

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between the

FOP LODGE 5,

"Union,"

-and-

CITY OF PHILADELPHIA,

"Employer."

AAA Case No. 01-21-0003-9691
(P/O Abdel Kanan (287527) – Discharge)

**OPINION
AND
AWARD**

**Before
Robert C. Gifford, Esq.
Arbitrator**

Appearances:

For the Union:

Richard G. Poulson, Esq.
Willig Williams & Davidson

For the Employer:

Michael J. Sheehan, Assistant City Solicitor
City of Philadelphia Law Department

FOP Lodge 5 and the City of Philadelphia are parties to a collective bargaining agreement ["Agreement"]. [Ex. J-1]. On April 20, 2021, the Union filed a grievance alleging that the City violated the Agreement by terminating the employment of Police Officer Abdel Kanan ["Grievant"] without just cause. [Ex. J-2]. After the City denied the grievance, the Union submitted the unresolved grievance for binding arbitration. On June 3, 2021, AAA notified me that I was chosen to serve as arbitrator.

The arbitration proceedings were held via videoconference on March 3, 2022, and then in person at AAA's Philadelphia offices on July 19, 2022, at which times the parties were afforded the opportunity to argue orally, present witnesses and submit documentary evidence into the record. A stenographic recording was made for the proceedings held on March 3, 2022. A court reporter was not utilized by the parties on July 19, 2022. Testifying on behalf of the City were

[REDACTED]

[REDACTED]¹ Testifying on behalf of the Union were [REDACTED]

[REDACTED] and Union Representative [REDACTED]. The parties provided oral closing arguments, along written post-hearing summations.

¹ [REDACTED]'s testimony is located from T:15-98. [REDACTED] is located from T:99-141. [REDACTED] is located from T:141-163.

ISSUE

The parties stipulated to the following issue:

Whether the City had just cause to discharge the Grievant? If not, what shall be the appropriate remedy? [T:5, lines 22-24].

CITED CONTRACT PROVISIONS

ARTICLE XX. DISCIPLINE AND DISCHARGE

A. General

No employee shall be disciplined or discharged except as is consistent with the Home Rule Charter and the Regulations of the Civil Service Commission.

BACKGROUND

Grievant Abdel Kanan had been employed by the City Police Department as a Police Officer since May 2016. Throughout his career, the Grievant has received satisfactory ratings and numerous commendations. [Exs. U-2 & U-3]. In the annual performance reports, the Grievant's supervisors have described him as having "demonstrated sound decision making and communication skills that have benefitted the general public", "a top performer", and having excellent knowledge of the crime in the 12th District. [Ex. U-2]. At the time of his discharge, the Grievant was assigned to the 12th District which is known for a violent crime, gang activity, and guns.

The basis for the Grievant's discharge is a single incident that occurred on February 29, 2020. The Grievant filed a Use of Force Report in which he provided a summary of the incident:

ON [REDACTED], I WAS IN FULL UNIFORM OPERATING A MARKED POLICE VEHICLE, [REDACTED] WHEN I OBSERVED ABOVE DEFENDANT ([REDACTED]) IN THE PASSENGER SEAT OF A VEHICLE THAT WAS ILLEGALLY PARKED. AS I GOT TO THE PASSENGER SIDE OF THE VEHICLE, I NOTICED THE MALE WITH A GUN IN HIS HAND AND TRYING TO TUCK THE FIREARM BETWEEN THE PASSENGER SEAT AND CENTER CONSOLE. I TRIED TO GET THE MALE OUT OF THE VEHICLE AND PLACE THE MALE IN HANDCUFFS. THE MALE ATTEMPTED TO RUN, I WAS ABLE TO GRAB A HOLD OF THE MALE AND GAVE HIM VERBAL COMMANDS. AS I HAD A HOLD OF THE MALE, HE DISREGARDED MY VERBAL COMMANDS AND CONTINUED TO RESIST ARREST

AND TIGHTEN UP HIS BODY AND ARMS. AS I HAD A HOLD OF THE MALE, WE BOTH FELL TO THE GROUND, I WAS UNABLE TO GRAB HIS ARMS TO PREFORM ANY CONTROL HOLDS, THEREFORE TO PREVENT ANY FURTHER INJURY TO MYSELF OR MY PARTNER, I PLACED THE MALE IN A CHOKE HOLD. MALE WAS ABLE TO GET UP AND THEN CONTINUED TO RESIST ARREST, AS I HAD A HOLD OF HIM, WE BOTH FELL TO THE GROUND AGAIN. THE MALE CONTINUED TO RESISIT VERBAL COMMANDS AND ACTIVELY RESISIT. THEREFORE, I STRUCK THE MALE MULTIPLE TIMES IN THE FACE WITH A CLOSED FIST UNTIL I WAS ABLE TO GET A HOLD OF HIS ARMS AND PREFORMED CONTROL HOLDS UNTIL WE GOT HIM INTO HANDCUFFS. [Ex. J-4].

Sergeant [REDACTED] who was assigned to the City of Philadelphia Police Department's Internal Affairs Division, conducted the internal affairs investigation into the matter. As part of her investigation, [REDACTED] interviewed ten (10) Philadelphia Police Officers including the Grievant and his partner, [REDACTED]. [REDACTED] compiled relevant documents as well as body-worn camera video from the Grievant and [REDACTED].² [REDACTED] interviewed the Grievant on August 6, 2020, and wrote the following summary:

P/O Abdel Kanan #2115, Payroll #287527, 12th District, was interviewed by the assigned on 8/6/20 at 10:16 PM, at Internal Affairs Headquarters. P/O Kanan was wearing a body-worn camera. His video is summarized below.

P/O Kanan was working overtime on his scheduled day off with [REDACTED] as 12T6 during the 4X12 tour of duty. P/O Kanan stated that he saw a black vehicle illegally parked on the [REDACTED] so he stopped to investigate it. As P/O Kanan approached the vehicle he saw a black male, who he

² The body-worn camera videos were admitted into evidence as Exhibits C-2 ([REDACTED]) & C-4 (Grievant Kanan).

recognized as [REDACTED] in the passenger seat. P/O Kanan saw that [REDACTED] had a firearm in his left hand. P/O Kanan was familiar with [REDACTED]'s criminal history and knew that he was not supposed to have a firearm. [REDACTED] began to tuck the gun between the seat and the center console, obstructing P/O Kanan's view of the weapon. P/O Kanan drew his weapon and ordered [REDACTED] to show his hands and to step out of the vehicle. As [REDACTED] got out of the vehicle he attempted to run but P/O Kanan grabbed him by the shirt and told him to stop resisting.

[REDACTED] began to struggle, flailing his arms and tensing his body to avoid being handcuffed and they fell to the ground. [REDACTED] started to deploy his ECW but P/O Kanan was afraid that he would get shocked as well and he thought it was possible for Mr. Johnson to be able to reach for another gun if that happened. P/O Kanan placed [REDACTED] in a choke hold to stop him from resisting. [REDACTED] was able to get up off the ground and was flailing his arms and turning his body, trying to break free. P/O Kanan used a second choke hold and they fell to the ground again. [REDACTED] said that he couldn't breathe but P/O Kanan felt as though his ability to verbalize meant that he could breathe. [REDACTED] was still struggling so P/O Kanan struck him in the face with a closed fist multiple times. P/O Kanan and [REDACTED] were able to handcuff [REDACTED] who continued to resist, attempting to kick out the windows of the patrol car that he was placed in so they requested a patrol wagon. [REDACTED] resisted being placed into the patrol wagon.

P/O Kanan stated that [REDACTED] did not assault him or any other officer and no other officer struck him. P/O Kanan stated that he briefly choked [REDACTED] twice and that [REDACTED] remained conscious the entire time. P/O Kanan explained that when [REDACTED] said that he could not breathe he briefly released his neck but kept his arms around the male.

P/O Kanan sustained cuts and pain to his right knee and hand, pain to his right hip and a cut on his lip. [REDACTED] was taken to the hospital for an injury to his shoulder.

P/O Kanan's body-worn camera video is seventeen minutes and fifty one seconds long. It is the ninth video on the disc.

:36 – P/O Kanan approaches the passenger's side of a black vehicle.

:50 – The front window rolls down and [REDACTED] can barely be seen inside of the dark vehicle.

:56 – P/O Kanan opens the door and points his firearm into the vehicle.

1:00 – P/O Kanan tells [REDACTED] not to reach for a weapon as he and [REDACTED] point the firearms at [REDACTED]

1:09 – [REDACTED] get out of the vehicle directly in front of P/O Kanan as P/O Kanan requests back up. The front of [REDACTED]'s body is pressed closely to P/O Kanan. They are chest to chest.

1:17 – [REDACTED] is on the ground on his back. [REDACTED] warns him "Don't get tased" as he and P/O Kanan try to gain control of [REDACTED]'s hands.

1:28 – P/O Kanan appears to be holding [REDACTED], who is silent, from behind with his hand appearing in front of [REDACTED]'s head. P/O Kanan says "You're gonna get choked out." Mr. Johnson reaches up and tries to pull P/O Kanan's hand away.

1:40 – P/O Kanan says, "Don't tase him. Don't tase him. I'mma choke him out."

1:45 – [REDACTED] gasping for air, says, "I can't breathe." as P/O Kanan's hands, which are clasped together, come away from [REDACTED]'s head. [REDACTED] tells P/O Kanan several times that he can't breathe as P/O Kanan holds him on his back on the ground. P/O Kanan begins to try to handcuff [REDACTED] turning him onto his front and grabbing him around his neck again.

2:13 – P/O Kanan is holding [REDACTED] around his neck again, with both hands clasped together as [REDACTED] say, "I'm going to die."

2:30 – P/O Kanan punches [REDACTED] in the right side of his head five times.

3:00 – Officers try to pull [REDACTED]'s arm, which is tensed tightly, behind his back so he can be handcuffed.

3:32 – [REDACTED] is standing, handcuffed and taken to a patrol car.

4:46 – P/O Kanan complains of an injury to his hip.

5:16 – [REDACTED] is resisting being put into the patrol wagon.

11:52 – [REDACTED] complains from the back of the patrol wagon that he couldn't breathe, that P/O Kanan had choked him and that the handcuffs were cutting off his circulation.

17:51 – The video ends.

[REDACTED] has a preliminary hearing scheduled on 12/17/20. He is currently in custody.

The assigned investigator reviewed the Use of Force Reports and found that they correlate to the officers' statements.

The assigned investigator conducted Neighborhood Surveys on the [REDACTED] with negative results. There were no other witnesses or relevant video surveillance found in the area. [Ex. J-4].

[REDACTED] compiled an internal investigation report that was reviewed and approved by her chain of command on December 10 and 11, 2020. The report included the conclusion drawn by [REDACTED], the IAD Inspector:

The internal investigation into the use of force by 12th District P/O Abdel Kanan #2115, Payroll [REDACTED], **SUSTAINED** allegations of **PHYSICAL ABUSE**.

P/O Kanan investigated a vehicle that was illegally parked and found [REDACTED], who you knew from previous

experience to have a criminal history, he became involved in a physical altercation with him. During the encounter, P/O Kanan punched ██████████ in the head five times and choked him twice in an effort to subdue and gain control of him. Although P/O Kanan was justified in using force to gain control of ██████████ who struggled with the officers from the moment they came in contact with him until they were able to put him in a patrol wagon, P/O Kanan was not justified in choking him or punching him in the head five times. P/O Kanan had other options, including ██████████'s ECW, available to him which could have been effective in getting control over ██████████ but he elected to choke and punch him. P/O Kanan's actions, in choking and punching ██████████, were unnecessary and extreme. Directive 10.2 – Use of Moderate/Limited Force, Section 2.1 advises officers that excessive force will not be tolerated and that they are to use all safe and reasonable means of control and containment, with the minimal amount of force necessary to overcome resistance.

In addition, P/O Kanan is clearly depicted on BWC video telling ██████████ not to utilize his Electronic Control Weapon (ECW) against ██████████ during the struggle. P/O Kanan informed ██████████ he would choke ██████████ out before he followed through, choking ██████████ P/O Kanan's actions were willful and intentional. Although ██████████ does not appear to lose consciousness during the incident, this tactic by P/O Kanan was highly dangerous and could have had tragic consequences.

A copy of this investigation will be forwarded to the Commanding Officer Police Board of Inquiry, for action.

[Ex. J-4].

On April 13, 2021, ██████████ took Direct Action on this matter in lieu of submitting the matter for review by the Police Board of Inquiry.

[Ex. J-3]. On April 15, 2021, the Grievant was given Non-Criminal Grievant Warnings and an opportunity to respond to the allegations against him. The Grievant chose

not to respond and thereafter he was placed on an immediate 30-day suspension with the intent to dismiss. [Id.]. That day, the Union filed a grievance alleging that the City violated the Agreement by terminating the employment of the Grievant without just cause. [Ex. J-2]. The City denied the grievance and thereafter the Union submitted the unresolved grievance for binding arbitration.

On May 14, 2021, the Grievant was served with a Notice of Dismissal that indicated that he was dismissed from his position effective May 13, 2021, for the following reasons:

CONDUCT UNBECOMING, SECTION 1-§026-10 (Unauthorized and/or excessive use of force in your official capacity.)

You investigated a vehicle that was illegally parked and found that [REDACTED] in the front seat with a gun. As you attempted to arrest [REDACTED], who you knew from previous experience to have a criminal history, you became involved in a physical altercation with him. During the encounter, you punched [REDACTED] in the head five times and choked him twice in an effort to subdue and gain control of him. Although you were justified in using force to gain control of [REDACTED] who struggled with the officers from the moment they came in contact with him until they were able to put him in a patrol wagon, you were not justified in choking him or punching him in the head five times. You had other options, including [REDACTED]'s ECW, available to you which could have been effective in getting control over [REDACTED] but you elected to choke and punch him. Your actions, in choking and punching [REDACTED] were unnecessary and extreme. Directive 10.2 – Use of Moderate/Limited Force, Section 2.1 advises officers that excessive force will not be tolerated and that they are to use all safe and reasonable means of control and containment, with the minimal amount of force necessary to overcome resistance.

In addition, you are clearly depicted on Body Worn Camera video telling fellow officer, [REDACTED] not to utilize his Electronic Control Weapon (ECW) against [REDACTED] during the struggle. You informed [REDACTED] you would choke [REDACTED] out before he followed through, choking [REDACTED]. Your actions were willful and intentional. Although [REDACTED] does not appear to lose consciousness during the incident, this tactic by you was highly dangerous and could have had tragic consequences.

The course of conduct you engaged in indicates you have little or no regard for your responsibility as a member of the Philadelphia Police Department. Therefore, you will be dismissed after being placed on a 30-day suspension.

On 4/15/21 in the presence of [REDACTED], Internal Affairs Division, [REDACTED], 12th District, [REDACTED] Representative, Fraternal Order of Police and [REDACTED], Esq., Attorney, Fraternal Order of Police, you were given your Non-Criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate, with the intent to dismiss. [Ex. J-3].

[REDACTED] testified on behalf of the City. [REDACTED] is an Internal Affairs Investigator who investigates use of force. [REDACTED] has been assigned to Internal Affairs for six (6) years and has been employed by PPD for 26 years.

[REDACTED]'s testimony was substantively similar to the contents of her IA report. [REDACTED] acknowledged that [REDACTED] was a strong individual who had a long criminal history with multiple gun violations and a reputation for fighting with police officers. [See T:162]. That said, [REDACTED] testified to the basis for

concluding that the [REDACTED] did not have a reasonable fear of bodily harm that would justify using a chokehold:

[REDACTED], On Direct]

Q. [By City Counsel [REDACTED]] Based on your review of the footage, your interview with Mr. Kanan, your interview with [REDACTED] and the other work you did, did you find that Mr. Kanan had reasonable fear of bodily harm which would lead him to be able to choke [REDACTED]?

A. I found that Officer Kanan believed it was possible that [REDACTED] could get back to the car and get his gun. I did not believe that that was a reasonable assumption on his part or a reasonable fear on his part.

* * *

Q. And [REDACTED] why didn't you believe that was a reasonable fear on his part?

A. Because if you watch the video, [REDACTED] got out of the car, they immediately became involved in a struggle. The two of them - - Officer Kanan and [REDACTED] - - [REDACTED] could have done a bit more to overpower him or to gain control of him before trying to do something like a chokehold. They had -- [REDACTED] had a taser. They had a ASPs. There's all kinds of things that they could have done.

They could have called for backup. There were other options to them that they may have gotten him under control before he would have possibly gotten back to his car. I didn't see any indication that he was trying to get back into the car.

[T:152, line 9 to T:153, line 16].

[REDACTED] also explained why it was inappropriate for the Grievant to inform [REDACTED] that he was going to choke [REDACTED].

A. Just that Officer Kanan made a conscious decision to use that prohibited tactic. It wasn't - - in my estimation, in my experience, that was just a poor choice. And he - - he actually decided to use that. It wasn't a heat of the - - the fact that he told the officer not to use his ECW, that he would go ahead and choke him, that, to me, meant that he had decided that this was a better situation for him - - to choke the defendant out - - instead of trying to come up with another tactic.

That deliberation meant that it wasn't kind of like a spur of the moment, heat-of-the-moment type of decision to me, and obviously to everyone else in my chain of command because they agreed with me.

[T:154, line 13 to T:155, line 5].

[REDACTED] testified on behalf of the City. [REDACTED] began her law enforcement career in 1997 with the Oakland Police Department. In 2017, [REDACTED] accepted the Police Chief position with the Portland Police Department. [REDACTED] commenced her position with the PPD in February 2020. During her testimony, [REDACTED] discussed her review of the IA report and the Department's Directive 10.2 which addresses the use of moderate/limited force:

[REDACTED], On Direct]

Q. [By City Counsel [REDACTED] And did you review the entire IA investigation memo?

A. Yes.

Q. Did you review multiple body-worn camera videos from this incident?

A. I recall being shown multiple, yes; meaning, more than one.

Q. When you reviewed the IA report and the body-worn camera videos, did you feel it was necessary to speak to anyone from Mr. Kanan's home district, the 12th District?

A. I did not.

Q. And why not?

A. I believe that the - - with the body-worn camera footage and the thoroughness of the IA investigation, that there was enough information there to make a decision.

Q. I'm going to show you another document that's been marked as J-5. * * *

Q. All right. The Philadelphia Police Department Directive 10.2, issue date, September 18th, 2015. Subject: Use of Moderate/Limited Force.

Are you familiar with this?

A. Yes.

Q. And generally, what is this document containing?

A. Well, this is our use-of-force policy in a nutshell that not only provides guidance along our use-of-force continuum, or the decision chart as listed here, but also definitions of what limited force would be, moderate force would be, less lethal force would be, what lethal force would be.

And then also goes into detail to what's prohibited, what officers will do, what officers will not do, and then also responsibilities and notification procedures of supervisors as well.

Q. And since you mentioned what - - the will and won't do section, I'm just scrolling down to Page 8 of 22 on the PDF, and it's Number 5. Below that, it says, utilizing force,

parentheses, general, end parentheses. There's a Section B.

If you need to familiarize yourself with it, please take a look, but generally what does this section say?

A. Well, Section B outlines - - and again, you can't print everything into a policy, but these are clear examples of will not - - what an officer shall not do.

Section B, again, it starts, you know, talking about sitting or kneeling or standing whenever possible. But it also makes very clear - - when you drop down to Number 4 - - that the use of prohibited neck restraints are included in the category, and it specifically points out chokeholds here.

Q. And to your knowledge, what's the difference between a chokehold and a sleeper hold?

A. I'm not the use of force expert. You might want to ask our training person here. Both the chokehold and sleeper hold. I mean, it's all about application that can have different outcomes.

The sleeper hold, when you can, you know, put someone out temporarily. A chokehold does just that; it chokes someone. But both of them, they're listed here under - - as a prohibition because ultimately they could also be deemed as lethal force.

[T:20, line 9 to T:23, line 16].

██████████ testified to why she concluded that the Grievant's conduct violated Directive 10.2:

[DC Outlaw, On Direct]

Q. [By City Counsel ██████████ ██████████, when you reviewed the body-worn camera footage, did you observe anyone using a chokehold?

A. Yes.

Q. And who did you observe using chokeholds in those videos?

A. Officer Kanan.

* * *

Q. Did you feel -- from your review of those videos and the IAB report -- that Mr. Kanan was within his abilities and proper procedures as an officer to use those chokeholds?

A. No.

Q. Why not?

A. Yes, thank you. And I'll tell you why. I know that the work that we do is very fluid. I don't think it's -- by any question -- that we were dealing with a pretty dangerous person.

The gun was in the car at that time, but we're also looking at whether or not the force was reasonable, and if the threat was still present period the policy also states if -- you know, when you scroll up to the top -- that it has to be proportionate in so many words.

In this instance, when I was thinking about whether or not this was reasonable, it's -- not only is it prohibited, but we're looking for an exigency that would justify the officer going outside of what is clearly prohibited here. There was another officer available to assist. There was other uses of force available that they could have used; meaning, the taser, or the electronic control weapon. There are other control holds that we are taught here. And in addition to that, again, it's prohibited. So it's against policies, and the gun was in the car at that time.

So given all of those other factors, to go outside of the policy such as this and to jump to a potentially lethal chokehold or mechanism and knowingly and intentionally do that was problematic for me.

[T:23, line 17 to T:25, line 15].

██████████ testified that she did not consider the Grievant's performance reports given the egregiousness of his conduct:

██████████. On Direct]

A. [Directive 10.2] states...that excessive force will not be tolerated.

And again, looking at the egregiousness of this - - and I say "egregious" because the gun had been isolated in the car, there was assistance there.

Now, it's no secret that I haven't been in Philadelphia in the police department my entire career, so my language might be a little bit different in what I am saying, but there were cover officers there, or at least one officer there to assist. Because of that, and again, the intention, he says it outwardly, you know, and very specifically, and directs his partner - - putting his partner in a pretty untenable position - - directs his partner not to utilize the lower level or the force alternatives that were available and deescalating in the manner in which we teach. To me, that was enough. It was enough. That made it egregious enough.

He showed intention. He showed a non-intention in violation of the policy to choke someone out and, you know, again, we don't focus on outcomes. But, you know, thank goodness it wasn't any worse than that. And then you have him saying, I can't breathe, I can't breathe.

So to me, that made it - - that boosted the importance of this and the criticality of the decision that was being made.

[T:26, line 7 to T:27, line 19].

██████████ concluded that the Grievant's punches to ██████████'s face were not permissible under the circumstances because she did not feel that the Grievant was fighting for his life or facing a present threat. [See T:33, line 10 to T:34, line 16].

██████████ testified that she considered other forms of discipline short of dismissal but concluded that termination was warranted under the circumstances:

██████████ On Direct]

Q. [By City Counsel Sheehan] And why did you not use other forms of suspension or discipline?

A. Again, I thought this was egregious enough. This is something that is serious enough where we really have to think about whether or not an officer would continue to make decision such as this. This was a very confidently made decision. It was a blatant disregard for policy. Our policy is very clear as to what will be tolerated and what would not be tolerated. And there was nothing that would tell me that this wouldn't continue again in the future. If this instance, you know, were to occur again.

[T:34, line 22 to T:35, line 11].

During cross-examination, ██████████ acknowledged that the range of discipline for excessive use of force ranges from reprimand to dismissal. [See T:63].

██████████ testified that she did not consider any prior cases of discipline imposed against PPD officers for the use of excessive force. [See T:64]. DC Outlaw indicated that she is aware of ██████████'s criminal history that includes multiple illegal weapons arrests and his reputation of being dangerous. [See T:65-67]. ██████████

██████████ testified that she did not know whether PPD officers are trained to assume that if a suspect has one gun that he has another one. [See T:78]. ██████████ acknowledged that the Grievant was in a struggle with ██████████ who was

resisting arrest, not handcuffed, and had a firearm in the car at that time. [See T:80]. She was also aware of the Grievant's previous experience in which a taser was ineffective. [See T:84]. [REDACTED] testified that she reviewed the narrative that the Grievant provided in his Use-of-Force form and his explanations for using a chokehold and punching [REDACTED] in the face. [See T:89-90]. [REDACTED] indicated that the Grievant was forthcoming with information and did not attempt to minimize or conceal his actions. [See T:90-91]. On re-direct, [REDACTED] indicated that the Grievant did not mention a second chokehold in his narrative or that he informed his partner that he was going to choke out [REDACTED]. [See T:93].

[REDACTED] testified on behalf of the City. [REDACTED] is assigned to the training bureau and currently oversees the reality-based training section. [REDACTED] indicated that he is "like the liaison when it comes to use of force." [T:99, lines 22-23]. [REDACTED] confirmed that the Grievant received reality-based training which included de-escalation techniques. [See Ex. C-6 & T:104]. [REDACTED] provided his perspective on use-of-force:

- A. ...officers who use unreasonable force degrade the confidence of the community, the Department. These are things that just don't look good.

Now, I will say, use of force is not pretty. So that's why we try to de-escalate as much as we possibly can without putting an officer in harm's way. And, you know, I'm probably going to say this a thousand times: It's all about creating distance, slowing things down, using cover and

concealment. Like, time and distance, you know, is our friend, you know, when it comes to, you know, approaching suspects on the street.

[T:109, line 11 to T:110, line 2].

█████ testified that the use of force decision chart that is used to describe escalation and de-escalation and the requirement to use the minimal amount of force required to reduce an immediate threat does not include the use of a chokehold. [See T:110-11, Ex. C-5, p. 21]. █████ testified that they do not train officers how to use chokeholds. He indicated that a chokehold is considered to be deadly force and the only time deadly force can be used is if an officer has an objectively reasonable belief that there is an immediate threat of death or serious bodily injury. [See T:111, Ex. C-5, p. 21].

█████ reviewed the body-worn camera footage from ██████ (Ex. C-2). █████ testified that the Grievant's bicep was not completely around ██████'s neck and had his forearm on ██████'s trachea area. [T:118, lines 11-17]. █████ stated, "I can't even tell you if he's trying to choke him or if he's just trying to take him down." [Id. at lines 18-20].

█████ testified to the tactics that the Grievant should have used during the incident:

A. Well, the first thing he should have done is he should have not approached the vehicle from the front and just walked up to the car and opened up the car door.

If he knew this person was who he was, that he had a prior record, and he was violent, that he likes to fight the police, he should have asked for additional units to come with him. He should have approached from the rear of the car, kept the door closed, visualized what -- you know, if it was safe, you know. And as he -- you know -- testified, or as the paperwork states, there was a gun on the -- in his hand.

Why Kanan -- and again, I'm not second-guessing what he did. All right? But if somebody has a gun in his hand, he would have been justified in shooting him. All right? He made a good decision not to because the gentlemen -- or the defendant put the gun -- you know, tried to put it in between his seats. And at this point, when he tried to get him out of the vehicle, he did not secure him right away. He kind of just allowed him -- and the reason -- the problem is he had is because he had his gun still in his hand and he's just now calling radio. Where if he would have called radio additionally, he could have just stayed right there on -- you know -- the pillar of the car until it was safe to have additional units there.

Q. [By City Counsel ██████████] Okay. And then when he get out of the vehicle and Mr. Kanan's wrestling with the suspect or the defendant ██████████ at that point, I think you heard him say that he told Walter to go back to the car?

A. Correct.

Q. Is there anything wrong with what he did there?

A. Again, I wasn't there, but what I see from the body video cameras, there was no other crowd. There was no exim -- circumstances there. There was nobody else in the car that he would believe could take that weapon. And we always teach that you have to address the immediate threat first, you know, because that's what we know. Yes, we know that gun's in the car, but the gun can't go anywhere unless somebody comes and takes it. In this instance here,

struggling with the defendant, his partner should have been helping him contain him.

Q. Okay. Should have been helping him even if Kanan told him to go to the car?

A. Again --

Q. In terms of what you teach, [REDACTED]?

A. No. So what I would have told his partner [REDACTED] is, you need to get in there and you need to take the defendant's base. Take his legs out from behind him to keep him down on the ground. That's what I would have told him.

Q. Do you instruct cadets or officers that they're allowed to threaten to choke someone even if they're not going to do it?

A. No.

[T:119, line 12 to T:122, line 8].

[REDACTED] testified that deadly force was not required "because the weapon was clearly still in the car." [T:123, lines 4-6].

During cross-examination, [REDACTED] confirmed that the United States Supreme Court requires use of force cases to be viewed from the perspective of a reasonable officer on the scene as opposed to 20/20 vision of hindsight. [See T:128]. [REDACTED] acknowledged that some of the facts and circumstances to consider are the seriousness of the offense, the level of the threat or resistance, whether the subject was posing an imminent threat to the officers or a danger to the community, and the potential for injury to citizens, officers or subjects. [See T:130,

Ex. C-5, p. 23]. Although [REDACTED] did not review the entire Internal Affairs report, and only observed the body-cam video, [REDACTED] recognized that the Grievant was dealing with an individual who committed a felony and had a weapon in the car. [See T:131-132]. When asked if "it would be reasonable for an officer in that situation to be concerned if there was a gun within, what would you say, five feet of this struggle", [REDACTED] replied, "[e]very person sees threats differently. I can't make a judgment on what he was thinking at that time." [T:137, lines 11-18].

The Grievant testified that he applied to become a police officer with PPD after completing 106 college credits to spend his life helping the City of Philadelphia. The Grievant indicated that he was originally assigned to foot patrol in the 39th District and then moved over to the 12th District in 2017. He and his partner, [REDACTED], were hand-picked by their Captain to "5 Squad Tactical", a squad for proactive officers. The Grievant testified that his goal was to have no shootings, no crimes, and no homicides.

The Grievant testified as follows. Prior to the incident that led to his termination, the Grievant was involved in a situation where a taser was deployed but had no impact upon the individual. The Grievant indicated that the ineffectiveness of the taser in that instance played a factor in his decision-making when he was dealing with [REDACTED]. The Grievant did not call for backup upon arriving to the scene on February 29, 2020, because he thought he was simply

encountering an illegally parked car. The Grievant then recognized [REDACTED] after he approached the passenger side of the vehicle. Although the Grievant did not have any previous arrests of [REDACTED], he knew that [REDACTED] had a reputation for resisting arrest and fighting cops. The Grievant observed [REDACTED] reach for a gun and move it towards the console. The Grievant pulled out his weapon, ordered [REDACTED] to show him his hands, and he activated his body camera. [REDACTED] was not complying. The Grievant stated that [REDACTED] was extremely strong, and he felt like "the Hulk on PCP". The Grievant got a hold on [REDACTED] in an attempt to get him to comply, to keep him away from the gun that was nearby, and to avoid the need to shoot him. Given that he knew that [REDACTED] was armed, the Grievant was concerned that there may have been other weapons. When his partner indicated that he was going to use his taser, the Grievant did not want to release [REDACTED] out of concern that [REDACTED] could break free and retrieve his gun. The Grievant reiterated that his previous encounter with the taser was ineffective. The Grievant indicated that he was not letting go of [REDACTED] until he was handcuffed. He wanted [REDACTED] to stop fighting and decided to use "verbal Judo" by indicating that he was going to "choke him out". The Grievant acknowledged that [REDACTED] was yelling that he could not breathe, but he was not choking [REDACTED] at that time. Mr. Johnson was finally subdued, and it took five (5) or six (6) police officers to get [REDACTED], who continued to resist, into the police vehicle. The Grievant indicated that he was at all times concerned for the safety of himself, his partner,

and [REDACTED]. The Grievant stated that he suffered a busted lip, scraped hands and knees.

As he previously indicated in his Use-of-Force Report, the Grievant acknowledged that he used a choke hold despite the fact that the hold is not taught at the police academy. The Grievant did not intend on violating Department policy, but he wanted to get [REDACTED] into handcuffs and keep everyone alive.

[REDACTED] and [REDACTED] testified on behalf of the Union. [REDACTED] and [REDACTED] are familiar with the Grievant's work performance in the 12th District, a busy district known for violent crime, gang activity, and guns. [REDACTED] and [REDACTED] described the Grievant as an "exemplary" police officer who was hand-picked for "5 Squad Tactical". [See Ex. J-3]. [REDACTED] indicated that the Grievant is open to suggestion and responds to criticism. They both testified that they would have absolutely no concerns with the Grievant if he was reinstated.

FOP Representative [REDACTED] testified on behalf of the Union. [REDACTED] indicated that since 2014 there have been approximately 100 use of force cases, but only two (2) of which have involved choke holds. In one instance, in May 2018, the officer received an Official Reprimand and re-training on defensive tactics after applying a choke hold after an individual attempted to interfere in

an arrest. [Ex. U-5]. In the other instance, in June 2019, the Police Board of Inquiry found the officer not guilty of neglect of duty. [Ex. U-6]. The Specification in that matter indicated that the officer was "forcibly grabbing and holding [REDACTED] by the neck while the defendant was in handcuffs". [Id.]. [REDACTED] confirmed that [REDACTED] was the same individual named in that matter.

SUMMARY OF THE ARGUMENTS

The City's Position

The City contends that it had just cause to terminate the Grievant based upon his "conscious, premeditated, and deliberate choice to attempt to choke an individual, [REDACTED], until he was rendered unconscious on February 29, 2020." [City Brief, p. 1]. The City maintains that the Grievant simply had other viable options under the circumstances:

Kanan could and should have allowed his partner to assist, either through use of the electronic control weapon ("ECW" or "taser"), or by rendering physical assistance in handcuffing the suspect. Kanan should not have told his partner to go to the car as there was no reason to fear that anyone else in the area would access any of the items in [REDACTED]'s vehicle. Kanan should not have chosen to get on [REDACTED]'s back to handcuff him in violation of PPD training. The BWC videos show that backup arrived less than three minutes after Kanan first stated that he intended to choke the suspect unconscious. Kanan had many options, but that day he chose to place the suspect in a choke hold in direct violation of established PPD policy and must now live with the consequences of his willful, intentional, reckless, and dangerous decision. [*Id.* at 2].

The City emphasizes that the incident that led to the Grievant's termination was thoroughly investigated by Internal Affairs. Moreover, as testified to by [REDACTED], the Grievant failed to follow his training and used tactics that conflict with the Department's directives. Additionally, [REDACTED] after reviewing the

matter, concluded that the Grievant willfully choked [REDACTED], was not in fear for his own life, and would likely repeat his actions if he remained employed as a Philadelphia Police Department. The City points out that [REDACTED] determined that the Grievant's actions were egregious enough for her to take Direct Action rather than allowing the matter to go to the PBI. The City emphasizes that the PBI is simply an advisory board whose recommendations can be accepted or rejected by the Commissioner.

The City submits that the Grievant "failed to provide any explanation as to why the Use of Force form he completed failed to mention that he told [REDACTED] he planned to "choke him out", nor that he told [REDACTED] he was going to be choked unconscious." [id. at 5]. Moreover, the Grievant waited approximately five (5) months before he acknowledged his conduct in his statement to [REDACTED]

For these reasons, and the entire record, the City had just cause to terminate the Grievant's employment, and the grievance must be denied.

The Union's Position

The Union contends that the City has not met its burden to prove that it had just cause to terminate the Grievant's employment. The Union maintains that the City failed to prove that the Grievant used unauthorized or excessive force, or that he actually deployed a neck restraint. The Union emphasizes that the Grievant was the only fact witness to testify in this matter, and there was neither a citizen nor a use of force complaint filed against him. Moreover, [REDACTED], the City's use of force expert, was unable to conclude that the Grievant applied a neck restraint or that he violated Directive 10.2. The Union stresses that Directive 10.2 provides for exceptions to the neck restraint prohibition. The Union contends that the circumstances show that the Grievant "attempted to deploy a neck restraint in the midst of the struggle to protect against imminent serious bodily injury or death." [Union Brief, p. 4]. The Union points to the following factors:

- a. Kanan testified that [REDACTED] was extraordinarily strong. Kanan unsure if he could subdue [REDACTED]
- b. Kanan knew that [REDACTED] had a firearm. Kanan not sure whether gun was in the vehicle (in very close proximity) or on [REDACTED]'s person.
- c. Kanan also not sure if [REDACTED] had another gun. Taught in Police Academy to assume that if there is one gun there will be another.
- d. Kanan believed that if he let [REDACTED] go, somebody was going to be seriously injured or die. Himself or his partner, a civilian, [or] [REDACTED]
- e. Kanan did NOT want to have to shoot [REDACTED].

- f. Same rationale applies to Kanan's decision to reject the TASER. Kanan had a reasonable fear about relying on the TASER based on his experience just one month prior and a video that was shown to him during his training at the Police Academy.
- g. And Johnson was much stronger than the criminal who was not stopped by the TASER in January. [*Id.* at 5].

The Union also contends that the City failed to prove that the Grievant “‘willfully and intentionally’ utilized unauthorized or excessive force by virtue of his refusal to permit his partner to utilize his TASER on the suspect[.]” [*Id.*]. Even though [REDACTED] and [REDACTED] believed that the Grievant provided truthful explanations for his actions, the Department viewed the circumstances with “20/20 hindsight” rather than through the “perspective of a ‘reasonable officer’” as is required by the United States Supreme Court and the Department’s policies. [*Id.* at 6].

Assuming *arguendo* that discipline was warranted, the Union submits that the City has failed to prove that the Grievant's termination was required. The Union emphasizes that a “finding of unauthorized or excessive force does *not* mandate termination.” [*Id.* at 7]. The Union references two (2) prior instances in which the officers were either reprimanded or not disciplined at all. The Union points out that [REDACTED] admitted that she did not even consider a lesser form of discipline or the Grievant's “impressive work history”.

Lastly, the Union submits that the Department conducted an inadequate investigation given the Department's failure to consider the Grievant's work history, to refer the use of force for expert review, or to allow PBI review. Moreover, the Department did "not complete [the] IA investigation until December 2020, and Outlaw did not review the matter until March 2021." [*Id.* at 8].

For these reasons, and based upon the entire record, the Union "requests that the Arbitrator sustain the FOP's grievance, and order the City to rescind the improper discipline, restore P/O Kanan's employment and work records, and make P/O Kanan and the FOP whole for all damages incurred as a result of the City's breach of the CBA." [*Id.* at 9].

DISCUSSION

I have carefully considered the arguments and evidence submitted into the record. The City has the burden to prove that it had just cause to terminate the Grievant's employment. The Grievant is charged with conduct unbecoming:

CONDUCT UNBECOMING, SECTION 1-§012-10 (Unauthorized and/or excessive use of force in your official capacity.)

At the time of his discharge, the Grievant had been employed by the PPD since May 2016 and received satisfactory ratings and numerous commendations. The basis for the Grievant's termination is the incident that occurred on February 29, 2020.

I have independently reviewed the evidence in this matter, including the body-worn camera videos of the incident. The evidence shows that the Grievant encountered an armed individual with a criminal history, a reputation for resisting arrest and being a cop fighter. I am persuaded that the Grievant had a reasonable concern for his safety, his partner's, and [REDACTED]'s given his propensity to refuse to go down without a fight. Although the Grievant may have failed to provide every step-by-step detail of the incident, the Grievant's description of the incident was generally consistent from the time that he submitted his Use-of-Force Report to the time that he testified during the

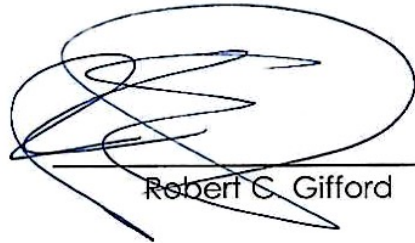
arbitration proceedings. The Grievant admitted that he used a choke hold and that he announced his intention to do so in an effort to get [REDACTED] to comply. The Department has shown that the Grievant's actions are contrary to Directive 10.2, but at the same time, having considered the facts and circumstances from the perspective of the Grievant, the evidence does not support the City's claim that the Grievant intended to choke out Mr. Johnson to the point of unconsciousness. Moreover, given the testimony provided by the Grievant's superiors and the numerous commendations that the Grievant received for his previous actions, the evidence does not support the City's claim, as asserted through the testimony of [REDACTED], who admitted that she did not consider the Grievant's work history, that the Grievant would likely repeat his actions. In hindsight, the Grievant could have deployed better tactics during the incident, but this does not require his termination from employment. Instead, I conclude that the evidence supports a level of discipline and retraining that will serve to be corrective in nature.³ For these reasons, and the entire record, I conclude that the City had just cause to discipline, but not terminate the Grievant. The Grievant's termination shall be reduced to a five (5) day suspension without pay and he shall receive retraining as deemed appropriate by the City. The Grievant shall be reinstated to his position as a police officer and made whole in all other respects.

³ I considered the prior instances of choke hold cases submitted by the FOP in support of its position, but I render my decision based upon the specific facts and circumstances presented in this matter.

AWARD

The Grievant's termination shall be reduced to a five (5) day suspension without pay and he shall receive retraining as deemed appropriate by the City. The Grievant shall be reinstated to his position as a police officer and made whole in all other respects.

Dated: September 30, 2022



Robert C. Gifford