

BEFORE THE DISCIPLINARY REVIEW BOARD
COMPOSED OF

MICHAEL E. CAVANAUGH, J.D., Neutral Chair,
ASSISTANT CHIEF JOSEPH KESSLER, SPD Member,
and OFFICER KEVIN STUCKEY, SPOG Member

CITY OF SEATTLE, SEATTLE POLICE)
DEPARTMENT,)
)
Employer,)
) DECISION AND AWARD
) OF THE NEUTRAL CHAIR
and)
)
SEATTLE POLICE OFFICERS')
GUILD,)
)
Union.)
)
(Grievance of Officer Eric Faust))

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I. INTRODUCTION

Grievant, a sworn officer in the Seattle Police Department (SPD), was suspended for eight days after an investigation into his use of force in detaining a citizen suspected in a hit-and-

run accident. The Guild contends that Officer Faust's use of force was justified because the subject was both verbally and physically resistant to authority, including spitting in the officers' faces as they attempted to handcuff him (after he had already physically resisted an earlier attempt to put him in handcuffs). Thus, says the Guild, because the subject assaulted the officers, the two blows delivered by Officer Faust, one with his forearm and the other with a closed fist, were both necessary and reasonable to defend the officers and bring the subject under control. Former Acting Chief Pugel, by contrast, concluded that Officer Faust had unnecessarily escalated the confrontation between the subject and the officers by aggressively telling the subject to "shut his mouth" at a time when he was "relatively calm." Had he not done so, Chief Pugel concluded, the use of force might not have been necessary.

At a hearing held at City Hall on May 21 and 23, 2014, the parties had full opportunity to present evidence and argument to the Board, including the opportunity to cross examine witnesses. The proceedings were transcribed, and the Board has carefully considered the transcript in the course of its deliberations. Counsel filed simultaneous electronic post hearing briefs on June 30, 2014, and the Board met for a preliminary consideration of the issues on July 2, 2014. On October 13, 2014,¹ I circulated a draft of a proposed Decision and Award to the other members of the Board and invited comments, which I then incorporated into the draft. That process completed the Board's deliberations and has resulted in the following unanimous Decision and Award.

¹ The delay in preparing a draft Decision and Award after the close of briefing and the Board's initial meeting was caused by my busy schedule in connection with interest arbitration hearings for bargaining units of State employees entitled to that process. Traditionally, those hearings take place in August of even-numbered years, and the Arbitrators' decisions are due, under the terms of the statute, not later than the end of September. Thus, those matters had to take priority over other pending cases. I greatly appreciate the parties' understanding and patience in allowing me extra time to complete my work on this case.

II. STATEMENT OF THE ISSUE

The parties agreed at the hearing that a “standard just cause” formulation of the issue is appropriate:

Did the City have just cause to suspend the Grievant, Officer Eric Faust, for eight days? If not, what should the remedy be?

III. FACTS

A. The Incident

On October 6, 2012, just after 4:30 PM, Officer Faust and his partner, Officer Ron Campbell, responded to a report of a hit-and-run incident between a bicycle and a white van in the Central District of Seattle. On their way to the scene, with Officer Faust driving, they observed an oncoming white van make a rapid left turn into a liquor store parking lot. The maneuver seemed unusual to the officers because there was no traffic in the area that should have required a quick left turn. Approximately twenty seconds later, the officers turned right into the parking lot and observed an African-American male who appeared to be walking away from the parked white van.² They drove up to the van and noted a license plate very similar to the plate of the van reported to be involved in the hit-and-run.³ Officer Campbell exited the vehicle, and Officer Faust then drove the car in reverse, parking it in a position that would bring the suspect within direct view of the in-car video camera.⁴ Officer Campbell followed on foot, and the officers asked Mr. Etherly to approach the car. Faust instructed Mr. Etherly to put his hands on the vehicle hood and to keep them there, then he walked to the van to investigate further, leaving Officer Campbell to monitor Mr. Etherly. A short time later, Officer Chin arrived on the scene to

² Estimates of the distance of the suspect from the van have varied, but the video from Officer Faust’s vehicle appears to show the subject, later identified as Leo Etherly, approximately 15-20 feet away from the white van when the officers turned into the lot. Exh. 2 (head on video) at 2:04.

³ The numbers of the plate were identical, and only one letter was different, a “B” instead of a “D.”

⁴ The subject had walked to a position near a bus stop where he appeared to be conversing with bystanders.

assist, and he took up a position behind the subject while Officer Campbell remained in front of him.

For a minute or so, the video shows that Mr. Etherly seems to be compliant, keeping both hands on the hood while holding an apparently unlit cigarette in his right hand. After a while, however, Mr. Etherly began to occasionally lift a hand from the hood, and each time Officers Chin and/or Campbell put a hand on his back and appeared to be reminding him that his hands were to remain on the vehicle.⁵ Eventually, Mr. Etherly removed both hands from the hood altogether and started to move toward the front of the vehicle, complaining that the hood was too hot. While doing so, he offered to put his hands on the front push bumper of the car. Exh. 2 (side view at 1:04). As Mr. Etherly began to move, however, Officer Chin grabbed his arm and said “Okay, you’re going to go in handcuffs now.” *Id.* at 1:11. Mr. Etherly raised his voice, saying “I’m going in handcuffs?” and objecting that the hood was hot and that Chin was “riding” him. He forcefully pulled his arm away from Chin and said “Don’t fuckin grab me, bro,” then sat on the front bumper, saying “I’m going to sit here” and loudly repeated his complaint that the hood was too hot. *Id.* at 1:17. Officers Chin and Campbell decided to allow Mr. Etherly to sit on the front bumper.

The next few seconds constitute the crux of the matter before the Board. While investigating the white van, Officer Faust heard raised voices and saw Mr. Etherly forcefully pull away from Chin’s grip. At that point, he returned to the police vehicle, walked briskly up to Mr. Etherly and loudly told him “shut your mouth and just sit there.” *Id.* at 1:29. Faust testified that he was attempting to use a technique he had learned in Department training, i.e. to vigorously assert his authority in an attempt to overcome a subject’s resistance. He concedes it did not work,

⁵ There is no audio from the in-car videos at this point.

however.⁶ Mr. Etherly immediately raised his voice and responded defiantly “What are you going to do? Knock me out? Shoot me?” Officer Faust then retreated from Mr. Etherly, going to the other side of Officer Chin, who was standing to Etherly’s right. Mr. Etherly continued to protest loudly, e.g. “I ain’t done nothin’ to you.” Officer Faust then asked Mr. Etherly “What is your name?”⁷ Mr. Etherly did not respond with his name. Officer Faust asked Mr. Etherly for his name again and Etherly replied, “Don’t matter ‘bout my name, what’s *your* name?” *Id.* at 1:36.

In response, Officer Faust immediately took out his cuffs in his right hand and moved around Chin to stand directly in front of the suspect.⁸ He ordered Mr. Etherly to stand up and put his hands behind his back. *Id.* at 1:40. Officer Chin grabbed Mr. Etherly’s right arm and appeared to be attempting to pull him to an upright position. Meanwhile, Mr. Etherly exclaimed something like “Man, don’t touch me. I ain’t gonna put my arms behind my” Before Mr. Etherly could finish the sentence, however, Officer Faust put both hands to Mr. Etherly’s chin or neck area, pushing his head away as he pinned the suspect on his back on the hood of the vehicle.⁹ While Mr. Etherly struggled, Faust again ordered him to put his hands behind his back, although the video shows that Chin still had hold of Mr. Etherly’s right arm and Officer Campbell had taken control of his left arm. *Id.* at 1:44. With Officer Campbell’s help, Faust used

⁶ As will be noted later, the Office of Professional Accountability and Acting Chief Pugel viewed Officer Faust’s forceful entry into the interaction between Mr. Etherly and the other officers as “provoking” the subject, but it is apparently undisputed that the technique is one recognized as appropriate to use in dealing with belligerent subjects, at least under some circumstances. Tr. at 121.

⁷ Although Officer Faust has described his questioning of Mr. Etherly at this point as “calm,” the audio clearly establishes that there was a continuing edge to his voice as he asked for Etherly’s name.

⁸ As Officer Faust moved to confront Mr. Etherly, the subject formed his left hand into a fist and drew his arm back as if he might throw a punch. Exh. 2 at 4:28 (Head-On View).

⁹ At this point, Officer Faust had his handcuffs in his right hand on or near Mr. Etherly’s neck, and the base of his left palm under the suspect’s chin controlling his head. Exh. 2 at 4:31 (Head-on View). Apparently, the Prosecuting Attorney’s office concluded that the video gave the “impression” that Officer Faust was “choking” the subject and on that basis declined to prosecute Mr. Etherly for the eventual assault on the officers.

his right hand to cuff Mr. Etherly's left wrist. He told Mr. Etherly "Enough!" several times, but Etherly continued to struggle, claiming that Officer Faust was "choking" him. Faust responded "I'm not choking you, I'm getting your head away from me." Exh. 2 at 4:40 (Head-on View).¹⁰ As the officers attempted to control the struggling subject, Officer Chin asked "Which way do you want to flip him?" *Id.* at 4:42. One second later, despite Officer Faust's efforts to control Etherly's head, the subject managed to work to the left and to raise his head slightly off the hood. He then spit directly into the face of Officer Faust. *Id.* at 4:43.¹¹

A split second before being spat upon, it appears that the officers had been preparing to flip Etherly to his right on the vehicle hood. That is, Officer Faust had grabbed Etherly's left shirt sleeve and he nodded to the other officers, appearing to say (or at least to mouth) an 'okay.' *Id.* at 4:43. Before they could flip Etherly stomach-down on the hood, however, he spit in the officers' faces. Officer Faust exclaimed "Oh!" and immediately delivered a blow with his right forearm to the left side of Etherly's face, then grabbed the suspect's head with both hands and dragged him off the hood onto the ground on the driver's side of the vehicle. *Id.* at 4:44. As the three officers took Etherly to the ground, Officer Faust delivered another blow, this time with a clenched fist. *Id.* at 4:45.¹² The officers managed to roll Etherly to his stomach and cuff his hands behind his back. In the course of this physical confrontation, the suspect received significant facial injuries, including a badly swollen eye and a bloody nose. Exh. 3 at 4.

¹⁰ The Head-on video shows that Officer Faust at this point still had the base of his left palm on Mr. Etherly's chin, and the fingers of his gloved hand appear to be covering Etherly's mouth, and occasionally his nose.

¹¹ Although Mr. Etherly spit directly at Officer Faust, both of the other officers reported that they were also hit by spray.

¹² None of the available video shows the second blow in detail, but Officer Faust conceded during the investigation that he had struck Mr. Etherly with a closed fist. He said he did so because Mr. Etherly was still struggling and seemed to be attempting to get to his feet. Tr. at 286.

B. Command Review of the Incident

Sgt. Visaya investigated the use of force and found it to be within policy. *See*, Exh. 3 at 4.¹³ Similarly, Acting Lt. Yamanaka found the use of force reasonable and within policy. *Id.* He did find, however, that there were some issues of “handcuffing techniques” that needed to be addressed. *Id.* Capt. Calder found that Lt. Yamanaka’s findings were supported by evidence and that “concerns” had been “sufficiently addressed.” *Id.* On the other hand, he referred the matter to the Office of Professional Accountability (OPA) because he thought a “thorough review of [Officer Faust’s] tactics would be beneficial.” Exh. 6 at 3.

The OPA found Officer Faust’s use of force unjustified and unnecessary for the following reasons. First, said OPA, Faust “interjected himself in an aggressive manner in an unsuccessful effort to gain control of the subject” even though Etherly “had taken a seat on the front bumper and no longer was aggressive to Officers Campbell and Chin.” *Id.* at 4. Although OPA conceded that Etherly became “angry and hostile” after Faust asked for his name, the report says that Etherly had done nothing “*physically* aggressive or combative” at that point. *Id.* (emphasis supplied).¹⁴ Thus, the use of force was “premature” and “not necessary” because “little verbal persuasion had been attempted at this point in an attempt to gain the subject’s voluntary cooperation.” *Id.* In addition, the officers had Etherly in a position of “disadvantage,” according to the OPA report, because he was seated on the front bumper “with three officers

¹³ In explaining his finding, Sgt. Visaya observed “Etherly immediately became uncooperative and verbally combative. After continually refusing to cooperate with the Officers, the Officers attempted to handcuff Etherly for their own safety and to safely investigate the accident. Etherly immediately became physically combative and resisted any effort to place handcuffs on him. He spit in the Officers’ faces, and Officer Faust delivered two blows to his face to get Etherly to stop spitting.” *Id.*

¹⁴ In reaching this conclusion, the OPA report does not discuss the significance, if any, of the fact that Mr. Etherly had physically resisted Officer Chin’s earlier attempt to place him in handcuffs, which occurred even before the subject’s interactions with Officer Faust. In any event, Officer Faust’s approach, says the report, “seemed to expose [him] to a far greater threat of assault or injury than leaving the subject seated on the car bumper encircled by the three officers.” *Id.*

present.” *Id.*¹⁵ Finally, says the report, “the two blows delivered by [Officer Faust] to stop any further spitting or aggression by the subject were not reasonable under the circumstances.” That is so, said OPA, because Officer Faust had previously utilized the option of controlling Etherly’s head with “his hand over the subject’s chin.” “It would appear that this option, *so successfully employed early in the struggle with the subject*, was still a viable option.” *Id.* (emphasis supplied).¹⁶ On the basis of this reasoning, OPA recommended a finding of “sustained” with respect to the charge of “unnecessary force.” *Id.*¹⁷

Interim Chief Pugel, considering the file and the results of a *Loudermill* hearing that had been conducted by former Chief Diaz, found a suspension of eight days to be appropriate, with one day held in abeyance for two years. He reached that conclusion, he said, because Officer Faust’s “escalation of the situation and the resultant force you applied was not consistent with Department Policy or training provided by the Department.” Exh. 6 at 3. The Guild appealed on Officer Faust’s behalf, and these proceedings followed.

IV. DECISION

A. Background

Allegations of excessive use of force by police officers require consideration of several significant—and often conflicting—public policy and political considerations, each of which is critically important in its own right, e.g. public safety, officer safety, the rights of individual

¹⁵ On the other hand, the Guild argues that it was the *officers* who had placed themselves at a disadvantage by allowing Mr. Etherly to sit on the front bumper. That position made it difficult for the officers to get *behind* Etherly and to quickly control him when it became necessary to place him in handcuffs. On cross examination, Chief Pugel, the ultimate decision maker on the discipline here, seemed to agree with that assessment. Tr. at 65.

¹⁶ In sum, OPA found that the “hand on chin” technique should have been sufficient to control Mr. Etherly and to prevent him from spitting, thus the blows delivered by Officer Faust were not “necessary.” The video, however, clearly demonstrates that Officer Faust still had his hand on Mr. Etherly’s chin *at the time Etherly spit on the officers*, *id.* at 4:43, i.e. that the technique, at least as employed under these circumstances with this particular subject, was not by itself adequate to protect the officers from being spat upon.

¹⁷ There were other allegations evaluated in the OPA report, specifically Officer Faust’s use of profanity after Mr. Etherly spit on him. Those allegations are not part of the issues before the Board at this time, however.

members of the public, and the health of relationships between the SPD and the communities it serves—not to mention the City’s compliance with a settlement agreement with the United States Department of Justice resulting from claims the SPD has too often used excessive force. In this delicate political and public policy context, it is also important to remember, as the Department’s Use of Force policy explicitly recognizes, that “the decisions of when, which type, and how the force is used are complicated and very often made in split seconds.” *See*, Exh. 1 at 1, Policy 6.240-Use of Force. Thus, the City’s Policy appropriately provides that in evaluating force incidents, it is imperative to consider what a “reasonable officer” would have done under the circumstances. *See*, e.g. *id.* at 5, Section X(C) (“an officer is justified in using less lethal force in circumstances where an officer *reasonably believes* that other force options would be ineffective or impractical”) (emphasis supplied).

In applying these standards to the case before us, the Board is not free simply to apply its own views as to how these competing interests should be accommodated. We take these factors into account, to be sure, but we must be guided ultimately by the principles of just cause contained in the parties’ CBA.¹⁸ Under the traditional just cause analysis, developed by Arbitrators in deciding workplace discipline cases since at least the 1930’s, the Employer bears the burden of proving the employee’s alleged misconduct. Consequently, the parties appear to agree here that Officer Faust’s suspension was consistent with standards of just cause only if facts sufficient to support the discipline imposed have been established by a preponderance of the evidence in the record, and even then, only if the process used by the City comports with accepted notions of due process and with concepts of equal treatment when considered in light of the discipline imposed on other officers for similar established offenses.

¹⁸ As noted above in Section II, the specific question the parties have asked the Board to determine is whether the suspension of Officer Faust is consistent with contractual prerequisite for discipline, i.e. just cause.

B. The City's Use of Force Policy

Turning to an analysis of the specific situation before us, we begin with the detailed standards set forth in Policy 6.240 regarding the use of force by officers. The core concepts of that policy are reflected in the definition of “necessary” force:

Necessary. No reasonably effective alternative to the use of force appeared to exist, and the amount of force used was reasonable to effect the lawful purpose intended.

Policy 6.240, Section I(A). In other words, the key questions to be answered in a use of force case are whether an officer's use of force was intended to accomplish a lawful purpose, and if so, whether one or more reasonably effective alternatives to the use of that force existed, and if not, whether the level of force actually used was reasonable in relation to the accomplishment of the law enforcement purpose the officer intended.¹⁹

The Policy provides additional guidance for our consideration in answering the questions outlined above:

When determining the necessity for force and the amount of force required, officers shall consider known circumstances, including but not limited to, the level of threat or resistance presented by the subject, the danger to the community, and the seriousness of the crime.

Id. at 1 (“Policy”).

C. Officer Faust's Use of Force

1. “Command Voice” Technique

Applying these concepts to the facts of this case, the Board has carefully considered the Policy's provisions regarding “less lethal force,” which is defined as “a level of force such that

¹⁹ As I understand the City's arguments in support of the discipline, it is ultimately question three that is at issue, i.e. the City concedes that Officer Faust had reason to detain and control Mr. Etherly while investigating the hit and run, but contends that he unnecessarily “escalated” the confrontation by his aggressive approach which in turn resulted in a use of force that would otherwise have been unnecessary. *See*, Exh. 5 at 3. Thus, while Chief Pugel concedes that Officer Faust was justified in using some unspecified level of force in this situation, he concluded that alternatives existed that would have obviated the need for the *level* of force actually used.

the outcome is not intended to cause death.” *Id.* at 2, Section I(D). The Policy describes conditions for the use of “less lethal” force in Section X. *Id.* at 4, Section X(A). The City’s Policy informs officers that they may use such force when it is “necessary” to do so in order “to overcome a subject’s combative intent, active physical resistance, and/or assaultive behavior” or “to provide self-defense.” *Id.* at 4, Section X(B)(1) and (3). On the face of it, these factors as set forth in the Policy seem to describe the situation faced by Officer Faust in this case, and thus to justify his use of force against Mr. Etherly.

The City argues, however, that delivering two blows to the face of Mr. Etherly was not truly “necessary.” That is so, argues the City, because Officer Faust’s use of the “command voice” technique “provoked” Etherly and unnecessarily “escalated” the conflict. *See*, City Brief at 9. A better approach, says the City, would have been to calmly explain to the subject “why he was being arrested in hopes that he would cooperate and acquiesce to the handcuffing.” *Id.* No doubt with hindsight, we all agree that the City’s suggested approach would have been preferable had it worked. Any use of force by an officer against a member of the public is an unfortunate circumstance, to be avoided if possible. The Board has concluded, however, that a reasonable officer in Officer Faust’s position could appropriately conclude that further discussion with Mr. Etherly was highly likely to fail to gain his compliance. That is so because a review of the entire incident establishes that the subject was noncompliant throughout this encounter with the officers—no matter how calm and polite they were in addressing him.

For example, even in the first minute of the incident, when Mr. Etherly was relatively calm, he repeatedly removed his hands from the hood, even after being politely reminded by Chin and Campbell several times that he was not to do so.²⁰ Eventually, and without telling the

²⁰ We also note that at the very beginning of the incident, when Officer Campbell monitored Mr. Etherly while Officer Faust went to the van to investigate, the video shows Officer Campbell in what appears to be polite

officers what he intended to do, he took *both* hands off the hood and started to move toward the front of the vehicle. When Officer Chin said “Okay, you’re going in handcuffs now,” Mr. Etherly violently pulled away and said in a loud voice “Don’t fuckin’ touch me, bro” while accusing Chin of “riding” him—despite the fact that Chin had been very polite to him at all times, even in the tone of his statement to Mr. Etherly that he intended to handcuff him. Eventually, Mr. Etherly told Officers Chin and Campbell where *he* intended to sit, and they acquiesced.²¹

From his vantage point near the van, Officer Faust observed Mr. Etherly pull away from Chin and heard the subject’s verbal aggression. Consequently, even before he returned to the vehicle, Officer Faust already had ample reason to doubt that Mr. Etherly would become compliant if the officers simply continued their polite treatment of him. Under those circumstances, Officer Faust’s use of the “command voice” technique—which the City’s witness on training, Capt. Edwards, conceded was a recognized police tactic on which the Department has trained its officers²²—was not unreasonable. In fact, it strikes us as one possible “reasonably effective alternative to the use of force” that Policy 6.240 at 1, Section I(A) requires officers to consider. Unfortunately, this recognized technique turned out not to be effective under these circumstances with this particular subject. But if the technique is a recognized one, and one that reasonably could be employed here, as we find, it is manifestly unfair for the City to fault Officer

conversation with Etherly for an extended period. Unfortunately, there is no audio of that conversation, but it seems to establish that the officers initially engaged the subject with an appropriate level of respect.

²¹ As an aside, one can reasonably wonder whether Mr. Etherly’s successful noncompliance with the instructions of Officers Chin and Campbell, including his refusal to be handcuffed, led him to believe that he could successfully resist the later instructions from Officer Faust, e.g. to give his name, to turn around and put his hands behind his back, etc.

²² When asked on cross examination if officers have been trained to utilize “command voice” to try to gain control of a subject, Capt. Edwards responded “Yes, absolutely.” Tr. at 121.

Faust for the outcome simply because the tactic did not work—and that is especially true when the situation was already demonstrably out of the officers’ control.²³

Although there has been some suggestion, e.g. in the OPA report of March 26, 2013, that Mr. Etherly was “no longer aggressive” with Officers Chin and Campbell once he sat on the front bumper,²⁴ the video demonstrates that Mr. Etherly was *still* being verbally aggressive when Faust returned to the vehicle from the van. *See*, e.g. Exh. 2 at 1:25 (Side View). In any event, when Officer Faust “interjected himself” in the situation, to use the description contained in the OPA report, mere seconds had elapsed since Mr. Etherly had physically resisted being handcuffed by violently pulling away from Officer Chin and loudly exclaiming “Don’t fuckin’ touch me, bro.” *See*, Exhibit 2 at 1:19 (Side View) (Mr. Etherly pulls his arm away from Chin); *id.* at 1:22 (Mr. Etherly sits down on front bumper); *id.* at 1:25 (Officer Faust “interjects himself” by forcefully telling Mr. Etherly to “Shut [his] mouth and just sit there”).

This sequence of events is inadequate to demonstrate, contrary to the suggestion in the OPA report and in Chief Pugel’s testimony, that Mr. Etherly was ready to be compliant if only the officers had continued to make polite requests of him.²⁵ In the Board’s view, Officer Faust could reasonably have concluded, at the very least, that polite treatment had failed to bring Mr. Etherly into compliance, and thus it was time to try some other approach. It is no doubt *possible* that Mr. Etherly could have been persuaded to comply by utilizing the approach described by Chief Pugel, but as the Chief himself conceded, it was unlikely. Therefore, as an officer on the

²³ The Board also notes that Officer Faust is concededly a good officer, Tr. at 42, and that he has not previously been disciplined for use of excessive force.

²⁴ *See*, Exh. 6, Bates No. SPLU0002; *see also*, Tr. at 57-58 (Pugel) (subject was “relatively calm until Faust re-engage[d] him”).

²⁵ To be fair to Chief Pugel, he conceded that “it was more likely that [Mr. Etherly] wouldn’t [be compliant], but you have to give it a try.” Tr. at 66.

scene faced with making a tactical decision on the fly, and in light of Mr. Etherly's continuing resistance to authority, Officer Faust could reasonably conclude that it was appropriate to try an alternative tactic he had been taught by the Department. In sum, the Board cannot accept the City's argument that the suspension of Office Faust is supported by just cause because he improperly "escalated" the conflict.

2. Tactical Errors

In a similar vein, at the hearing the Chief suggested that the officers had made tactical errors that unnecessarily put them in the position of using excessive force, e.g. he contended they should have worked together to pull Mr. Etherly upright and forward from the front bumper so they could trip him face-down to the ground and apply handcuffs from behind. Tr. at 73.

Alternatively, Chief Pugel testified that the three officers simply should have flipped Mr. Etherly over and cuffed him, then applied a "spit sock" over his head to prevent him from spitting further. Tr. at 26.²⁶ These arguments each reflect an alleged tactical error by Officer Faust (and presumably the other officers, although neither Officer Chin nor Campbell was disciplined here), which, had the allegedly proper tactics been utilized, arguably would have made the blows from Officer Faust unnecessary. That argument, in one form or another, constitutes the crux of Chief Pugel's reasoning in support of the discipline:

He put himself in a situation not following good tactics, not following training, and then employed tactics and force that was not trained. Inexcusable for what this guy Etherly did, inexcusable. But his actions, the officer's actions,

²⁶ As described in Section III, however, flipping Mr. Etherly on the hood and cuffing him was exactly what the officers were attempting to do when, despite Officer Faust's efforts to control his head, the subject intentionally spit in the officers' faces. *See*, page 6 above. Thus, the officers unsuccessfully attempted one of the precise maneuvers Chief Pugel suggests. The Chief seems to be contending that the officers should have continued to attempt to flip Mr. Etherly—and continue to expose themselves to the potential biohazard of his bodily fluids—until they were successful in turning him over. For reasons that follow, however, the Board agrees with the Guild that the officers had the authority, under the law and under the City's policies, to take actions necessary to protect themselves from what the City concedes was a felony assault. Whether Officer Faust used *excessive* force in that effort, of course, is the key question.

precipitated it, helped precipitate it greatly and contributed to what eventually became an improper use of force. I don't know how much clearer I can be.

Tr. at 91.

Of course, as already noted, to the extent “bad tactics” contributed to putting Officer Faust in a difficult position where force became necessary (and the Guild does not dispute that bad tactics were utilized here), that same logic would have supported discipline against Officers Chin and Campbell. In hindsight, it is clear the other officers made at least two critical tactical errors. First, they acquiesced to Mr. Etherly’s insistence on sitting on the front bumper instead of requiring him to continue to stand with his hands on the hood (or elsewhere) where he could have been more easily and safely cuffed when the time came. Second, they failed to follow through on Officer Chin’s stated intention to handcuff Mr. Etherly when he removed his hands from the vehicle. Chief Pugel conceded that, under Department policy, Mr. Etherly should have been cuffed at that time. Tr. at 59. Had neither of these errors occurred, of course, Officer Faust would not have been in the position of attempting to handcuff Mr. Etherly in a face-to-face confrontation. But despite these errors by Campbell and Chin, neither was disciplined, while Officer Faust, who attempted to handcuff the subject under the less than ideal circumstances created by those errors, *was* disciplined—at least in part on the basis of “bad tactics.” That situation raises significant questions of unequal treatment in violation of long-established principles of due process under the just cause standard. Be that as it may, however, while the tactical errors here might call for additional training, they add little to the Board’s evaluation of the core issue here: did Officer Faust, under the circumstances as they actually developed, use excessive force after being spit upon by Mr. Etherly?

3. Was The Level of Force Used Reasonable?

Chief Pugel determined that the force used by Officer Faust *was* excessive under these circumstances. It is troubling to the Board, however, that in explaining his reasons for reaching that conclusion, he made critical factual assertions that are persuasively refuted by the video evidence. For example, he stated repeatedly during his testimony that the force used by Officer Faust was excessive because he struck Mr. Etherly with an “impact tool” in his hand, i.e. his handcuffs. *See*, e.g. Tr. at 26-27; 31; 45-47. He also testified that in the initial blow, Officer Faust struck Mr. Etherly with his “fist.” Tr. at 46. Both of these claims are mistaken. At the time of the first blow, Officer Faust had succeeded, with the assistance of Officer Campbell, in cuffing Mr. Etherly’s left hand. Thus, the cuffs were no longer in Officer Faust’s hand, and the blow he struck just after Etherly spit in his face was delivered with his forearm, not his “fist.” *See*, Exh. 2 at 4:35 (Head-On View); *id.* at 4:44.²⁷

Eventually, however, in response to a question from the SPD Board Member, Assistant Chief Kessler, Chief Pugel testified, in essence, that even if the facts were not as he had described them in his testimony, the force used by Officer Faust was nevertheless excessive and justified a suspension of eight days. Tr. at 94. Chief Pugel did not explain this answer, e.g. by adding anything beyond the reasoning contained in his testimony as a whole. The question still remains, however, whether the blows actually delivered by Officer Faust were excessive under the circumstances.

²⁷ No criticism of Chief Pugel is intended. At the time of the hearing, he had been retired for some time already, and he had inherited the role of decision maker in this matter from former Chief Diaz who actually had conducted the *Loudermill*. On the other hand, it was Chief Pugel who imposed the suspension here, and he was the witness called by the City to explain its justifications for the discipline. Thus, these factual errors, which in our view tend to overstate the seriousness of Officer Faust's actions, cannot help but undermine the City’s case.

Chief Pugel asserted that the level of force Officer Faust used was improper because it was not the “least intrusive.” *Id.* In his testimony, however, Chief Pugel failed to identify any lower level of force that could reasonably have been expected to prevent Mr. Etherly from further spitting on the officers (and repeatedly kicking Officer Faust).²⁸ It is entirely fair for the Chief to criticize the tactics leading up to that situation, but once Mr. Etherly’s assault was underway, it is not convincing to the Board that the officers should have simply continued their attempt to flip him over on the hood, exposing themselves to being further assaulted. Nor, once the subject had begun his assault, would it have been practical to bring Mr. Etherly to a standing position and then to trip him to the ground face-first. That approach, too, would have subjected the officers to the danger of continued biohazard exposure and kicking.²⁹ Thus, the City’s evidence does not allow us to conclude that an effective alternative existed to Officer Faust’s use of force.³⁰

It may be true that there was no training module for officers that instructed them to strike a subject in the face in response to being spit upon, but the situation here is unique, i.e. there is no training about how to handcuff a subject from the front while he is bent backwards on the hood of a vehicle. But that was the situation in which Officer Faust found himself. Clearly, neither the Use of Force Policy nor the Department’s training can anticipate *every* scenario an

²⁸ Officer Faust testified, without contradiction, that Mr. Etherly was intentionally kicking him during the entire time he was attempting to place handcuffs on the subject. Tr. at 284-85. Although that kicking cannot really be confirmed by either video, the Side View does show Officer Faust moving his legs from side to side in a manner that would be consistent with his claims of trying to avoid being kicked, Exh. 2 at 1:45-1:55. The Head On view is similar, and also shows that Mr. Etherly at one point had wrapped his legs around the waist of Officer Faust. Exh. 2 at 4:34. In any event, under these circumstances, Officer Faust’s testimony that he was being kicked is sufficient to establish that fact, another aspect of the assault against him by Mr. Etherly.

²⁹ To the extent Chief Pugel contended that a “reasonable alternative” was not to “provoke” Mr. Etherly in the first place through use of the “command voice” technique, we have disposed of that contention already. *See*, Section IV(C)(1).

³⁰ *See*, e.g. Exh. 1 at 5, Section X(C) (“an officer is justified in using less lethal force in circumstances where an officer reasonably believes that other force options would be ineffective or impractical”).

officer might encounter in the field.³¹ The policy does provide general guidance, however—for example, that “less lethal force” may be applied, when “necessary,” to “overcome a subject’s combative intent, active physical resistance, and/or assaultive behavior,” each of which was present here. No doubt that is especially true when an officer is acting in “self–defense.” *See*, Exh. 1 at 4-5, Section X(B)(1) and (3). In the absence of convincing evidence that there was a reasonably available lower level of force that was likely to be as effective in ending the assault, the Chief’s articulated rationale for the discipline fails.

One final question remains—specifically, whether the *second* blow delivered by Officer Faust was excessive. The City argues that it was because Etherly was on the ground, “presumably stunned by the initial blow to his face.” City Brief at 13. Thus, the subject was under control, says the City, and the second blow went “above and beyond” what was necessary. *Id.*; *see also*, Tr. at 28 (Pugel). In evaluating this argument, the Board does not have the benefit of video that shows exactly what happened after Officer Faust dragged Mr. Etherly off the vehicle hood and onto the ground. Mr. Etherly cannot be seen at all in either video. What the video does show, however, is that Officer Faust delivered a blow within a second after pulling Etherly off the hood. Exh. 2 at 4:45-4:47. The City seems to argue that the subject must have been “under control” at that time because he was on the ground with three officers over him, but Officer Faust credibly testified that was not the case:

When he goes down, immediately as he is hitting the ground which is a direction, the officers are slack in his arms. So he immediately goes to the ground and his chest starts to rise off the ground, like he is pulling himself off the ground. Head and chest kind of keep coming up. Which to me that said, he was coming back at

³¹ Capt. Edwards described a “cross jaw” technique designed to pin a subject’s jaw and mouth away from an arresting officer with a forearm, but it is conceded that the training he described constitutes only a small part of the “street skills” module, lasting only minutes, and that Officer Faust did not attend that training in 2012. Nor has the City pointed to any policy that requires officers to use that technique exclusively as opposed to other appropriate techniques they may be familiar with. In fact, officers are given “a great amount of latitude” in determining which techniques to use so long as they are not inconsistent with policy. Tr. at 146-47 (Capt. Edwards).

me. So I delivered one strike to him and he immediately ceased his aggression, his body went back down and you saw the rest.

Tr. at 286.

In the Board's view, the testimony of Officer Faust quoted above, which is at least partially corroborated by the available video, is sufficient to overcome the City's contention that the subject was immediately under control when he hit the ground.³² In other words, the fight was not yet over, and Officer Faust was entitled to employ appropriate self-defense tactics until it was.

V. CONCLUSION

The City has failed to establish by a preponderance of the evidence that it had just cause to suspend Officer Eric Faust for eight days. Consequently, the grievance must be granted. The suspension shall be removed from his record and he shall promptly be made whole for lost wages and benefits.

³² For example, the video demonstrates that at the time Mr. Etherly had first been taken to the ground, Officer Chin was at least somewhat out of position and was being blocked by the front of the vehicle from assuming full control of Mr. Etherly's right arm. It appears to take five or six seconds for him to re-position himself with proper leverage and to bring Mr. Etherly's right arm fully under control again. Exh. 2 at 4:44-4:51 (Head-On View).

DECISION OF THE DISCIPLINARY REVIEW BOARD

The Disciplinary Review Board convened to consider the suspension of Officer Eric Faust, having carefully considered the evidence and argument, hereby renders the following Decision:

1. Interim Chief Pugel lacked just cause to suspend Officer Faust; therefore,
2. The sustained finding and suspension shall each be rescinded and be removed from Officer Faust’s file; and,
3. Officer Faust shall be made whole for lost wages and benefits.
4. The Board will retain jurisdiction to resolve any disputes over implementation of this Decision that the parties are unable to resolve on their own; either party may invoke the Board’s remedial jurisdiction by fax or email sent, or letter postmarked (original to the Neutral Chair, copies to the other party and their designated members of the Board) not later than sixty (60) days from the date of this Decision, or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Board) or that the Board may order for good cause shown; and
5. The parties shall bear the fees and expenses of the Neutral Chair in equal proportion.

Dated this 15th day of October, 2014



Michael E. Cavanaugh, J.D.
Neutral Chair

Asst. Chief Joseph Kessler
SPD Member of the Board

Officer Kevin Stuckey
SPOG Member of the Board

___ I concur ___ I dissent

___ I concur ___ I dissent

Date: _____

Date: _____