

STATE OF NEW YORK
CITY OF BUFFALO

In the Matter of the Disciplinary Proceeding

between

BUFFALO POLICE BENEVOLENT
ASSOCIATION, INC.

Union,

And

CITY OF BUFFALO,

Employer.

RE: Police Officer Robert McCabe
Police Officer Aaron Torgalski

BEFORE: Jeffrey M. Selchick, Esq.
Arbitrator

APPEARANCES:

For Buffalo Police Benevolent Association, Inc.
The Law Offices of Thomas H. Burton
Thomas H. Burton, Esq.

For the City of Buffalo
Goldberg Segalla, LLP
Sean P. Beiter, Esq.
Christopher P. Maugans, Esq.

OPINION

AND

AWARD

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INTRODUCTION

This arbitration was conducted under the Collective Bargaining Agreement between the Buffalo Police Benevolent Association, Inc. and the City of Buffalo, New York.¹ At issue in this proceeding is whether the City sustained its burden of proof in establishing Charges against Buffalo Police Officers Robert McCabe and Aaron Torgalski (“Officers” or “Respondents”), which Charges were contained in Notices of Charges against both Officers dated June 4, 2020 and served on them on June 5, 2020.²

An essential element of each Charge is the claim that on June 4, 2020 the Respondents “used unnecessary force and/or violence against Martin A. Gugino, a protester being dispersed from the area [in Niagara Square in downtown Buffalo], by forcibly pushing him causing him to fall to the ground and strike his head, injuring same.”³ Both Officers filed answers in response to the Charges served on them that denied in their entirety all allegations in the Charges.⁴ Acting as the duly designated Master Arbitrator under the parties’ Collective Bargaining Agreement and subsequent Memorandums of Agreements, the undersigned presided over an arbitration proceeding that was held on November 1, 2, and 3, 2021 in Buffalo, New York. A transcript was taken each day.

¹ Joint Exhibit 1.

² Joint Exhibits 6 & 8.

³ The video and photographic evidence in the record depicts Gugino as a tall slender man. Gugino was 75 years of age on June 4, 2020.

⁴ Joint Exhibits 7 & 9

All findings of fact made in this Opinion and Award are based on evidence the parties made part of the record, stipulations between the parties, evidence properly received at the hearing, or the Arbitrator's taking of "arbitral notice" of commonly known facts. The factual events relevant to the Charges and the Arbitrator's assessment of them naturally focus on the Respondents' interaction with the aforesaid Martin A. Gugino in Niagara Square in downtown Buffalo. It is important to note that Gugino did not respond to a lawful subpoena properly served on him by the City and in effect refused to testify at in this proceeding. Accordingly, any account Gugino may have offered of what occurred is not found in the instant record.

It is also noted that June 2020 occurred during the first early stages of the COVID-19 pandemic. Much of the country, and clearly New York State, was in some type of pandemic lockdown. Face masks were required to be worn at most places and close personal contact was to be avoided. Social distancing of staying 6 feet away from others became the prescribed norm. Most large gatherings, including sporting events and religious services, were banned or significantly limited. Individuals whose required work was public facing clearly faced medical peril as they went about their jobs. Such individuals, including Police Officers, did not have the luxury of remote or virtual work and performed their duties which required face to face contact with members of the public.

CONDITIONS IN BUFFALO IN THE WAKE OF THE GEORGE FLOYD DEATH IN MINNEAPOLIS

As with most major cities in the United States, Buffalo began to experience protests and demonstrations triggered by the death of George Floyd in Minneapolis on May 25, 2020. It would appear that the protests began in Buffalo on May 30, 2020. One central site of the demonstrations in Buffalo was the area in downtown Buffalo known as Niagara Square, which is located in front of Buffalo City Hall. Protests and demonstrations in Buffalo also occurred at other locations, and, on June 1, 2020, law enforcement personnel were injured when a vehicle drove through a blockade on Bailey Avenue in Buffalo, some distance from downtown.

On June 2, 2020, the City's Mayor, Bryon W. Brown, issued a Declaration of State of Emergency under the auspices of Section 24 of the New York State Executive Law. (Respondents' Exhibit 30). The State of Emergency Declaration ordered "a city-wide curfew of all nonessential pedestrian and vehicular traffic within the City of Buffalo, NY from 2000 [8 pm] and 0500 [5 am] hours." (Id.). The Declaration stated that it had been issued "due to the conditions of civil unrest and disturbance within the City of Buffalo and its immediate threat to the maintenance of law and order or endanger life, property, or the safety and welfare of the residents of the City of Buffalo." (Id.). The curfew took effect on June 2, 2020 and was to remain in effect until the June 8, 2020. The curfew was in place, therefore, on June 4, 2020.

GUGINO'S CONDUCT IN NIAGARA SQUARE BEFORE HIS INTERACTION WITH RESPONDENTS

At approximately 8:00 p.m. on June 4, 2020, a dispersal order was issued over a loudspeaker in Niagara Square that announced the 8:00 p.m. curfew. Before the dispersal order was issued, there were a number of Buffalo Police Officers in Niagara Square assigned to Traffic Control that included Officers Mielcarek, Frascatori, and Lopez. As described in their unrefuted testimony, these Officers were sought out by Gugino prior to the incident, as he made his way around Niagara Square at a point in time when the vast majority of demonstrators in the Square left or were in the process of leaving the Square in response to the curfew taking effect.

Officer Frascatori testified that he was assigned to Traffic Control in a marked patrol car at Niagara Square and was standing outside of his patrol car talking to fellow Officers present when he was approached by Gugino. (Id., 368-369). By that time, Officer Frascatori testified, there had been “verbal audible warnings” to the effect that people had “ten minutes to exit.” (Id., 369). A large number of people, Officer Frascatori testified, were moving from City Hall northbound up Niagara Street away from Niagara Square. (Id.). It was at that point, the Officer testified, that Gugino approached him with a motorcycle helmet in his hand and a mask on. (Id., 370). Officer Frascatori testified that Gugino told him that he, Gugino, “believed the curfew was in violation of his First Amendment rights.” (Id.). According to Frascatori, he informed Gugino he could

file a complaint, though he observed that Gugino was not listening to him but “kind of talking over me and he didn’t really hear what I had to say.” (Id.). At that juncture, the Officer testified, Gugino “reached out, touched my arm as he continued to speak his mind.” (Id.). Frascatori testified that he told Gugino at that point, “sir, don’t touch me.” (Id.).

Officer Mielcarek testified that he was sitting in the driver’s seat of his marked patrol car on Niagara Street just off Niagara Square at approximately 7:45 p.m., when Gugino approached the patrol vehicle. (Id., 333-334). Mielcarek noted Gugino had a motorcycle helmet under one of his arms and asked if he could speak with the Officer. (Id., 337). Mielcarek told him he could, and Gugino asked the Officer if he had an opinion about the curfew. Gugino, after the Officer stated he had no opinion, voiced his opinion that the curfew was unconstitutional. (Id., 337-338). According to Officer Mielcarek, Gugino then stated to him he would not leave and would need to be arrested. (Id., 338). Mielcarek told Gugino how much time remained before the curfew would take effect and that, if Gugino was to be arrested, Mielcarek would not be the arresting Officer. (Id., 340). Mielcarek stated his belief that Gugino was attempting to start an argument with him. (Id.).

Gugino then proceeded to the next patrol vehicle stationed on Niagara Square where Officer Lopez was standing outside his marked patrol vehicle. (Id., 341). Officer Lopez testified that he had just finished speaking with two other demonstrators after arranging with headquarters a short extension of the

imposition of the curfew so that the demonstrators could say a prayer. (Id., 391-393). Lopez had seen Gugino “carrying a motorcycle helmet” and “walking back and forth” before Gugino approached him. (Id., 393). Lopez testified that Gugino began yelling at him, stating “this is all wrong, this is all wrong, you’re violating my rights.” (Id., 394).

According to Officer Lopez, Gugino continued, stating “[t]his is against the Fifth Amendment, you might as well take me to jail now because I’m not leaving here, I’m going to jail one way or the other.” (Id.). Officer Lopez testified that because he was not there to have any confrontation with protestors, he simply walked back to his car and, Officer Haas, who was also in the car, told Gugino “why don’t you get on the sidewalk.” (Id., 394-395). Officer Lopez testified that Gugino then “went off in a rampage and was still ranting and raving that he wants to go to jail, you might as well take him now.” (Id., 395). Officer Lopez opined that this interaction with Gugino occurred within ten minutes of Gugino’s eventual interaction with Officers McCabe and Torgalski. His interaction with Gugino ended, Officer Lopez testified, when Lopez “stood down.” (Id., 396).

While Gugino was in Niagara Square before the curfew took effect, Deputy Police Commissioner Joseph Gramaglia was in the Command Center at Police Headquarters monitoring the situation. While there, the Deputy Commissioner was observing events in Niagara Square in front of City Hall through various surveillance cameras. (Id., 185). In doing so, the Deputy Commissioner became aware of Gugino’s presence. (Id.). According to the Deputy Commissioner, he

observed Gugino and a younger male probably in his mid-twenties who “seemed to me to be directing his aggression and anger towards Mr. Gugino.” (Id., 185-186). It was this observation, the Deputy Commissioner testified, that led to his issuance of an order to the Department’s Emergency Response Team that had assembled behind City Hall to enter the Square and disperse the crowd. (Id.).

After Gugino spoke with the Officers, he went up the steps of Buffalo City Hall, which faces Niagara Square, and spoke with journalist Michael Desmond. Desmond testified that when he spoke with Gugino, there were news media personnel present in Niagara Square along with several demonstrators but “not a large crowd.” (Id., 56). Mr. Desmond also testified that, at some point, he noticed law enforcement personnel enter Niagara Square from the south end of Buffalo City Hall. By then, Desmond testified, there were more Police Officers in Niagara Square than protestors. (Id., 57).

As the vast majority of the demonstrators left Niagara Square and Gugino remained in the Square, the Emergency Response Team entered the Square at the south end of Buffalo City Hall. The Emergency Response Team, known as the “ERT” consisted of police officers specially trained to respond to riots and other crowd control situations that are out of the ordinary police response. When activated as ERT, they wear riot gear due to the critical nature of their assignment. Members are on high alert and aware of imminent physical danger. There were approximately 57 members of the Department trained and assigned to the ERT. An ERT Platoon, led by Detective Sergeant John Losi, consisted of

about 20 officers present in Niagara Square during the incident. Included in the ERT were the Respondents in this proceeding, Officers McCabe and Torgalski.

Body cam videos from members of the Response Team reflect Gugino's actions after he spoke with Desmond. A body cam video from Officer Haettich depicts ERT members at the far end of their line closest to City Hall as they are about to proceed in a northerly direction in front of City Hall. (City Exhibit 7). Desmond is seen in this video standing on the lower steps of City Hall when a "forward march" directive is heard and Gugino can be seen behind Desmond, crouching down in the direction of individuals sitting on the steps of City Hall. (Id.). Gugino is then seen entering the sidewalk in front of City Hall with this right arm extended and apparently looking at the object in his right hand. (Id.). Gugino then walks to the edge of the sidewalk, with his right arm still extended, then lowers that arm and turns in the direction of the advancing Emergency Response Team. (Id.).

Gugino's actions at this point are also captured in a body cam video from Officer Zgoda. (City Exhibit 5). This body cam video shows Gugino walking at what can fairly be described as a brisk pace toward the Response Team. Gugino's advance on the front line of the Response Team is also shown in the body cam video from Respondent McCabe where Gugino can be seen walking straight to McCabe, with his left arm held by his side, holding a black object that looks like a motorcycle helmet, and holding in his outstretched right arm and hand what appears to be a cell phone. (City Exhibit 8).

INCIDENT THAT BECAME THE SUBJECT MATTER OF THE CHARGES

In the McCabe body cam video, Gugino continues walking directly to the front of McCabe, lowering what appears to be the cell phone held in his right hand to McCabe's lower left arm and then moving the right hand and beginning to wave the cell phone very near the lower right arm of Torgalski. (Id.). McCabe's arms are outstretched, holding his baton in a horizontal direction. As Torgalski's right hand enters the video, Gugino can then be seen moving and then stumbling backwards until he falls on his back. (Id.).

As McCabe's body cam video indicates, Gugino approached the front line of the Emergency Response Team and stood directly in front of Officer McCabe and just to the right of Officer Torgalski who was at McCabe's left side. When Gugino approached the Response Team, the Team was beginning its maneuver in a northerly direction in Niagara Square. The actual interaction between Respondents and Gugino lasted approximately five seconds and ended when the two Officers pushed Gugino away from them. Officer Torgalski used his right hand to push Gugino and Officer McCabe used a baton to push Gugino. The ERT Platoon Leader, Detective Sergeant Losi, pushed McCabe forward as part of the Team's maneuver at the same time McCabe's baton made contact with Gugino. After being pushed, Gugino, as noted, lost his balance and fell to the pavement on his back. In the process, he struck his head and required medical attention.

DESMOND VIDEO AND MEDIA RESPONSE

Journalist Desmond testified that after his conversation with Gugino on the steps of City Hall, he saw Gugino moving toward the line of Officers “and something happened, and he was pushed backwards and hit his head on the concrete.” (Id., 58). Desmond had the video camera on his cell phone operating at that point in time and captured this event. (Id., 58). The video itself was entered into the record. (City Exhibit 2). Desmond testified that the video was then put online on the same evening. (Tr. 59-60).

The Arbitrator has conducted a frame-by-frame review of the Desmond video. The Desmond video begins with the Emergency Response Team starting to move in front of City Hall. At that time, Gugino’s pace brings him to the Emergency Response Team’s front line almost directly in front of McCabe. Gugino, who is much taller than McCabe, seems to be looking at an object in his right hand. Gugino then turns his head in the direction of Respondent Torgalski who has walked slightly ahead of both McCabe and Gugino, as McCabe seems to have come to a stop given Gugino’s position directly in front of him. Gugino then reaches over with his right hand and waves it along the right forearm area of Torgalski who is now looking in Gugino’s direction. Gugino also seems to have slightly moved the position of his body so that it is more at an angle as he continues to stand in front of McCabe. Someone can be heard yelling “move.” (City Exhibit 2).

Torgalski then can be seen moving his outstretched right arm to Gugino as McCabe raises his baton in the area of Gugino's chest. Gugino's right leg seems to move slightly. Behind the outstretched arm of Torgalski, Platoon Leader, Detective Sergeant Losi, can be seen. Gugino is then pushed back by what seems to be the right arm of Torgalski and the baton held by McCabe, as both Torgalski and McCabe move in Gugino's direction. Gugino still seems to be positioned more in front of McCabe than Torgalski. Gugino's right foot now is slightly off the ground and he seems to be in the position of losing his balance. Gugino takes three or four steps backwards as he loses his balance and begins to fall. As Gugino falls backwards, his body leaves the video. (Id.).

Gugino is next shown laying prone on the ground. Blood can be seen on the right side of Gugino's head. McCabe begins to bend in Gugino's direction and partially squats down to look at Gugino when Losi takes McCabe's right shoulder and urges him forward. As McCabe and Torgalski move forward, Losi can be seen standing to the side of Gugino's body. Losi begins to move away, making some communication in relation to summoning an ambulance. (Id.).

The Emergency Response Team line moves past Gugino and several members of the ERT then encounter a male holding a protest sign and begin to interact with him. Several ERT members can be seen taking custody of the male holding the sign and moving him away in a direction opposite from the direction the ERT was moving. The video then shows the male being cuffed. (Id.).

The detailed description of the video should not obscure the fact that the video is approximately 40 seconds in length and that portion of the video showing Gugino's interaction with Respondents takes up approximately five seconds of the video. The Desmond video, or that portion of it showing the approximately five seconds of interaction between Respondents and Gugino, was viewed by millions of individuals and featured prominently in media accounts of the demonstrations and protests that were sweeping the United States in the days following the death of George Floyd. A more detailed analysis of Respondents' encounter with Gugino, which will include a detailed description of individual frames taken from the Desmond video, and the testimony of Respondents and Platoon Leader Losi will be set forth below when the Arbitrator analyzes the Charges.

It is critical to note again that any account of the incident that might have been offered by Gugino to explain his movements and overall conduct before his encounter with Respondents and the encounter itself is not available because of his refusal to testify in this proceeding.

DEPARTMENTAL RESPONSE

When the events in Niagara Square that led to Gugino's interaction with the Respondents that were captured on video by journalist Desmond took place, Deputy Police Commissioner Joseph Gramaglia was in the Command Center at Police Headquarters. At that time, he was the highest Command Officer present. (Id., 182). Deputy Commissioner Gramaglia testified that he had been called in to work because of a "large gathering in front of City Hall that blocked the street and they [the Emergency Response Team] were going to move into position to open the street back up and ... that's when I came back in and we staffed up the command center." (Id., 183). According to the Deputy Police Commissioner, before the 8:00 p.m. curfew, the Emergency Response Team was in the staging area behind City Hall and was then directed to clear the Square "because people refused to leave ... by the eight o'clock curfew." (Id., 185).

As noted above, the Deputy Commissioner issued the order to the ERT to disperse the crowd in Niagara Square after he observed a "younger male" who was "directing his aggression and anger towards Mr. Gugino." (Id., 185-186). The Deputy Commissioner testified that the dispersal order was issued to Lieutenant Palisay, who was Operations Commander of the Emergency Response Team and who was with the Deputy Commissioner at the Command Center. (Id., 187). After issuing the order, the Deputy Commissioner testified, he stepped out in the hallway of the Command Center, was on the phone with Departmental Spokesperson Captain Rinaldo who was asking him for an update

as to what was going on, and, while he was on the phone with Captain Rinaldo, Rinaldo informed him that there was “somebody on the ground” but he “didn’t know what happened.” (Id., 188). The Deputy Commissioner testified that he then went back into the Command Center and could see on a surveillance camera that somebody was lying on the ground. (Id.).

According to the Deputy Commissioner, a short time later he learned of a tweet about an individual tripping over a bollard in front of City Hall, and it was not until the Desmond video began to go “viral” that he actually became aware of the nature of Gugino’s interaction with the Respondents. (Id., 188-189). The Deputy Commissioner testified that he may have reached home before he saw the Desmond video but, once he viewed it, he phoned the Police Commissioner and informed him about what had occurred. Deputy Commissioner Gramaglia testified that the Police Commissioner ordered that Internal Affairs begin an investigation and that the District Attorney’s Office be notified. At that point, the Deputy Commissioner testified, “there were multiple phone calls and conversations back and forth.” (Id., 191). The Deputy Commissioner could recall speaking to the First Executive District Attorney, Michael Keane. (Id.). He also testified that he notified Inspector Rosenswie, in command of the Department’s Internal Affairs Division, and then, shortly after, was directed by the Police Commissioner to have Internal Affairs prepare misconduct charges and suspend Respondents without pay. (Id., 192-193).

Inspector Robert Rosenswie of Internal Affairs testified that he was off work on June 4, 2020 when he received a call from Deputy Commissioner Gramaglia to report to work. According to Inspector Rosenswie, after speaking with the Deputy Commissioner, he spoke with the Commissioner. (Id., 85-86). Before speaking with the Commissioner, Inspector Rosenswie noted, he received the Desmond video from the Deputy Commissioner. According to Rosenswie, the Deputy Commissioner stated that there was a “situation going on downtown” and there was initial concern that Respondents may have used unnecessary force and might have been able to arrest Gugino and pass him back to law enforcement personnel behind the ERT. (Id., 87). When he thereafter spoke with the Commissioner, Inspector Rosenswie testified, he was specifically directed by the Commissioner to charge the Respondents with misconduct and suspend them without pay before they left from duty that night. (Id.).

Thus, Inspector Rosenswie testified, some witness statements were taken, and the Charges and a Suspension Notice were prepared and served on Respondents during the early morning hours of June 5, 2020. (Id., 90).

DEPARTMENTAL CHARGES

Charge 1 Violation of Chapter 1, Section 1.1(b) and Chapter III, Section 3.6 of the Rules and Regulations for the Government and Discipline of the Buffalo Police Department.

Specification 1 Police Officers Robert McCabe and Aaron Torgalski failed to obey all of the Rules and Regulations, General Orders, and authoritative instructions of the Department, in that on or about June 4, 2020, at approximately 8:30 p.m., while on duty, detailed to the Emergency Response Team (ERT) at City Hall, 65 Niagara Square, Buffalo, N.Y., McCabe and Torgalski used unnecessary force and/or violence against Martin A. Gugino, a protester being dispersed from the area, by forcibly pushing him causing him to fall to the ground and strike his head, injuring same.

Charge 2 Violation of Chapter I, Section 1.1(b) and Chapter III, Section 3.27 of the Rules and Regulations for the Government of the Buffalo Police Department.

Specification 1 Police Officers Robert McCabe and Aaron Torgalski failed to obey all of the Rules and Regulations, General Orders, and authoritative instructions of the Department, in that on or about June 4, 2020, at approximately 8:30 p.m., while on duty, detailed to the Emergency Response Team (ERT) at City Hall, 65 Niagara Square, Buffalo, N.Y., McCabe and Torgalski used unnecessary force and/or violence against Martin A. Gugino, a protester being dispersed from the area, by forcibly pushing him causing him to fall to the ground and strike his head, injuring same.

Said force utilized by McCabe and Torgalski was not in accordance with current law and directives.

[Charge 3 withdrawn]

Charge 4 Violation of Chapter III Sections 3.2(a) and/or 3.2(b) of the Rules and Regulations for the Government and Discipline of the Buffalo Police Department.

Specification 1 Police Officers Robert McCabe and Aaron Torgalski failed to obey all of the Rules and Regulations, General Orders, and authoritative instructions of the Department, in that on or about June 4, 2020, at approximately 8:30 p.m., while on duty, detailed to the Emergency Response Team (ERT) at City Hall, 65 Niagara Square, Buffalo, N.Y., McCabe and Torgalski used unnecessary force and/or violence against Martin A. Gugino, a protester being dispersed from the area, by forcibly pushing him causing him to fall to the ground and strike his head, injuring same.

By their actions, McCabe and Torgalski conducted themselves in such a manner which brought discredit upon the Department, and/or performed an act(s) which was prejudicial to the good order, discipline and/or reputation of the Department.

The Arbitrator is charged herein with determining the following mutually agreed upon Issues:

ISSUES

1. Is Officer Robert McCabe guilty of the Charges?
2. If so, what shall the penalty be?
3. If Officer Aaron Torgalski guilty of the Charges?
4. If so, what shall the penalty be?

(Tr. 9-10)

STIPULATIONS

1. Officer McCabe was hired by the Buffalo Police Department as a Police Officer on August 3, 2018.
2. Officer Torgalski was hired by the Buffalo Police Department as a Police Officer on August 1, 2014.
3. Officer McCabe was on duty with the Buffalo Police Department on June 4, 2020.
4. Officer Torgalski was on duty the Buffalo Police Department on June 4, 2020.
5. Officer McCabe served on the Buffalo Police Department's Emergency Response Team ("ERT") during certain times of his employment, including on June 4, 2020.
6. Officer Torgalski served on the Buffalo Police Department's Emergency Response Team ("ERT") during certain times of his employment, including on June 4, 2020.
7. The City has withdrawn Charge 3 from the disciplinary charges served on Officer McCabe and Officer Torgalski.

The parties further stipulate to the admission of the body camera footage of Officer McCabe on June 4, 2020.

CRIMINAL CHARGES AND GRAND JURY DETERMINATION

Two days after the incident with Gugino, and one calendar day after being served with Departmental Charges and suspended without pay, the Respondents were each charged in Buffalo City Court with Assault in the Second Degree, a Class D felony, on the ground that, individually and acting in concert, they “intentionally caused physical injury to Martin Gugino.” The criminal charge coincided with “Charge 3” in the Charges that had been served on Respondents by the City on June 5, 2020.

On February 12, 2021, an Erie County Grand Jury dismissed the criminal charge against each Respondent.⁵ After the Grand Jury dismissed the charges, the Erie County District Attorney noted in a press conference that Gugino’s conduct on June 4, 2020 in Niagara Square constituted a crime because of his intentional violation of the curfew order. (Respondents Exhibit 45).

⁵ The dismissal of the criminal charge against the Respondents eventually led the City to abandon pursuit of the third Charge of misconduct that was set forth in the Charges served on the Officer on June 5, 2020. Charge 3 was subsequently withdrawn by the City.

**DETAILED DESCRIPTION OF RESPONDENTS' ENCOUNTER
WITH GUGINO AS SET FORTH IN THE TESTIMONY OF
RESPONDENTS AND TESTIMONY OF DETECTIVE SERGEANT
LOSI, AND FRAMES TAKEN FROM THE DESMOND VIDEO**

Respondent McCabe testified that he was hired by the City as a Police Officer on August 3, 2018, having previously served four years in the military after graduation from high school and having worked for the Erie County Sheriff's Department in the Jail Division. (Tr. 405-407). McCabe testified that on June 4, 2020, he was directed to report to assignment as a member of the Emergency Response Team. His regular assignment, he noted, was as a Patrol Officer in D District. (Id., 412).

McCabe testified that on June 4, 2020, the ERT had been assigned to Niagara Square but remained behind City Hall waiting for the order to clear the Square. (Id., 413). According to McCabe, as the Team turned from the south end of Buffalo City Hall and formed its line facing north, it fanned out from west, on the steps of City Hall, to east, across the sidewalk and into the street in front of City Hall. When the line began to advance north, McCabe testified, the majority of individuals had cleared out of Niagara Square. McCabe testified that it was approximately 8:13 p.m., when the line began its movement. (Id., 418-420).

According to McCabe, he first noticed Gugino at a distance of about 50 feet as Gugino began to walk toward him at the time when the line was formed. (Id., 422). McCabe noted that the ERT Officers were clad in riot gear and he was

somewhat “stunned” as Gugino continued to approach the line. (Id., 423). At this time, McCabe noted, Officer Torgalski was to his left. McCabe testified that he “was pointing” at Gugino and telling him “at least two to three times to get back” as Gugino continued his approach. (Id., 425). According to McCabe, his pointing and verbal command to Gugino is consistent with the Department’s Policy on the Use of Force Continuum because it was an attempt to avoid any physical confrontation with Gugino. (Id., 425-426).

McCabe testified he had no intent to arrest Gugino when Gugino approached but that he simply “wanted him to turn around and walk away.” (Id., 426). When Gugino continued his approach, having disobeyed McCabe’s directives, McCabe, according to his testimony, was “in shock honestly.” (Id.). When Gugino “first got up” to him, McCabe testified, McCabe’s “big thing ... [was] to clear the hands.” (Id., 428). McCabe observed that he didn’t know until later that Gugino had a cell phone in his right hand but that Gugino was using his right hand and “scanning it all over my body and [then] he proceeded to go toward Officer Torgalski.” (Id.). McCabe acknowledged that he “cleared” Gugino’s hands to know that Gugino was not holding “a gun or knife or anything.” (Id., 430). McCabe testified, however, that he found “it was very odd” that Gugino was sweeping the object back and forth in front of him. (Id.). McCabe also testified it was not until after the incident and Gugino fell on the ground that he learned that the large black object Gugino held in his left hand was a motorcycle helmet. (Id.).

McCabe testified that, as Gugino turned his hand toward Torgalski, he noticed that Gugino had his right hand “towards his [Torgalski’s] arm down to his waist.” (Id., 431-432). This movement brought Gugino’s arm, McCabe testified, “close” to Torgalski’s “sidearm.” (Id., 432). McCabe also testified that, after Gugino moved his hand in the vicinity of Torgalski’s right side near his firearm, Gugino directed his attention back to McCabe. (Id., 435). According to McCabe, there was some delay in his perception of Gugino’s movements as Gugino stood in front of him and moved his right hand and arm close to Torgalski’s weapon. As McCabe put it, Gugino “should have never been in my personal space, especially being on an ERT riot squad, you don’t let anyone that close to you.” (Id., 436). McCabe added that Gugino “should never have been that close to Aaron’s [Torgalski’s] weapon.” (Id.). McCabe testified that, at that point, it was his intent simply to “get him [Gugino] away from our personal space. We had no intention on injuring him.” (Id.).

McCabe testified that in response to Gugino’s presence and movements in front of him, he was holding his riot baton with both hands and had “already fully extended” his arms when his baton came into physical contact with Gugino. (Id.). McCabe testified that he gave Gugino “a nudge to get him back.” (Id.). McCabe emphasized that the force he used against Gugino was “[j]ust to get him out of my personal space and for him to keep walking.” (Id., 439). McCabe described the amount of force he used as “very little” and contrasted the force he used with the force he could have used had he intended on “driving” Gugino back. (Id.).

McCabe testified that “simultaneously, as I gave him a nudge, Detective Sergeant Losi also was trying to push the line forward and that’s when he drove me forward with his hand on my back.” (Id., 440). McCabe also testified that he observed Torgalski, at this left side, “extending his arm and telling him [Gugino] to get back also.” (Id., 441). McCabe testified that, after the force was applied to Gugino, he “watched him wobble back and cross his feet and I believe he took two or three steps, ... and fell.” (Id., 439-440).

McCabe testified he did not believe the force that he used toward Gugino was responsible for Gugino falling. (Id., 457). He described the amount of force on the Department’s Use of Force Continuum as “minor” and voiced his surprise that Gugino fell. (Id.). McCabe also noted that he “kind of knelt down immediately” near Gugino after Gugino fell but Detective Sergeant Losi then “shooed me to hold the line.” (Id., 457-458).

Respondent Torgalski testified that he had been an Officer with the Buffalo Police Department for approximately eight years, previously having been a New York State Correction Officer for three years. (Id., 490). He noted that assignment to the Emergency Response Team was on a voluntary basis and that he had been on the Team for approximately two to three years. (Id., 491). He described the work on the ERT during the demonstrations in Buffalo that preceded his interaction with Gugino on June 4, as “long hours, long days.” (Id.).

Torgalski noted that on June 4, he was armed with a riot baton and a “duty issued Glock.” (Id., 492). His weapon, Torgalski testified, was at his right side. (Id., 493). Torgalski testified his place on the front line was to the left of McCabe and observed that the Response Team “held the line for a bit and as we started moving forward, we were given the order to move forward.” (Id., 494). At that point, Torgalski testified, there was “a gentlemen that started walking towards us” and “he kept approaching us as commands were given to move back.” (Id.). Torgalski testified that he heard McCabe in a loud voice say to Gugino “move back, move back” as McCabe was “pointing” at Gugino. (Id., 495-496).

Gugino, Torgalski testified, did not stop approaching McCabe, and, as the front line “slowed down ... a bit,” Gugino “started making some movements in front of Officer McCabe.” (Id., 496). Torgalski testified that he saw Gugino move his right hand across McCabe’s chest, later learning that Gugino had a cell phone in his right hand, at a point when Gugino was less than a foot away from McCabe. (Id., 497-498). Torgalski testified that Gugino’s distance from McCabe concerned him because Gugino “was already too close to the officer.” (Id., 501). Torgalski also testified that Gugino held a helmet in his left hand and that he could not see what was in the helmet. (Id., 501-502). Torgalski further testified that, after Gugino waved his right hand in front of McCabe’s chest, he started pointing his right hand toward Torgalski’s right hand. (Id., 503). When asked if Gugino actually touched his “gun arm,” Torgalski replied that “he made contact multiple times, twice with my right forearm and down to the edge of my glove, my

right glove.” (Id.). Torgalski testified that he asked Gugino, “what’s the matter with you?” at a time when Gugino was touching his arm. (Id., 504). Gugino, Torgalski noted, did not respond. He did observe that, when Gugino was approaching, he appeared angry and was asking the Officers in effect how “tough” they thought they were with their batons out. (Id., 505).

Gugino’s actions toward McCabe and then touching his arm, Torgalski testified, caused him to believe “something wasn’t right and I don’t know what this gentlemen is capable of, but something [was] off about the situation that makes you feel uneasy.” (Id., 506-507). Citing the Covid pandemic and noting that Gugino had touched his “bare skin,” Torgalski testified that he had a concern about his health and the health of his family, which included a three-year-old daughter. (Id., 505). Torgalski observed that he had “[a]bsolutely no interest” in “catching COVID.” (Id.).

Thus, Torgalski testified he did not want Gugino to touch him any further and “wanted him out of my personal space.” (Id., 507). According to Torgalski, “I steadied my right arm and attempted to get him out of my space and push him away.” (Id.). Torgalski testified his arm was extended all the way out with “an open hand,” because it was his intention “just to push him back, get him away out of our personal space, mine and who I know now as Officer McCabe was next to me.” (Id., 508). Torgalski emphasized that he was “absolutely not” going to have Gugino so close to his firearm a second time. (Id.). According to Torgalski, he did not connect solidly with Gugino when he extended his arm to push him away

because “he was already moving backwards so I didn’t make solid contact with him, and I remembered my two fingers touching his sweatshirt.” (Id., 510). Any force on his part, Torgalski testified, was “minimal,” and he did not know how Gugino fell back as he did. (Id., 511).

Detective Sergeant John Losi testified that he was the leader of the Emergency Response Team’s First Platoon on June 4, 2020. (Id., 286). As Platoon Leader, he testified, he was the “on the ground, commander of the squads that were working that day” at Niagara Square.” (Id., 286). He noted his position behind the Emergency Response Team’s front line as it took its place on the south side of City Hall to move north to clear Niagara Square. (Id., 287).

Detective Sergeant Losi testified that when he saw Gugino walking toward the Emergency Response Team’s front line it captured his attention because “normally when a formed line of armed police officers are walking forward telling everybody to walk back, you don’t usually see somebody coming towards us.” (Id., 288). Detective Sergeant Losi noted that “there were verbal commands from several of the officers” directed at Gugino to “move back, get back.” (Id., 288-289). Losi testified that his position behind the front line of the ERT gave him the ability to survey the entirety of the line and allowed him to identify any issues with the line and to control its pace. (Id., 289-290). According to Losi, one issue was that the line had to remain essentially straight in order to complete its maneuver. (Id., 290).

Detective Sergeant Losi testified that he had “identified that both officers [McCabe and Torgalski] had slowed, the line was dragging now and that I was going to correct it by pushing them forward.” (Id., 293). He described pushing an Officer in the line as “an accepted technique.” (Id.). When he pushed McCabe, Losi testified, McCabe was directly opposite Gugino and before he pushed McCabe, he had “accelerated” his pace “in order to get up there to correct the issue that was going on, I had to quick step to get up there.” (Id., 294). The force he used to push McCabe, Detective Sergeant Losi testified, had to be hard enough for McCabe “to know I’m moving him. It wasn’t just a touch. I mean, I imparted some force to move him forward.” (Id., 300). He then described using a “good degree of force” to move McCabe, and testified that, after using the force, he observed Gugino’s fall to the ground to be “almost simultaneous.” (Id., 301). Detective Sergeant Losi noted that, in his “opinion,” Gugino’s fall did not “seem consistent with the amount of force I would have applied to Jamie [McCabe] or he could have applied to Gugino.” (Id., 304). After Gugino fell, Detective Sergeant Losi testified, he corrected the line and then stopped it so that an ambulance could reach Gugino. (Id., 308).

In addition to the above testimony and the Desmond video, Gugino’s encounter with Respondents as shown in the Desmond video is also captured in four picture frames taken from the video. In the first frame, McCabe is pointing his left arm in the direction of Gugino and is holding his baton only by his right hand. The baton is horizontal to the ground. Gugino’s left foot is off the ground,

and it is clear that he is still moving to McCabe. (Respondent Exhibit 12).

In the next frame, Gugino's feet are together. He is holding a cell phone in his right hand, close to and diagonal to McCabe's chest. It is obvious that Gugino did not begin to back away after being told to do so by McCabe. (Respondent Exhibit 13).

In the third frame, Gugino has angled himself towards Torgalski and is holding his phone in his right outstretched arm close to Torgalski's right forearm and very close to Torgalski's holstered firearm. Detective Sergeant Losi can be seen behind Torgalski, and Losi's right hand can be seen between the left shoulder of McCabe and the right shoulder of Torgalski. (Respondent Exhibit 14).

The fourth frame depicts Losi's now outstretched right arm. Gugino still has his outstretched right arm with a cell phone in that hand close to Torgalski's holstered firearm. (Respondent Exhibit 15).

POSITION OF THE CITY

The City contends that the three Charges against the Respondents under consideration in this proceeding have been established by a preponderance of the evidence. In advancing this contention as to the first two Charges, which rely on the allegation that Respondents used "unnecessary force and/or violence" against Gugino, the City rests its factual case on its interpretation of the video evidence, including the Desmond video, the frames taken from the Desmond

video, and body cam videos of Emergency Response Team members. The City, in other words, maintains that the conduct of the Respondents depicted in such evidence compels the conclusion that they used “unnecessary force and/or violence.”

On the third remaining Charge (Charge 4), the City claims that the Respondents’ conduct constituted “conduct unbecoming” and conduct that “brought discredit upon the Department” by virtue of Respondents misconduct established under the first two Charges. In addition, the City argues that even if the first two Charges are not sustained, the Respondents’ conduct nevertheless amounted to the misconduct alleged in Charge 4. On this point, the City points to the extensive international attention that City and the Department received when the Desmond video went viral. The City claims that this attention placed the City in a bad light and reasons that such attention would not have visited upon the City and the Police Department but for the actions of the Respondents.

POSITION OF THE RESPONDENTS

The Respondents claim that the City did not sustain its burden of establishing any of the Charges. As the Respondents view the record, the City engaged in a rush to judgment when it served them with the Charges and suspended them without pay hours after the incident with Gugino. As to the incident itself, the Respondents stress Gugino’s absence as a witness and argue that an adverse inference should be drawn because of his refusal to testify.

Further, the Respondents note that the City did not produce any witnesses to support its claim of unnecessary force. Respondents contend that all credible evidence in the record conclusively establishes that they followed all applicable Use of Force Policies in place and that their use of force was also in conformity with the Penal Law provisions in New York. Respondents note that a dismissal of the first two Charges logically supports a dismissal of the remaining “conduct unbecoming” Charge.

ARBITRATOR’S FINDINGS – CHARGES 1 AND 2

Charges 1 and 2 can be analyzed together because they both allege that Respondents “used unnecessary force and/or violence” against Gugino “by forcibly pushing him and causing him to fall to the ground and strike his head, injuring same.” Though various Rules and Regulations of the City of Buffalo and the Buffalo Police Department are cited in the two charges, the Charges are essentially the same. The allegation of unnecessary force “and/or” violence is predicated on the City’s claim that the Respondents violated the Police Department’s Use of Force Policy and the Department’s Rule prohibiting “unnecessary force or violence.” (Joint Exhibits 2, 3).

Before analyzing Respondents’ conduct to determine if there was an unnecessary use of force relating to Gugino, the Arbitrator finds it useful to first identify what evidence is not found in the record. The record contains no testimony from Martin Gugino. Though lawfully subpoenaed, Mr. Gugino refused

to appear and give testimony in this proceeding. The Arbitrator also observes that the City produced no testimony from any individual that set forth any detailed analysis of the Respondents' encounter with Gugino that supports the conclusion that the Respondents' use of force directed at Gugino was, in the language of the first two Charges, "unnecessary force and/or violence."

Further, the Arbitrator notes that the City produced no evidence to refute the testimony of the three Officers assigned to Traffic Control who were present in Niagara Square on June 4, 2020 who encountered Gugino – Officers Frascatori, Mielcarek, and Lopez – or the testimony of the Emergency Response Team's Platoon Leader, on June 4, in Niagara Square, Detective Sergeant Losi. Finally, the Arbitrator finds that there is no evidence in the record, other than the City's interpretation of the Desmond video, that refutes the testimony offered by Respondents in describing their interactions with Gugino, nor, the Arbitrator finds, did the cross-examination of Respondents impeach their credibility as measured either by the truthfulness or the accuracy of their testimony.

The most detailed and precise statement regarding use of force is set forth in the Department's Use of Force Policy. (Joint Exhibit 3). The Policy sets forth some general proscriptions regarding use of force:

6.6 USE OF FORCE – GENERALLY

- A. Members of the Department must be familiar with Article 35 of the NYS Penal Law which outlines the legal parameters for the use of physical force and the use of deadly physical force.

- B. Physical force shall only be used when no other viable option is available.
- C. When force is used, only the minimum amount of force that is necessary to overcome the suspect's resistance, shall be employed.
- D. The use of force must be reasonable and can never be reckless.
- E. During an encounter in which force has become necessary, the level of resistance may vary at different points in the encounter. The level of force used by the Officer must be adjusted to each change in the suspect's resistance. (Id.).

These general rules raise a threshold question as to whether, in the language of Section 6.6(B), Respondents had “no other viable option” than to use some type of physical force on Gugino. If Respondents had viable options to not use physical force, then they clearly would be in violation of the Departmental Rules and Policy regarding use of force. In answering this threshold question, the Arbitrator identifies a definition of “viable” as “having a reasonable chance of succeeding.” *Merriam-Webster*, Online. In the context of Section 6.6(B), “succeeding,” of course, is the accomplishment of an Officer's mission. The Respondents' mission, under the direction of Detective Sergeant Losi, who was following an order issued by the Commissioner and Deputy Commissioner, was to clear Niagara Square of protestors. Respondents, in turn, specifically had the duty of holding their place on the front line of the Emergency Response Team and moving forward in a northerly direction in Niagara Square. Thus,

Respondents did not have the option of stopping and debating with Gugino, who was clearly intent on confronting the line of officers. Indeed, the conduct of Detective Sergeant Losi in pushing McCabe in the back to keep the line moving forward reflects the Respondents' need to keep moving.

Moreover, all credible evidence in the record shows that Respondents, independent of the order to clear Niagara Square, were confronted with an individual who walked directly in front of McCabe, having ignored McCabe's directive to stop, and who then came into physical contact with Respondent Torgalski's forearm with a cell phone some inches away from Torgalski's holstered weapon. For their protection, in addition to their need to continue with the directive to clear the Square, Respondents did not have any "viable option" to have some type of non-physical communication with Gugino. It would be folly to believe that the Respondents were somehow required to ignore the fact that Gugino was acting in an erratic fashion, was preventing the forward movement of the Response Team, after not complying with the directive to move back, and was making odd physical gestures within a foot of Respondents. Moreover, Gugino's conduct in touching Torgalski's "bare skin" raised reasonable concerns on Torgalski's part in connection with a possible exposure to COVID, which concern constituted additional justification to move Gugino away from the position he occupied within inches from the Respondents. Simply stated, there was no viable option for Respondents' to hold up the ERT line and engage in some sort of discussion or debate with Gugino.

The Arbitrator is mindful of the City's contention that Respondents should have somehow "passed" Gugino back for arrest, to apparently the State Police personnel who were behind the Response Team's front line, but the City does not explain how Respondents could have possibly been able to do that without coming into physical contact with Gugino, nor has the City explained how Respondents were to do that and continue with the performance of their duties, as evidenced by Losi's pushing McCabe in the back after McCabe and Torgalski had come to a stop due to Gugino's presence immediately in front of them.

A full understanding of the record evidence also discloses that the Officers did not seek out any confrontation with Gugino. Consistent with his statements and conduct witnessed by the three Traffic Control Officers immediately before the incident, Gugino made it his business not to be ignored as he walked right up into the face of Respondents and impeded their forward progress. As he had stated to the above Traffic Control Officers prior to the incident, he was intent on making his point regarding constitutional rights by getting arrested.

Upon review, there is no evidence to sustain any claim that Respondents had any other viable options other than to move Gugino out of the way of their forward movement. The Arbitrator's finding that Respondents had no "viable option" except to use minimal physical force against Gugino raises the next question of whether Respondents' use of physical force was in keeping with the Use of Force Continuum set forth in Section 6.9 of the Department's Use of Force Policy.

As it would pertain to this proceeding, the Use of Force Continuum provides:

6.9 USE OF FORCE CONTINUUM

Members of the Department may use no more than the minimum amount of force necessary to overcome a suspect's resistance. A suspect's response to his/her arrest may be broadly classified into four categories.

A. Cooperative

The suspect generally complies with the commands of the Officer and offers no resistance. In this instance the use of force is not authorized.

B. Constructive Resistance

The suspect is verbally abusive, insulting, taunting or threatening and refuses to comply with the Officer's commands, or flees, or attempts to escape from the Officer but does not direct any physical assault at him/her. The Officer is authorized to physically restrain the suspect by grabbing, holding, knocking off balance, using pain compliance holds and pressure points, or using Department issued chemical agents.

C. Physical Resistance

The suspect engages in resistance that is aimed directly at the Officer. This includes grabbing, pushing, punching, kicking, biting, throwing objects, or any other behavior in which the Officer becomes the object of the suspect's assault. Physical resistance also includes that situation in which an Officer reasonably believes the suspect is using or is about to use physical force against another. The Officer is authorized to use the minimum amount of force to overcome this resistance by using any physical skills, tactics, impact weapons or chemical agents. ... (Joint Exhibit 3).

As can be seen, the Use of Force Continuum identifies an individual who may be subject to the use of physical force as a “suspect.” While no definition of “suspect” is set forth in the Use of Force Policy, the Arbitrator adopts the commonly accepted meaning of a suspect as “a person who the police or authorities think may be guilty of a crime.” collinsdictionary.com

Clearly, Martin Gugino was a suspect within the meaning of the Use of Force Continuum Policy when he walked up to and deliberately positioned himself in front of Respondents. At the time of his encounter with Respondents, Gugino had intentionally remained in Niagara Square after the curfew dispersal order was announced and took effect. Indeed, the Erie County District Attorney described Gugino’s conduct as criminal in a press conference. (Respondents Exhibit 45).

Gugino’s status as a suspect is also established by his encounters with Officers Frascatori, Mielcarek, and Lopez in Niagara Square shortly before the curfew took effect on June 4, 2020, which reflected a propensity on his part to engage in some type of confrontation with the police. Thus, Gugino told Officer Mielcarek that Mielcarek would need to arrest him. (Tr. 340). Officer Frascatori warned Gugino that he would be arrested for violating the curfew if he did not leave the Square and was informed by Gugino that Gugino didn’t “care.” Gugino also previewed his odd behavior in waiving his cell phone in front of the Respondents when he reached out and touched Frascatori’s arm. (Id., 372) Officer Lopez testified that Gugino told him that he was not leaving the Square

and that Lopez “might as well” take him to “jail now because I am not leaving here.” (Id., 394-395). Respondents, of course, also could have reasonably viewed Gugino as a suspect by virtue of his presence in Niagara Square past the announcement of the curfew, his failure to comply with the directive to move back, and his behavior as he deliberately walked in front of and stood close to McCabe and Torgalski. While Gugino might well have believed that he was engaged in some type of civil disobedience or, perhaps, acting out a role in some type of political theater, Gugino was definitely not an innocent bystander but comfortably fell within the definition of “suspect” under the Use of Force Continuum.

Under the Use of Force Continuum, an officer, when dealing with a suspect, is not authorized to use physical force if the suspect is “cooperative,” meaning the suspect “generally complies with the commands of the Officer and offers no resistance.” Gugino’s conduct in intentionally placing himself in front of the moving line of the Emergency Response Team and his refusal to comply with the directive to move back cannot reasonably be understood as any type of compliance. Then next rung on the ladder of the Use of Force Continuum is “Constructive Resistance.” Various types of conduct by a suspect are identified in Section 6.9(B), as such resistance. The one that fits Gugino is a refusal “to comply with the officer’s commands.”

Where there has been constructive resistance, Officers are “authorized to physically restrain the suspect by grabbing, holding, knocking off balance, using pain compliance holds and pressure points, or using Department issued chemical agents.” In the Arbitrator’s estimation, the Respondents used a lesser amount of force than allowed in the Use of Force Continuum because they simply sought to push Gugino away from them, albeit the force used was inadvertently increased to some extent when Detective Sergeant Losi pushed Respondent McCabe in the back as McCabe was pushing Gugino away. In any event, the use of force employed by Respondents reflected no intent on their part to do more than to move Gugino away from them. There is no persuasive evidence, particularly when the Desmond video is reviewed in its various frames, that the Respondents sought to push or drive Gugino to the ground. Gugino, after the force was applied to him, appears to have not been able to keep his balance for reasons that might well have had as much to do with the fact that he was holding objects in each hand or his advanced age. Gugino may also have been surprised when the Officers used force to push him away because he may have entertained the unfounded belief that the Officers would let him interfere with the performance of their duties as part of the Emergency Response Team and engage in some sort of debate or discussion with him.

Thus, the Arbitrator finds that the Officers engaged in an absolutely legitimate use of physical force vis-à-vis Gugino. Another Department Rule relied upon by the City concerning use of force is found in Section 3.6 of the

Rules, which prevents Officers from using “unnecessary force or violence toward any person” and requiring them to “use only such force as may be necessary to accomplish their lawful purpose and in conformity with existing law.” The Arbitrator finds that the Respondents use of force squarely fell within the authorized use of physical force contemplated by this Rule.

Accordingly, the Arbitrator finds that the City has not met its burden of proof in establishing Respondents’ misconduct under both Charges 1 and 2.

ARBITRATOR’S FINDINGS - CHARGE 4⁶

Charge 4 alleges that Respondents violated various parts of the Rules and Regulations of the City and the Buffalo Police Department because they “used unnecessary force and/or violence against Martin A. Gugino.” According to the Specification for this Charge, Respondents “[b]y their actions ... conducted themselves in such a manner which brought discredit upon the Department, and/or performed an act(s) which was prejudicial to the good order, discipline and/or reputation of the Department.”

Charge 4, logic would dictate, cannot be seen as a “standalone” Charge. In other words, Charge 4, particularly in view of the allegation in its Specification that Respondents “used unnecessary force and/or violence against Martin A. Gugino,” has as a necessary condition that Charge 1 and/or Charge 2 have been

⁶ Charge 3, which was predicated on a claim that Respondents’ conduct was criminal, was withdrawn by the City.

sustained. That is, if the conclusion was reached under either Charge 1 or Charge 2 that the Respondents used “unnecessary force and/or violence” against Gugino, then the question would arise as to whether the Respondents’ conduct also “brought discredit” or was “prejudicial” to the Department. But, given the Arbitrator’s finding that neither Charge 1 nor Charge 2 has been sustained by the City, then it would follow that Charge 4 must be dismissed.

More, however, must be said about this Charge because the City in its submission to the Arbitrator argues that, even if Charges 1 and 2 have been dismissed, and the Arbitrator now quotes from the City’s post-hearing brief, “it cannot be disputed that the actions of these Respondents brought discredit and disrepute on the BPD and the City.” (City Brief, p. 25). The City asks the Arbitrator, therefore, to sustain Charge 4 notwithstanding the dismissal of Charges 1 and 2. The City’s argument, again quoting from its brief, is that Respondents’ “conduct brought embarrassment on the City of Buffalo and left a black eye on the BPD.” If accepted, the City’s position would result in Officers, whose conduct was legal and in conformity with the Department’s Rules on use of force, nevertheless being disciplined because of perceived and vocal public opinion. That is simply not the standard to be utilized in a due process proceeding, such as that herein. An employee cannot be disciplined based solely on the existence of perceived and vocal public sentiment. If there is no violation of any rule or regulation, this charge cannot be sustained. Therefore, Charge 4 is dismissed.

Accordingly, and based on the foregoing, I find and make the following:

AWARD

The Issues presented for decision are answered:

Officer Robert McCabe is not guilty of the Charges, which are hereby dismissed.

Officer Aaron Torgalski is not guilty of the Charges, which are hereby dismissed.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

I, Jeffrey M. Selchick, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Award.

Dated: April 8, 2022
Albany, New York



JEFFREY M. SELCHICK, ESQ.
ARBITRATOR