Paul D. Roose
Arbitrator / Mediator
Golden Gate Dispute Resolution
510-466-6323
paul.roose@ggdr.net
www.ggdr.net
December 12, 2023

HEARING OFFICER RECOMMENDATION
PURSUANT TO
DEPARTMENT POLICY MANUAL

In the Matter of a Disciplinary Appeal	)	
	)	
City of Brentwood, Employer	)	Officer Paul Matecjek Termination
and	)	
Paul Matecjek, Appellant	)	

APPEARANCES:

For the Employer: James E. "Jeb" Brown, Attorney
Liebert Cassidy Whitmore
6033 W. Century Blvd. 5th Floor
Los Angeles, CA 90045

For the Appellant: Julia D. Fox, Attorney
Rains Lucia Stern
2300 Contra Costa Blvd. Suite 500
Pleasant Hill, CA 94523

PROCEDURAL BACKGROUND

The above-referenced matter results from an appeal filed by the Appellant, Officer Paul Matecjek. The appeal was made pursuant to the Brentwood Police Department Policy Manual, Policy 1028.

The undersigned was selected by the Employer and the Appellant as the hearing officer. The matter was heard in Brentwood, California on August 8 and 9, 2023.

The parties stipulated that the matter was properly before the hearing officer. Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. At the conclusion of the hearing, the parties chose to conclude their presentations by written briefs. Briefs were received by the hearing officer on November 13, 2023, and the matter was submitted.

In accordance with the applicable policy, the following is a recommendation to the City Manager.

ISSUE

The following is the issue in this matter: Did the Employer fail to provide the facts cited in support of the punitive action by a preponderance of the evidence? Did the Employer abuse its discretion in the imposition of the penalty? If so, what is the proper remedy?

RELEVANT POLICY PROVISIONS

Brentwood Police Department Policy Manual

Policy 1028 – Administrative Appeals

1028.1 PURPOSE AND SCOPE This administrative appeal process is established pursuant to Government Code Section 3304.5. This policy applies to all public safety officers (as that term is defined by Government Code Section 3301) who are subject to any punitive (disciplinary) action or denial of promotion on grounds other than merit. A punitive action is defined as any personnel action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment (Government Code Section 3303).

…….

(c) Advisory Findings:

1. The recommended findings of the hearing officer shall be rendered within thirty (30) calendar days of the hearing, or within a reasonable time thereafter, and shall be advisory only to the City Manager. In the event the punitive action being appealed was initially imposed by the City Manager, the hearing officer's finding shall be advisory to the City Council. The City Council shall make the final decision. The City Manager or City Council may accept, modify, or reject the recommended decision. Nothing in this policy shall be construed as to bind the City Manager or City Council, to any findings of the hearing officer.

(d) Burden of Proof/Persuasion:

1. The employer shall have the burden of providing the facts cited in support of the punitive action by a preponderance of the evidence. The employer shall also bear the burden of persuasion that the punitive action being appealed is not an abuse of discretion.

FACTS

The Appellant Was a Police Officer with Five Years Experience with the Employer: He attended the Contra Costa County Sheriff's police academy in January 2017 as a "non-affiliate student," paying his own way. One of the academy training officers was Officer Tonkle from the Brentwood PD. The Appellant testified as follows:

> He [Office Tonkle] saw how well I was doing at the academy, he knew that I wanted to come to Brentwood, because I had family that lived in the area, and I wanted to serve in the community that I kind of grew up in…

The Appellant was sworn in as a Brentwood police officer on August 2, 2017. At the time of the incident for which he was terminated, the Appellant was a patrol officer working the night shift. He had no prior discipline.

Officer David Franson was hired in 2020 and worked with the Appellant. He was called by the City as a witness and testified as follows:

> Honestly, going to [the Appellant's] team because we bid for shifts every year…I was looking forward to it. My little experience before being assigned to that team with him…I knew him to be a good guy. And…in my opinion, a good officer, a competent officer, somebody I could trust to get my back if things went really bad, if that makes sense.

Over His Years Working Patrol, the Appellant Had Several On-the-Job Encounters with the Civilian[1]: The Appellant's experience with the white female[1] went back several years. He testified as follows:

> I knew that she was a local transient that we, myself, I had multiple problems with, as far as when I arrested her, and the kind of human that I saw she was…She was a transient

[1] To protect her privacy, the civilian involved in the incident will be referred to in this Recommendation as "V1." She did not testify at the hearing.

> who was always under the influence of methamphetamine or alcohol or both….I knew her to be belligerent, violent. She never showered, so she was always kind of dirty…
>
> I knew that she was a shoplifter. I knew that she would run away from me any time that I tried to arrest her. And if I did arrest her and tell her that she was going to go to jail, she would normally fight with us. Whether it be kicking, pulling, biting, screaming, anything to resist going to jail.

Prior to April 2022, the Appellant had contact with [V1] twenty times and arrested her approximately six times. In 2021, he arrested her when she was observed going through people's clothes in a laundromat. He and his partner coaxed her out of the building. He testified as follows:

> I put her in handcuffs…and sat her down. While she's sitting down, she's doing the same kind of thing, screaming at me, obscenities, the "fuck yous," you know, "you got nothing on me," that kind of thing…I eventually escort her to the back of my patrol car and I try putting her in the back of the car. When she's in the back of the car, she's pulling away, she's kicking at me, and then she actually spat at me.

The Appellant stated that his first contact with [V1] was in 2019. He testified as follows:

> She had a restraining order which was issued by her father because she had been arrested for elder abuse against him…He called us saying that "Yeah, she's here." So we actually ended up chasing her until she went and hid in the back of a truck…She was…aggressive with us as well. Like, "What, I'm not [V1]
>
> Then putting her in handcuffs, she starts amping it up with a lot of verbal aggression and kind of pulling away…

[V1] had a "two-officer minimum" listed by her name in police records, the Appellant stated. This meant that officers were not advised to contact her by themselves. [V1] had informed the Appellant and other officers that she was Medical Information or had Medical Informat

Prior to being hired by BPD, Officer David Franson worked as a correctional officer and deputy sheriff for San Mateo County for thirteen years. He was called by the City as a witness at the hearing.

Officer Franson had also had encounters with [V1] during his time as a patrol officer. He had approximately five contacts with her prior to April 2022. He stated that she is a "known transient. Has been a problem in the past. Multiple law enforcement contacts." He said she had a reputation in the department as a "difficult person to deal with."

Officer Franson testified about one prior incident with [V1]

> It was not my call, I was just there to help out if needed…[V1] was found inside of a new home that was almost done being built…She somehow gained access to that residence

> and was hiding in a closet…Officers contacted her inside. I remember them describing her as acting like a zombie as she crawled out of the closet.
>
> When I showed up on scene, she was on a stretcher in front of the house, and she was acting pretty bizarre, as far as yelling, almost animal-like behavior.

On April 23, 2022, the Appellant and Two Fellow Officers Responded to a Call in the Parking Lot of a Home Depot: A call came in to 911 from an individual who was in the parking lot at the Home Depot in Brentwood. She reported that she had arrived to perform landscaping duties on the site and had heard the sound of screaming coming from one of the manufactured storage sheds in an outdoor display area adjacent to the parking lot.

The Appellant was on his way back to the police station to book some personal belongings from an arrest he made earlier that morning. He heard the call, knew he was the primary officer for that beat, and told dispatch that he would take it. He testified that Officer Josh Flynn also arrived on the scene in an unmarked vehicle.[2]

Officer Franson also heard the call on the radio and went to the scene. He recalled arriving on the scene and conducting a brief interview with the Home Depot gardener. He then met Officer Flynn and the Appellant near the sheds. Officer Franson had his body worn camera (BWC) activated at this time.[3]

The officers heard noises coming from one of the sheds. Officer Flynn and the Appellant approached the shed. The door of the shed was shut. Officer Flynn shone his flashlight through a small window in the shed while the Appellant opened the door. Officer Franson stood a few feet from the shed door with his taser pointed at the door.

V had apparently been standing inside the shed, near the door. When the door opened, she walked out. Officer Franson stated "let's see your hands," which were visible in front of her at about shoulder height. V began to walk away and the Appellant ordered her to sit down. "Sit down, sit down, sit down, [V1 sit down," can be heard on the audio of the BWC. She did not sit down and continued to walk.

The Appellant grabbed her from behind by the upper arms and stated he used a leg sweep technique to get her into a seated position on the ground in front of the shed.[4] The BWC video is oriented from V1's waist up, so it is not possible to see whether a leg sweep took place or whether he just pulled her

[2] Officer Flynn did not testify at the hearing.
[3] The Appellant turned off his BWC when he arrived on the scene. He was not charged with a rule infraction for doing so. That matter is therefore not further discussed in this recommendation.
[4] The Appellant was not charged with excessive force for this initial takedown of the suspect.

down. She is then seated with her legs crossed in front of her. Debris and broken glass can be seen scattered in front of the shed.

The Appellant can then be heard saying "put your hands behind your back." [V1] then asks "why," and the Appellant responds, "because I said so." He then proceeds to place metal handcuffs on her wrists. She appears and sounds calm at this point, telling the Appellant that she was "shot in my nose."

The Appellant and the two officers talk with her for the next several minutes. One goes to look around the other sheds to see if anyone else is in the vicinity. A calm conversation continues for approximately six minutes as the officers question her about her claim of being shot. Then Officer Flynn can be heard asking her "[V1] why is it so dirty here? What are you doing with all this stuff?" [V1] suddenly yells "I'm sick and tired of you following me sir" as she bends forward from the waist. "Stop following me. I can do whatever the fuck I want to. Stop shining those lights in my eyes."

The Appellant Kicked / Pushed the Handcuffed Suspect with the Sole of His Boot: At the 8:09 mark on the BWC video, officer Franson can be seen reaching up and turning off the audio on his BWC. The audio goes silent. Officer Franson testified as follows on direct examination:

> Q: Officer Franson, you muted the audio right there; is that right?
>
> A: I did.
>
> Q: Why?
>
> A: At that time, I mean, it's something that we commonly do if we're trying to figure out what's going on. If we're going to start talking amongst ourselves and don't feel that…whatever we're going to be discussing needs to be recorded. That's…what I was doing there, if I recall correctly.

Officer Franson did not remember what was said after the audio was muted. He did not recall giving [V] any commands. He recalls [V] being "verbally aggressive" during this time frame. He testified as follows:

> I recall smelling the odor of an alcoholic beverage. Her behavior was bizarre. I know sometimes in my experience, drug influence indicators and mental health issues can kind of indicate the same things. But, in my mind, she could have definitely been under the influence of drugs, as she was aggressive. Didn't make sense to me why she went from being more calm, to all of a sudden being super aggressive verbally, and the things she was saying…not making sense.

The Appellant testified that he believed, when [V] began screaming profanities, that the situation had changed. He testified as follows:

> So I knew at that point…any idea of her going to the hospital is out the door right now, because I'm not going to send… a verbally aggressive, known to be combative person to the hospital. I'll just send her to jail at this point. And for her safety, because now she's intoxicated and…we were near Lone Tree Way, which is a large corridor…as well as to prevent her from contacting anybody else within the parking lot.

By the 8:20 mark on the video, [redacted] can be seen beginning to rock back and forth slightly. The BWC shows [redacted] from a side angle, from Officer Franson's standing position. It only shows [redacted] from the upper part of her torso up. [redacted] is facing the Appellant and Officer Flynn.

The BWC video shows [redacted] continuing to rock back and forth slightly, apparently talking. At 9:09, it shows her beginning to stand up by leaning forward and using her weight to propel her upward without the use of her hands. Immediately, before she reaches a full standing position, the video shows the Appellant quickly take several steps forward, raise his right foot to his waist height, and push [redacted] in the midsection. The video shows her back hitting the door of the shed, and her sliding down to a seated position.

The Appellant testified as follows:

> As soon as I saw her start to stand up, I told her "[redacted] sit down." She didn't listen, she continues to stand up. I said, "[redacted] stay seated." I ran over really quickly, and at that point I kicked her with a push from the bottom of my foot, the ball of my foot on the…left hip bone to push her back down to the ground. I saw she had a backdrop of a door that I could push her into, and she could slide back down to her butt.
>
> I thought that would be the safest, least intrusive way for us to gain compliance with her and an immediate action. I did not think it was safe for us to approach her if she was to stand all the way up.
>
> I wanted to maximize the distance between my face and her face. I knew that she likes to spit, which she had a habit of doing in the past. Not only to me, but to other officers, and I did not want to be infected with anything that she might potentially have.

That's why I used my foot to keep myself as far away from her as I could, instead of getting my hands close to her and pushing her back down to the ground.

On the BWC video, the Appellant quickly steps behind [redacted] grabs her arms from behind and lifts her to a standing position. In the meantime, Officer Flynn is seen walking slowly the few steps over to the scene of contact. The Appellant secures [redacted] and begins walking her toward the patrol vehicle nearby in the parking lot. [redacted] expressionless face, without apparent vocalizing, can be seen while the Appellant walks her to his patrol car.

Officer Franson testified that he perceived V1 when she began to stand up, as a "minimal threat." He stated that the Appellant's kick "surprised" him. "I just didn't see it coming. I didn't see a reason for that level of force under those circumstances."

The Appellant called for an ambulance to check on V1 wellbeing. On direct examination, he was asked why he called EMS:

> One, she had claimed that she was shot in the face, and she did have scratches on her face, but also because I had used force against her. And I wanted her to be cleared by medical personnel before being transported to jail.

Emergency medical personnel arrived, spoke to V1 and evaluated her. "They determined that she was medically cleared to go to jail," the Appellant testified. EMS did not transport V1 from the scene. She was put in the Appellant's patrol car.

The Appellant, Officer Flynn and Office Franson had a conversation on the scene prior to leaving. The Appellant recalled it as follows:

> They said, "Hey we think we need to talk with you about this. We think we need to inform the sergeant." And I was like, "Well, of course, we're going to inform the sergeant. This is a use of force incident. I know that I used force, and I know that per our policy we need to advise our sergeants that we used force. I have no problem telling the sergeant exactly how it happened."
>
> And I explained to them, "If you guys are so worried about this, join in that conversation when I tell the sergeant exactly what happened. And if I miss anything, if I'm…playing it down, or if I miss out certain bits of evidence, or bits of…information, please interject."

Officer Franson recalled that, while the Appellant was talking with the original reporting party at Home Depot after V1 was in the patrol car, he and Officer Flynn discussed the use of force. "The gist of it," he stated, "was that we believed it was excessive." He recalled them then discussing the use of force with the Appellant. The Appellant responded "fairly well," Officer Franson recalled. "I don't remember it being a big argument or anything like that."

The Appellant transported V1 to the police station. He testified as follows:

> So after I transported V1 to the Brentwood PD in the sally port, I contacted Sergeant Alvarez, and I waited on the scene with Alvarez until Flynn and Franson had both arrived, and then I told Sergeant Alvarez exactly what had happened in front of them. And neither of them had interjected, and they said that I told the story completely.

Officer Franson recalled the conversation at the station between the Appellant, Sergeant Alvarez, Officer Franson, and Officer Flynn. "He [the Appellant] detailed it [the use of force incident] properly, in my opinion."

When [V1] was being transported from the police station to the county jail, she spit in the mouth of the community service officer transporting her.

The Department Investigated Then Terminated the Appellant for Unauthorized Use of Force: Later that same day, Sergeant Alvarez wrote a memo to Chief Thomas Hansen concerning "Use of Force" by the Appellant.[5] He described the Appellant's account of the incident, corroborating the Appellant's recollection of the incident. He noted that the Appellant "asked Officers Flynn and Franson if they had anything to add and they did not."

He ended his memo with the following:

> I then watched Officer Franson's body worn camera footage from the incident. Upon viewing Officer Matejcek's kick of [V1] I had concerns that the use of force from the kick was unreasonable and/or unnecessary. I elected to call Lieutenant Louwerens and notify him of the incident and inform him of my concerns about the level of force that was used by Officer Matejcek.

Thomas Hansen was Chief of Police for the Brentwood Police Department (BPD) from 2018 – September 30, 2022. Prior to that, he worked his way up from police officer to police captain over a 28-year career with BPD. He was the police chief at the time of the incident.

He testified that, prior to the incident, he had no knowledge of [V1] He stated that he received a call from Captain Silva about the incident and instructed staff to place the Appellant on administrative leave.[6] He participated in a decision to hire Todd Simonson, an outside investigator, to investigate the incident.[7]

When the investigation was completed, Chief Hansen reviewed it and concluded that the charges were "extremely serious." He decided to terminate the Appellant. He testified as follows:

> [V1] was handcuffed when he kicked her, and this could have resulted in…serious injury, if not death…In my 35 years in law enforcement, I have never been trained to kick anyone that's in handcuffs. That's extremely dangerous. And the fact that Officer Matejcek believed that he did nothing wrong, that this was justified. After reading the report and all the documents, I truly lost faith in the future he was going to use appropriate force in

[5] Sergeant Alvarez did not testify at the hearing. The parties stipulated that, had he testified, he would have affirmed what he wrote in his memo.
[6] Captain Silva did not testify at the hearing.
[7] Mr. Simonson did not testify at the hearing, nor was his report in the record.

> other situations that my officers are involved in…I couldn't risk…the liability with the city at that point.

On August 31, 2022, the department issued a Notice of Termination to the Appellant. The Notice cited the Use of Force section of the department policies. Relevant excerpts are as follows:

> Officers shall use only that amount of force that reasonably appears necessary given the facts and totality of the circumstances known to or perceived by the officer at the time of the even to accomplish a legitimate law enforcement purpose (Penal Code 835a).
>
> The reasonableness of force will be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any evaluation of reasonableness must allow for the fact that officers are often forced to make split-second decisions about the amount of force that reasonably appears necessary in a particular situation, with limited information and in circumstances that are tense, uncertain, and rapidly evolving.
>
> …officers are entrusted to use well-reasoned discretion in determining the appropriate use of force in each incident. Officers may only use a level of force that they reasonably believe is proportional to the seriousness of the suspected offense or the reasonably perceived level of actual or threatened resistance (Government Code 7286(b)).
>
> …the use of any improvised device or method must nonetheless be objectively reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

The Notice of Termination accused the Appellant of writing his police report in such a manner "that attempts to minimize the violent force with which you kicked [V1. The Notice states the following:

> An egregious use of excessive force like that which you used against [V1 tends to undermine public confidence in the professionalism and trustworthiness of the Brentwood Police Department, which in turn undermines our effectiveness…You employed what can be fairly described as bully tactics.
>
> While [V1 was not seriously injured, my sworn duty is to protect the public and this incident has broken my trust and confidence that you can or will safely perform the duties of a police officer. I do not believe that additional training would address or prevent similar instances in the future…Thus, I believe that termination is the only appropriate course of action.

Appellant Called a Use-of-Force Expert Who Testified that the Appellant Did Not Use Excessive Force on April 23, 2022: Sean McCann is a former police officer who is now a college professor and law enforcement training instructor. He stated that he has testified about 60 times in criminal cases about police use of force.

Counsel for the Appellant moved to have Professor McCann qualified as an expert in police use of force and reasonable force for the arbitration hearing. Without objection from opposing counsel, the motion was granted.

Professor McCann testified that he reviewed the police reports, the IA interviews of the involved officers, and the BWC video regarding the instant matter. He evaluated the incident, considering the Appellant's familiarity with V1. In particular, he noted V1 propensity to spit at law enforcement personnel. He also characterized V1 behavior prior to standing up as "pre-assaultive."

He termed the Appellant's actions as the use of "significant" force. The kick was "toward the higher end of that [reasonableness] range." But "the availability of less intrusive options doesn't make the option chosen unreasonable." He testified as follows:

> …it does knock her off her feet and backwards and into the door, and thus it's successful…it's what's sometimes referred to as standing stop kick…you're hitting with the sole of the foot. In order to hit with the sole of your foot, you have to raise your knee a lot higher than your intended target area, and then you push outward and stomp outward. It actually lessens the power of the kick, though.

Professor McCann concluded as follows:

> But in balancing it all, that fear of being spit upon, and the fact that the handcuffs don't prevent that, that weighed heavily in…my decision…to say that this kick probably falls within the range of reasonableness that the industry looks for.

He concluded that the other two officers at the scene may have drawn different conclusions about the use of force because they were not as familiar with V1 as the Appellant was. "Use of force is supposed to be reviewed from the perspective of the…officer who's using force," he testified.

Professor McCann further testified that if the Appellant's actions were "merely to prevent flight, then I'd probably be criticizing it…but the idea of being spat upon…is a serious assault."

When asked about the Department's allegation that the Appellant's actions exposed the City to liability, Professor McCann responded as follows:

> …there's multiple liabilities there, depending on whether or not you succeed in successful use of force, or fail to, decide not to, and then something else happens. I don't think for the line officer you can make your decisions based on liability.

The Department Called a Former Department Training Sergeant Who Testified that the Appellant Violated Department Use-of-Force Policy on April 23, 2022: Richard Nance retired from the BPD in May 2023. He held the rank of sergeant at his retirement. He worked for BPD for twenty-five years. He was in charge of the defensive tactics program for the department and worked as a defensive tactics instructor there since 2001. He is a prolific author of articles about firearms and defensive tactics in newsstand publications, with over one thousand published articles. Since his retirement, he has become the self-defense editor for "Handguns Magazine" and gun technology editor for "Guns and Ammo" magazine. He co-hosts television shows on the Outdoor and Sportsman Channels called "Handguns" and "The Best Defense."

While he was still working at BPD, he taught law enforcement training courses in Utah, North Dakota, and Georgia.

In 2019, when he was promoted to sergeant, he was put in charge of weaponless defense, arrest and control tactics, and defensive tactics training for BPD. In that capacity, he attended the department's force review boards. These meetings were held four times a year and analyzed incidents of use of force in the prior months.

On the day the incident took place in April 2022, Sergeant Nance received a call at home from on-duty sergeant Tonkle, asking his opinion about the incident.[8] He came down to the department to look at the BWC video. After reviewing it, he told Sergeant Tonkle that "it did not appear that the use of force was within policy, and he [Sergeant Tonkle] needed to contact a lieutenant."

Sergeant Nance then contacted Officer Peachman, the BPOA president at the time. He also contacted Sergeant Huseman, who Sergeant Nance described as "very involved in the BPOA."[9] He stated that he contacted Officer Peachman both to give him a "heads-up" as the POA President but also because Officer Peachman was a current defensive tactics instructor.

The following exchange took place with Sergeant Nance on direct examination about his review of the incident:

> Q: …if you were on scene in a similar situation as Officer Matejcek, and you had a suspect handcuffed and seated, and then they stand up. What would that present to you?

[8] Sergeant Tonkle did not testify at the hearing.
[9] Neither Officer Peachman nor Sergeant Huseman testified at the hearing.

> A: My concern would be that they may attempt to flee. That would be my first concern, or that they may attempt to…fight or who knows what. But it's certainly cause for concern if a seated suspect, who's handcuffed, stands.
>
> Q: Given the circumstances that you saw on the body-worn camera, would that kick [be] in compliance with policy."
>
> A: I didn't think it was within policy.
>
> Q: Why is that?
>
> A: There were two other officers present. She was handcuffed behind her back. When she stood, she didn't appear to make an overt movement toward any of the officers. And…it didn't seem that there was an immediacy or an urgency to close distance with her and use a kick, which I don't believe resulted in injury, but it might have.

Sergeant Nance testified that at BPD "we've taught various other kicking techniques, where you would kick the abdomen…we try to teach officers that every part of their body can be used as a weapon that you could utilize under the right circumstances." He stated that BPD does not train officers to kick a handcuffed suspect. He concluded his testimony by stating that the Appellant's actions on April 23, 2022, were a failure of "decision-making" not "technique."

EMPLOYER'S POSITION

The City argues that the Appellant engaged in "misconduct which placed Officer Matejcek the public and his partner officers at risk."

The Employer contends that the Appellant's conduct failed a three-pronged test of reasonable use of force, under existing case law. One, "the crime at issue, if any, was not severe." Two, the suspect "did not pose a threat to the safety of the public or responding officers." And three, the suspect was "not actively resisting arrest."

The Appellant's "unreasonable use of force violated Brentwood Police Department Policy," the City asserts. "The forceful kick delivered by Matejcek and captured on the BWC video is wildly disproportionate to the seriousness of the crime [V1 may have committed or her action of trying to stand," the City writes in its brief.

The kick used by the Appellant "was not trained and not authorized by the Brentwood Police Department," the Employer argues.

The City contends that the "City meets its burden if the evidence shows that Matejcek more likely than not engaged in this misconduct. The City's discipline should not be overturned unless the City has abused its discretion. Courts instruct civil service commissions, arbitrators, and hearing bodies to give deference to the employer's penalty decision considering such things as the employer's administration of its own standards and rules. (See Kolender v. San Diego Civil Service Commission (2007) 149 Cal.App.4th 464, 471.) The fact that reasonable minds may differ regarding the penalty imposed supports a finding that the employer has acted within its discretion. (Ackerman v. State Personnel Board (1983) 145 Cal.App.3d 395, 401.)"

The Appellant's "prior experience with [V1 and his knowledge of her reputation to resist arrest did not justify his conduct," the City writes in its brief. "Matejcek may argue that since [V1 spat on CSO Alan Sheffield after her arrest, his kick was appropriate, because he thought she would spit at the officers and he wanted to keep his face far away from any potential spittle. This argument fails because it is speculative and the exact type of 20/20 hindsight analysis the Supreme Court forbids: Matejcek cannot use actions [V1 engaged in after his use of force to justify his claim that his use of force was necessary."

"Retraining," the city contends, "would not be sufficient based on these facts. As chief Hansen testified, he lost trust that Matejcek would make an appropriate decision in the future regarding when and how to use force. This use of force was so egregious that no amount of retraining would rectify Matejcek's behavior, and termination is the only appropriate remedy."

"Chief Hansen," the Employer asserts, "believed that Matejcek showed no remorse for his actions, and he lost faith in Matejcek's ability to appropriately use force in the future. For all of these reasons, Chief Hansen determined that termination was the only appropriate level of discipline in this matter. Chief Hansen's termination of Matejcek was not an abuse of discretion and should be upheld."

The Employer concludes by writing "For all of the reasons identified above, all of the evidence and testimony clearly shows that Matejcek violated policy when he kicked [V1 in violation of law and policy. Matejcek knew that this technique was not trained or authorized by the Brentwood Police Department. Nevertheless, Matejcek kicked [V1 without justification. As a result, the Department did not abuse its discretion in deciding to terminate him, and Matejcek's termination should be upheld."

APPELLANT'S POSITION

The Appellant argues that "Matecjek did not violate the Department's Use of Force Policy." The hearing officer should find that the Appellant "due to his many previous personal encounters with [V1 had

legitimate concerns for his safety and that of his fellow officers when [V1] resisted his orders to stay seated and attempted to rise to her feet. He used the least amount of force possible to keep [V1] at a distance, and ensured that his force would not result in injury to [V1] indeed, [V1] was neither injured by the kick nor displayed any signs of agitation afterwards," the Appellant contends.

The Appellant credits the opinion of expert witness McCann, including his opinion that "whether a use of force was reasonable is not evaluated under the standard of whether the force was the least intrusive means available; in other words, the availability of less intrusive options does not make the force option chosen unreasonable."

"The Hearing Officer," Appellant's brief contends, "should therefore align himself with the conclusion reached by McCann that Matejcek, based on his personal experience, reasonably concluded [V1] was going to become assaultive and, accordingly, Matejcek's kick was reasonable and not excessive; indeed, it was the least intrusive means of force that could be used to ensure officer safety."

In regard to Department Policy, Appellant asserts that Matejcek's use of force was within policy. "The majority of these factors weigh in favor of Matejcek's use of force: [V1] had, in the past, indicated she was infected with Medical Info, making it very dangerous to the officers were she to spit at them; [V1] was intoxicated by alcohol, and most likely methamphetamine, as she usually was; Matejcek did not exhibit any hostile behavior toward [V1] while she was cooperating; [V1] had known mental health issues; [V1] became resistive and ignored Matejcek's commands; neither the handcuffs nor the presence of three officers could keep [V1] from spitting; and Matejcek had extensive experience with [V1] and was thus familiar with her behaviors."

Appellant argues that the penalty is inappropriate. "Even if, arguendo, the Hearing Officer concludes that Matejcek's use of force was unreasonable, he should find that termination is excessive and unwarranted," Appellant contends. "First, Matejcek used the least amount of force available to him, force that expert McCann categorized as not even rising to the level of 'intermediate' force. Second, officers are taught how to use kicks in the Academy, and POST materials provide that kicks to the mid-section are appropriate. Third, Matejcek utilized the force knowing that [V1] would not be injured as a result and, in fact, she was not. Fourth, the City presented no evidence that Matejcek had previously been disciplined for improper use of force or, indeed, any misconduct at all. The Hearing Officer should find that a first instance of use of unreasonable force that resulted in no injuries does not merit termination, the ultimate disciplinary measure."

"The Department presented no evidence," the Appellant's brief continues, "that Matejcek would not learn from this situation and therefore engage again in such conduct, or that he would not be amenable to further training for such situations. The Hearing Officer should thus find that a consideration of the Skelly factors leads to the conclusion that termination is unwarranted and excessive."

The brief concludes as follows: "For the foregoing reasons, it is respectfully requested that the Hearing Officer find that Matejcek's use of force against [V1] was reasonable, and thus not a violation of Department policy. In the alternative, if the Hearing Officer finds that the use of force was not within policy, he should conclude that termination in these circumstances is unwarranted."

DISCUSSION

The Appellant Violated Department Policy by Using Excessive Force on April 23, 2022: The preponderance of the evidence is that the Appellant engaged in an unauthorized use of force in violation of department policy. His decision to kick / push the handcuffed civilian was not reasonable, for several reasons:

1) The Appellant and Officers Franson and Flynn were standing several feet away from [V1] when she stood up. He and his fellow officers were in no imminent danger when she stood up.

2) Expert witness McCann, called by the Appellant, identified spitting as the only potential assaultive behavior available to [V1] at that moment. Review of the BWC video indicates that the Appellant could have merely stepped back or turned to the side if [V1] spat at him.

3) Expert witness McCann also stated that the flight risk alone would not have justified the Appellant's kick. The Appellant's after-the-fact justification for his kick, that [V1] posed a danger to other civilians in the area of Home Depot, does not ring true. The danger posed by [V1] at that moment was speculative. Had she fled, the officers on scene would have had other options at their disposal to address her flight.

4) Kicking a handcuffed suspect was not a tactic that had been included in the department's training.

5) The Appellant's expressed concern about the potential of [V1] spitting at him is undermined by his next actions captured on the video – he moved close to her and grabbed her arms from behind. This did not appear to be the actions of someone concerned about infectious spittle.

6) The Appellant's actions cannot be excused as a "split-second" decision made in a rapidly evolving set of circumstances. The Appellant was handcuffed and seated. The Appellant observed her begin to rock front to back as if she was trying to stand up. He had at least a minute to anticipate her attempting to stand up and decide how he

> would respond. He had time to confer with his fellow officers on scene about how to respond if she stood up.

The Appellant recalled that he gave verbal commands to [redacted] to "sit down" as she began to stand up. Unfortunately, Officer Franson turned off the BWC audio prior to the standing up / kicking incident. Those commands cannot be verified. Officer Franson did not recall if the Appellant did or did not give commands.

Even without the audio, the video appears to show that the Appellant gave no command as [redacted] began to rise to her feet. If he did give a command, he did not allow sufficient time to see if [redacted] would comply. Had he given a command, she might have ignored or defied it. Nonetheless, verbal commands would have been appropriate in this situation as a first resort prior to kicking [redacted] back to the ground.

The neutral observer concludes the following from watching the BWC video of the incident: that, for a second during an otherwise well-handled situation, the Appellant lost his cool. Without checking with his fellow officers, and without apparent forethought, he kicked / pushed [redacted] to the ground. This conduct was not reasonable. As former BPD training officer Nance stated, the Appellant erred in his "decision-making," not in his technique. Just cause exists for disciplining the Appellant for violating the department's use of force policy.

The Department Abused its Discretion by Selecting the Termination Penalty:[10] Discipline for the April 23, 2022 incident is warranted. The Employer met its burden that the Appellant used excessive force on that date.

The next question is the appropriate penalty. The BPD policy manual allows for written reprimands, demotions, and suspensions without pay (among other choices) as disciplinary options. The policy manual makes it clear that a hearing officer is restricted to exploring two questions: did the Employer prove the infraction by a preponderance of the evidence? And, if so, did it meet its burden of persuasion that "the punitive action being appealed is not an abuse of discretion."

[10] The Appellant brought forward a prior incident in the department in which an officer allegedly used excessive force on a suspect and received no discipline. The Appellant argued disparate treatment. The Hearing Office finds that insufficient evidence was in the record about the earlier incident to draw an apt comparison between it and the incident in the instant matter. The Appellant did not meet his burden of persuasion for disparate treatment. The Appellant also brought forward a prior incident involving a disagreement between him and Chief Hansen about the use of canines in the department. The Appellant alleges that animus by the police chief toward the Appellant resulting from this incident was a factor in the chief's decision to termination the Appellant. The undersigned hearing officer finds that the Appellant did not meet his burden of proof that this prior incident impacted the instant case.

Former Chief Hansen testified that he chose the termination penalty because he could no longer trust the Appellant. He thought the City would be exposed to liability if the Appellant were still on the street. He specifically rejected the idea of retraining as a viable option. Notably, he did not state why he believed that an intermediate form of discipline, such as a time-off suspension, would not correct the Appellant's behavior.

Part of the discretion that must be exercised by a deciding official in this type of case is the consideration of mitigation. No evidence emerged that Chief Hansen considered mitigating factors. Strong mitigation exists in the instant matter, as follows:

1) The Appellant had nearly five years of discipline-free service as a patrol officer for the department. A witness called by the Employer, Officer Franson, testified that he wanted to be assigned to the Appellant's team because "in my opinion [he was] a good officer, a competent officer, somebody I could trust to get my back if things went really bad." This praise is especially meaningful given that Officer Franson testified that he believed the Appellant used excessive force in April 2022. No one from the Department testified to the contrary.

2) In unrebutted testimony, the Appellant stated that the department recruited him because of his strong performance at the police academy.

3) Chief Hansen testified that he believed that V1 could have been badly hurt or even killed from the Appellant's kick. Yet the evidence is that she was unharmed and not in need of medical care after the deployed tactic. The Chief implied that the Appellant was just lucky that greater injury did not occur. The undersigned hearing officer believes that, indeed, the Appellant was fortunate that V1 was not injured. However, the Appellant also needs to be given some credit for striking V1 in such a way as to minimize the risk of injury.

4) The Appellant's actions can, in part, be justified by his extensive knowledge of the prior behavior and predilection of V1. This was not a first-time encounter between an officer and a civilian. She had a long track record of erratic and assaultive behavior. The Appellant over-reacted on April 23, 2022, but his actions must be viewed in the context of his prior interactions with the civilian.

5) The Appellant handled the post-incident interviews with candor and professionalism. From the viewpoint of the hearing officer, the Appellant was wrong in concluding that he did not use excessive force. But no evidence emerged that he in any way attempted to cover up the incident or enlist his fellow officers in a conspiracy to do so. The preponderance of the evidence is that the Appellant behaved like a trustworthy police officer during the post-incident assessment.

Excessive force actions by law enforcement personnel must be evaluated on a case-by-case basis. One size does not fit all when it comes to meting out discipline for these kinds of incidents. What best fits this incident is a lesser disciplinary action. Its characteristics – no injury to the civilian, suspect with a past history of resisting arrest, officer with a good track record and no priors, candid post-incident

debriefing – point away from termination. The preponderance of the evidence is that the Department abused its discretion when it terminated the Appellant.

The Appropriate Remedy is to Reinstate the Appellant by Converting the Termination to a One-Week Suspension: The Appellant's representative has asked that the penalty be reduced to retraining. Retraining is not the appropriate remedy in this situation. No evidence emerged that the Appellant was inadequately trained. He knew what to do. His lapse was in decision-making, apparently allowing his emotions to overcome his better judgment.

A better option than termination or retraining is a disciplinary suspension. Such an outcome would do two useful things. One, a suspension would serve as a step up the ladder of progressive discipline. Should the Appellant engage in another excessive force incident, a suspension in his file would provide a solid foundation for termination. Second, the loss of a week's pay would be a clear signal to the Appellant that his was a serious infraction. Hitting him in his bank account would focus him on the important task of being more measured in his future responses in performing his patrol officer duties.

The undersigned hearing officer recommends that the termination of the Appellant be reduced to a one-week suspension without pay. He should be made whole for the remainder of his time off since his termination on August 31, 2022. Any earnings he made in replacement employment since that date should be deducted from his back pay.

RECOMMENDATION

1. The Employer provided the facts cited in support of the punitive action by a preponderance of the evidence. Discipline of the Appellant, Officer Paul Matecjek, was for just cause.

2. The Employer abused its discretion when it chose the penalty of termination.

3. The discipline is to be modified to a one-week suspension without pay.

4. The Appellant is to be made whole for all lost pay and benefits minus the one-week disciplinary suspension. Interim earnings are to be deducted from back pay.



_____

Paul D. Roose, Hearing Officer

Date: December 12, 2023