his, and he's going to harm me in a, some fashion or form to accomplish whatever it is he wants to accomplish. I mean, he was for all intents and purposes out of position, a disadvantage and he's trying to make that his advantage by grabbing my, my leg, my pant leg and trying to roll me to get himself into an advantage position.

A lengthy discussion ensues about departmental policy and striking a suspect who is already in handcuffs and over whom the officer has control. The back

and forth narrative between Lieutenant Rowland and Grievant concerning the level of force he used both to gain control of OcJ before he was in handcuffs, and subsequently, after he was in handcuffs reflect a disagreement as to whether a suspect in handcuffs can still pose a serious threat to an officer, one who is in control of a suspect who is on the ground. However, the outcome of that discussion does not serve to overcome the discretion accorded a police officer by Graham v. Connor in a situation as set forth in the video, absent a specific Departmental policy to the contrary.

Lieutenant Rowland did not testify at the arbitration hearing. Rather, the evidence of the Internal Affairs interview and the inferences that the investigators drew and reported to Chief Schmaderer were placed in evidence by Sergeant Ceverney. The Union emphasizes that this complicated case was one of Sergeant Ceverney's first cases he was assigned to handle as an Internal Affairs investigator. The City asks the Arbitrator to draw the inference that the omission was deliberate based on the contrast between Grievant's account of the takedown and the force used to place OcJ into handcuffs and the total omission of the second set of strikes.

The Union argues that the omission was not deliberate, but the product of circumstances as supported by the following evidence. The time for preparing and submission of the report was shortened by Sergeant Woolman taking his scheduled last two hours of his shift off on March 21. Grievant wanted to complete the report in time for Officer Worm to collect all the reports. Grievant prepared the report on his Iphone. The Supplemental report and the Chief's Report do reflect that the Chief's Report is the product of a cut and paste job of the Supplemental report.

The Union asserts that Grievant discussed the level of force he used with other officers. The transcript of the interviews with these officers does not clearly support Grievant's account. Grievant claims he told Sergeant Woolman on the day of the incident at the scene the manner in which he used force. Sergeant Woolman testified, both in the Internal Affairs investigation and at the

arbitration hearing, that he would have recalled that conversation if Grievant had informed him at the time that he had struck a suspect in handcuffs. Sergeant Woolman did not recall such a conversation. Accordingly, Sergeant Woolman's testimony does not support Grievant's account of the interchange between Officer Canterbury and his immediate supervisor.

Similarly, in Officer Moore's account of the conversation between himself and Grievant, he notes that the conversation occurred after Moore had viewed the video. Secondly, he states at page 3 of Exhibit 30, "I don't remember if he was handcuffed or not, uh, but apparently when he was on the ground he was wiggling underneath and tryin' to uh, flip Officer Canterbury had ahold of his ankle - I believe . . . yeah he delivered some strikes to get him to stop." Officer Moore indicates that this conversation occurred on March 21. He is unable to indicate a time for that conversation. Similarly, Officer Reeves' testimony occurred subsequent to the viewing of the video.

At roll call the next morning, March 22, Sergeant Woolman made reference to the incident in the following terms according to the statement of Officer Korth at page 5 of Exhibit 33, as follows: "Oh he (Sgt. Woolman) mentioned uh that they were kinda - they were tryin' to get a guy in custody. Uh, Brad had taken him down, and during the course that there were some punches thrown and Sergeant Woolman said he - he believes he threw a couple of punches 'cause the guy had a hold of his leg and was trying to - was trying to flip him over to gain control of him, and that's why he - he threw a couple of strikes - that's all he said. He was like it'll be up to the investigators to handle if he wasn't right to use the force he did. But that's, that's apparently what he [Sergeant Woolman] told us. That's all he told us . . ."

Chief Schmaderer and the Department discount any of Grievant's statements post broadcast of the video. In their view, Grievant attempted to conceal his actions. Once he became aware that there was a video recording of his actions, then his statements explaining the strikes become suspect.

Arbitrator's Analysis

It is the Employer that bears the burden of proof. It must establish by a preponderance of the evidence that Grievant deliberately omitted reference to the second set of strikes. The Arbitrator understands both Lieutenant Rowland's and Chief Schmaderer's suspicion that Grievant was deliberately not forthcoming, when he wrote his report. The preponderance of the record evidence supports the finding that Grievant prepared his report in a rushed manner. He did cut and paste the Supplemental report for the Chief's Report. Grievant had no way of knowing that he would not be able to sit down and review his account, in its entirety, with his immediate supervisor the next day, March 22.

What is most convincing and supports Grievant's account of what he did and that the omission was not deliberate are the following undisputed facts. OcJ made the slightest of moves, but clearly he moved first before Grievant delivered the second set of strikes. The fact that OcJ moved first is corroborated through the review of the video conducted by Sergeant Pruse. The video he reviewed was enhanced both in the video and audio. The Arbitrator's viewing of the video detected that same slight movement very briefly, before Grievant delivered the three consecutive hammer strikes.

The force Grievant used was limited to the three strikes. The record evidence is unrebutted and the Employer concedes that Grievant could have used greater force than hammer strikes if Grievant's description of the suspect's movements are correct.

There is not sufficient evidence in this record to overcome the leeway accorded a responding officer in the use of force under the Supreme Court's decision in Graham v. Connor. There is no evidence in this record to suggest that a reasonable officer would have acted any differently than Grievant in the delivery of the second set of strikes under the circumstances depicted in the video.

The omission of the second set of strikes and the explanation for the use of that second set from his report justifiably aroused the Chief's and Lieutenant Rowland's suspicion that the omission was deliberate. The following excerpts from the Internal Affairs interview address the omission:

PR: OK. 'Cause your, your Chief's report is, um, I mean, the way this is read there's, there's no indication that the second event happens. It looks si, simply like its, you know - and, and I'll, I'll read it to you. It, it says, uh, um:

> "Reporting Officer displayed a taser and ordered OcJ again to place his hands behind his back. OcJ didn't place his hands behind his back. As soon as Reporting Officer Canterbury grabbed OcJ's hands he pulled his hands away from Reporting Officer's grasp and pushed back onto, pushed back onto Reporting Officer Canterbury with, um, with his body. Reporting Officer Canterbury grabbed OcJ's upper torso from the back - basically a bear hug - and hip tossed OcJ to his side. OcJ turtled up by pulling both of his hands towards his groin area.
>
> It should be noted that Reporting Officers had not had time to search OcJ because of how fast moving the situation was. OcJ was given several verbal orders to place his hands behind his back. Reporting Officer Canterbury delivered three to five hammer strikes to OcJ's upper shoulder area and used Mandibular Angle Manipulation to gain control of OcJ. Reporting Officer Rowland was able to get OcJ in cuffs, once he complied to the Reporting Officers' orders."

From that point on, there's there's no other description of use of force.

BC: **(speaking to himself, uncertain 1:31:35) God damn it.**

PR: So when, you know, I, I need an explanation of, you know, why this part wasn't documented?

BC: Well, all, all I can say is it's the same as several verbal orders. I gave him verbal orders at the beginning, so I, I guess in a way I didn't do that. In

my reporting from now on - this is my first set of verbal orders. Several were orders: *you need to do this, 1 to 5, or 1 to 3, however.* And the second set of verbal orders were the second indication that prev, prior to saying that. I, I understand what you're saying. It, it can't be read that away. Um, all I'm saying is the way I did it was, and the way I've done it in the past - not to say that's correct - um, I've, I've lumped them all together. Um, there was three to five strikes, and you can see - or, it should have been three to six but - you can see, the first setting, there's, there's not five strikes, but there's definitely at least three. And then in the second setting there's not five strikes, but there's at least three. So I…that uh, my, my reasoning behind that is that's, that, that's what I've done before. When I've done, I do a total of 10 strikes. I, I, I do see your point, uh, but it just, but that's the way I write and that's what I did. I did three to six, three to five strikes on him.

PR: 'Cause…you've got, you've got a situation where you're describing it, and it sounds like it's three to five strikes to get him under control.

. . .

PR: You know? Uh, granted; I realize. It may have happened, you know; you, you write it right away. But it's your obligation to cover this stuff. That's why you're training people to do it. Be as, be as accurate as possible. When you're this accurate, you know, go back to the question that I asked you before: do you not write it because you don't think anybody saw it? And you're not happy with the fact that you hit somebody in cuffs.

BC: I'm not happy to be put in that situation. That's the, that's the bottom line. I, I'm not happy that man made that decision to try to harm me in some fashion or form. That was, that was just not wise in any way shape or form. It was not a good choice in this matter.

PR: You know, I have a hard time believin' that you're - that when you said you hit him with three to five hammer strikes up here, and everything's, is documented as it is, is that that was a, a, in your mind a continuation of what happens later on.

BC: That, that's exactly what that is. That's, like I said, I, with me writin' it, it's obviously it's me writing it. Um, I, I should have had, you know, other individuals go over it before I turned it in. But that's the reason why, uh , the way I wrote is is exactly how I thought it happened. That three to five

is, encompasses how many times I struck him and touched him in any way shape or form. Um, like I said, uh, once he had. I'm gonna get to work on that part. I, I, I've accepted that. I didn't state in there that there was three the first time and then another additional three the second time; and it was while he was in cuffs. But by no means am I trying to omit it. And by no means am I tryin' to lie to you guys about it. I did it. Anything that wasn't on tape about it, I would still tell you, yes, I hit him three to five times and then one, uh, three to five times total the second time is when he got, uh, the three to five, or the three other times because he's in cuffs trying to roll me. Because I'd already explained that, you know, to my sergeant. I have, have no problem with it, what I did. I, I, I see it as justified.

. . .

PR: But, when somebody writes three to five up here, that's, that's what we're thinkin'. Thi, at this point of this, um, altercation you hit him three to five times. You, you're, you're not trying to minimize it. You're not tryin' ta, you know, overstate it. You're saying I think it was someplace in there. And that's the way we're lookin'at it.

BC: Mm hmm.

PR: And then it's, like, now you want me to believe that it's, it included somethin' else that's, you know, totally different dynamics. It's like, now it's not a guy that I'm trying to fight to get into cuffs; I got a guy in cuffs that I've made strikes to and I haven't written it down.

. . .

PR: OK. And, I understand that. But, but I'm trying to, I have to try to have an understanding of this. When, when you're telling me I can write this report, and I'm supposed to document somebody's actions and what caused me to take my actions; it's like, what happens up here is one set of actions. He, he did these, and now I, I used the hammer fist strikes. Now you've got another set of circumstances, and I, I have a hard time understanding why, why that doesn't get put in there as a separate set of circumstances.

BC: But it's not! Because I'm the guy that's in the situation, LT.

That is a continuous situation. That is the beginning to the end. That is him being combative from the, from when I seen that truck turn the corner from 33rd and Seward and come at me to when I finally said,

"Here, Lugod and, and Hopkins, take him please." That was the entire situation from beginning to end. He was completely combative. There was only times where he was quiet and, for all I know, he was just quiet for those moments. And there was very few moments. It was just when, just before Dyea left. Well, or, sorry; just after Dyea left there was a lull where he's just sittin' there breathing. And then the next think I know he's got me and he's trying to roll me. To me, the officers in that situation - that is a continuous movement, that's why I put three to five.

Now, yes, I see that has an administrative side, which you're pointing out to me. It's, and it makes it clear, and I, I completely agree with you. It's something that I will do better of. This situation that we're dealing with right now - that is what happened. That's how I wrote it up from beginning to end. I'm not omitting anything. That's what happened. That's why I put three to five. Because, as you said, I, I understand that; 'cause yes, I've told individuals if you hit somebody three to five times, then put it three to five times. If you hit 'em a total of three to eight times, then put it three to eight times. I hit him what I was guessing at - three to five times. One, two, three; and then as we see then I hit him an extra, the, the additional three more times. So actually it should have been three to six times. But I'm not trying to omit that I did not hit him a second set. I did hit him. I hit him three to five times.

. . .

SC: What is the reason you do not document your report that you gave him three more strikes to get him to stop grabbing your leg and stuff, rolling?

BC: Again, I just pull it all as that, that situation. Um, I, I got compliance out of him. Again, um, that's just a, that's an old habit of mine that I'll definitely break. Uh, it was too, I can see it from your guys's point that it's two different situations, two different instances.

. . .

SC: If you were able to re-write the, the report or add a Supp., um, how would you do that differently regarding the specific sev, second strikes?

BC: I would put it in there so it's understood there was a ser, there was series of second strikes that is accounted for in the original report as three to five. The, the second one was when this happened with him being in handcuffs and he and I being in essence tucked away from everybody's eyesight. Um.

Other than the omission, there is nothing else that suggests it was deliberate. There is no supporting evidence to indicate a deliberate attempt to mislead. The City case is based on the assertion that but for the video, supervision and the chain of command would not have learned of the second set of strikes. An unanticipated consequence of the decision to turn this portion of the events of March 21 over to Internal Affairs was to cut off supervisory review. Any such review would have come after the video aired. It is supposition as how Grievant would have completed the Chief's report after the video aired and Sergeant Woolman had an opportunity to review the events of March 21 with Grievant.

The evidence preponderates in favor of a finding that Grievant's report was rushed; it was incomplete. Grievant acknowledges in the exchange between Lieutenant Rowland and himself on March 25 during the Internal Affairs interview that he should have separated the two instances in which he delivered strikes. It took awhile for Grievant to acknowledge the shortcoming of his report. Clearly, he is guilty of sloppy report writing. The evidence does not support a finding that he deliberately omitted the reference to the second set of strikes to mislead and cover up the use of additional force.

Another basis for the discipline taken by Chief Schmaderer to terminate Grievant's employment is the account that Grievant said in effect to OcJ while Officer Rowland was in the house words to the effect – do you want to die tonight or do you want to be shot in the head.

The tow truck driver who was in the vicinity did not hear those remarks. The enhanced video reviewed by Sergeant Pruse and the lab criminalist did not detect that remark on the enhanced audio portion of the video. The sole source of the threat is the account provided to Internal Affairs by Grievant's partner Dyea Rowland.

In reading her account, it is hard to separate what she might have said from what Grievant, in fact, reported to her what he said. She did not testify at

the arbitration hearing. As such, she was not subject to cross-examination. The Arbitrator accords her account, what Grievant said to her when she entered the cruiser to drive DJ to corrections, no weight. Accordingly, the Arbitrator concludes that the City failed to establish that Grievant made any threat or conducted himself in a manner in violation of the rules of conduct and General Orders of the Department concerning the handling of a prisoner.

For all of the above reasons, the Arbitrator concludes that the City did not have just cause to terminate Grievant's employment.

Level of Discipline

The City correctly notes that the Arbitrator should not substitute his opinion for that of Chief Schmaderer. The above finding that the evidence does not support the conclusion that Grievant deliberately misled supervision and upper levels of command by deliberately omitting reference to the second set of strikes is based on the video, the transcript of the dialog that occurred in the Internal Affairs investigation, and the many documents in this record. Chief Schmaderer chose to base his decision on Lieutenant Rowland's account of those interviews. Lieutenant Rowland accurately described what Lieutenant Rowland believed to be the case that "Grievant stood by his report." "It was a complete report. A good report." Even so, by standing by that report, it does not support a finding that Grievant deliberately misled his immediate supervisor and the chain of command. The Employer bore the burden to demonstrate that the omission was deliberate, and not the product of the unanticipated truncation of the regular process of supervisory review of a Chief's report. The City failed to meet that burden.

Grievant's report writing was not complete. The question then remains what level of discipline should be imposed. There is no evidence in this record to suggest that faulty report writing results in discharge. The evidence suggests otherwise.

Exhibit 36 describes an incident in which an officer totally omitted any reference to use of force, a strike to the head of a suspect. The discipline imposed was a written reprimand. There is no evidence that suggests that officers who have submitted faulty reports that omitted or mis-characterized incidents were treated in a manner any more severe than a written reprimand. Accordingly, the Arbitrator finds that the Department may have treated Grievant's report writing through training or through the use of discipline. It is clear that the Department would impose discipline in this case. Accordingly, the termination is reduced to a written reprimand. The Department may place in Grievant's personnel file a letter documenting the deficiencies in Grievant's Chief's Report of the events of March 21.

A Final Note

The parties in their presentation indicate that an uproar ensued subsequent to the broadcast of the video of the arrest of OcJ. Be that as it may, the evidence is conclusive that the level of force employed by Grievant was not excessive. He acted in a manner consistent with the range of discretion accorded to police officers who are in a situation in which they may use force to bring a resisting suspect into compliance with their orders when placing suspects under arrest.

Grievant omitted the second set of strikes. The Department viewed the omission as deliberate. It was unable to prove that suspicion by a preponderance of the evidence. Accordingly, the Arbitrator sustains the grievance and reduces the discipline imposed to a written reprimand.

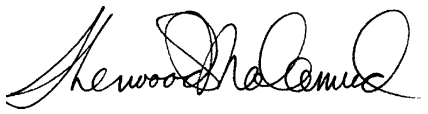
Based on the above Discussion, the Arbitrator issues the following:

AWARD

The City of Omaha did not have just cause to terminate the employment of Bradley Canterbury pursuant to the Labor Agreement between the City of Omaha and Omaha Police Union, Local No. 101. The City does have just cause

to issue a written reprimand over the accuracy of his March 21, 2013 Chief's report. The Arbitrator directs that the City reinstate Grievant to his former position as a Police Officer, with seniority, and make him whole for wages and benefits lost as a result of its action to terminate his employment. The Arbitrator retains jurisdiction for the limited purpose of addressing any questions that may arise out of the implementation of this remedy.

Dated at Madison, Wisconsin, this 21st day of January, 2014.



Sherwood Malamud
Arbitrator